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You Should See Your IRS File: Access to IRS Information - What Are a Taxpayer's Rights.

Richard J. Wood

YOU SHOULD SEE YOUR IRS FILE: ACCESS TO IRS INFORMATION—WHAT ARE A TAXPAYER'S RIGHTS?

RICHARD J. WOOD*

I. INTRODUCTION

There has been a ground swell of sentiment on the part of taxpayers and their representatives for an increased voice in the manner in which the Internal Revenue Service executes its duties. That senti-

* Richard J. Wood, 1988-89 IRS Visiting Professor of Law and Taxation assigned to Capital University Law School. The views expressed are those of the author and not of the Internal Revenue Service.

ment is reflected in the Taxpayer Bill of Rights.[1] One response to the Taxpayer Bill of Rights has been an attempt by the Service to adopt measures to address issues and concerns, expressed by taxpayers and others, outside of the legislative context.[2] Access to confidential taxpayer information is one such concern that the Service has addressed independent of congressional action. The Internal Revenue Service has amended the portion of Internal Revenue Manual which addresses access to IRS information by taxpayers and others.[3]

The Internal Revenue Manual now specifically provides that taxpayers may gain access to copies of their returns, examination work papers, criminal and collection documents.[4] However, access to that information is limited. The manual provides for access to information through such statutory vehicles as the Freedom of Information Act (hereinafter "the Act" or the "FOIA"),[5] the Privacy Act,[6] and the Internal Revenue Code.[7] This article examines access to information through these avenues. It discusses the Freedom of Information Act first because it affords the taxpayer the widest latitude in obtaining his[8] own tax information. This article then proceeds through section

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1. *See* Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3730, 3731 (listing Taxpayers' Rights).

2. Daily Tax Rep. (BNA) No. 130, at G-3 (July 7, 1988). On July 7, 1988, the Daily Tax Reporter reported:

> [I]n the face of the [Senator] Pryor [D-Ark.] effort [to enact a taxpayer bill of rights] and the agency's own quality improvement program, IRS recently expanded the powers of its problem resolution program officers to permit them to delay collections, liens, or levies against taxpayers when the officers have doubts about the tax agencies justification in taking the actions.
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> IRS adopted 11 separate categories of rights to which taxpayers are entitled. Some of these categories include:
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> The right to receive copies of their returns from IRS service centers and other tax information, such as examination criminal investigation, and collection division work papers.

Id.

3. On May 25, 1988, section 1279 of the Internal Revenue Manual, also known as the Problem Resolution Handbook, was amended to incorporate eleven different provisions of the Taxpayer Bill of Rights. Internal Revenue Manual § 1279 H.B. 313 (May 25, 1988).

4. *Id.*

5. 5 U.S.C. § 552 (1988)(amended 1967, 1974, 1976, 1978, 1984 and 1986).

6. 5 U.S.C. § 552a (1988).

7. All references to the Internal Revenue Code or to the Code are to the Internal Revenue Code of 1986 as amended by the Technical and Miscellaneous Revenue Act of 1988.

8. This article will use the masculine pronoun for convenience, but the author does so reluctantly and with apologies to all those who may be offended by its use.

6103 of the Internal Revenue Code which provides a detailed explanation of the amount of access that a taxpayer may have to his or her own tax information. This article then addresses the Privacy Act which is primarily geared to protecting taxpayer privacy but which contains provisions which permit an individual access to his own information.

II. FREEDOM OF INFORMATION ACT ACCESS TO RETURN INFORMATION

A. *Background*

The purpose of the Freedom of Information Act is succinctly stated in the seminal case of *NLRB v. Robbins Tire and Rubber Co.*[9] In this case the Supreme Court said that the Freedom of Information Act was designed "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[10] In other words, the FOIA was designed to be used by those who wish to observe the workings of government to ensure that government works fairly and honestly for the governed.[11] Toward that end, the Act was drafted in 1966 as an amendment to the Administrative Procedure Act (APA)[12] and was designed to ensure that citizens had access to all information within the government's control that could reasonably be disclosed.[13]

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9. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

10. *Id.*

11. *See* Warren, *Governmental Secrecy: Corruptions Ally*, 60 A.B.A. J. 550, 550-52 (1974)(secrecy concerning governmental records should be fixed by law).

12. Pub. L. No. 89-487, § 3, 80 Stat. 250, 250-51 (1966) (codified as amended at 5 U.S.C. § 1002 (1964)(repealed)). The Freedom of Information Act was derived from section 1002 of the Administrative Procedure Act and now replaces it.

13. H.R. REP. NO. 1497, 89th Cong., 2d Sess. 2, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 2418, 2429. The Freedom of Information Act was designed "to provide a true federal public records statute by requiring the availability, to any member of the public, of all of the executive branch records described in its requirements, except those involving matters which are within nine stated exemptions." *Id.* The Act was significantly modified and strengthened in 1974 by Pub. L. 93-502, 88 Stat. 1561, (1974). The legislative history surrounding this Act supports this proposition with the following statement.

> H.R. 12471 seeks to strengthen the procedural aspects of the Freedom of Information Act by several amendments which clarify certain provisions of the Act, improve its administration, and expedite the handling of requests for information from Federal agencies in order to contribute to the fuller and faster release of information, which is the basic objective of the Act.

H.R. REP. NO. 876, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6267, 6267.

In drafting the Act Congress also recognized the need to permit access to information without injuring either an individual or a legitimate governmental function.[14] Accordingly, the Act includes several concepts which are basic to its goal of free access to governmental information, but which may pose specific problems in achieving this goal while preserving other legitimate governmental interests. Among these concepts are personal privacy, national security, criminal investigation, and the need to balance these interests against the objective of attaining freedom of access to information to permit the citizenry to be informed.[15]

Although the Act is primarily designed for access to information, the other qualities within the Act which address personal privacy,[16] national security[17] and criminal investigation,[18] create a basic tension which the Act must resolve in order to be effective. The demands of

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14. Weissman v. CIA, 565 F.2d 692, 694 (D.C. Cir. 1977). In *Weissman*, the court stated, "[W]hen Congress enacted The FOIA it recognized the obvious difficulties that would inevitably arise when disclosure was sought of documents touching on sensitive matters affecting law enforcement and national security." *Id.*

15. S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965).

16. 5 U.S.C. § 552(b)(6), (7)(c) (1988). These sections protect personal privacy interests. *Id.* The (b)(7)(c) exemption concerns information collected or compiled for law enforcement purposes. The (b)(6) exemption covers "personnel and medical files and similar files" where the disclosure of information contained therein "would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552(b)(7)(c).

17. 5 U.S.C. § 552(b)(1) (1988). Section 552(b)(1) provides an exemption from disclosure for matters that are:

> (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order.

Id.

18. 5 U.S.C. § 552(b)(7) (1988). The seventh exemption from disclosure addresses:

> [R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) 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, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

Id.

national security, for instance, are not always consistent with the demand for open access to government information.[19] Similarly, the concept of personal privacy may limit access to information concerning individual citizens.[20]

The desire for enhanced taxpayer compliance highlights the tension between taxpayer privacy and the public's right to oversee governmental operation. In analyzing the relationship between these competing interests, Professor Boris Bittker concluded that "given the mass of information that must be supplied by taxpayers to comply with the federal income tax, a choice must be made between the public's desire to know and the individual's desire to live a life of privacy."[21]

Weighing on the side of public disclosure is the need to ensure that all taxpayers are treated equally and fairly. The primary method for ensuring such treatment is full disclosure of the government's actions concerning all taxpayers. Balancing against these concerns are first the individual's desire for privacy in matters of personal tax liability and second the government's interest in maximum voluntary taxpayer compliance with federal tax laws through assurance that taxpayer's privacy is preserved. Both of those interests are served by limited public access to individual taxpayer information. The nature of the civil or criminal investigation process also provides a significant constraint on the amount of access that an individual may have with respect to his own information in the control of the Federal Government.

There are several approaches which the Act could have taken to resolve the tensions between disclosure and legitimate confidentiality concerns that would have resulted in a general rule in favor of nondisclosure of governmental information. The approach that Congress approved in the Act is to provide first and foremost for access to in-

19. *See* Weissman v. CIA, 565 F.2d 692, 693 (D.C. Cir. 1977)(citizen not entitled to see information contained in CIA files which was compiled when CIA considered employing him); Halperin v. CIA, 629 F.2d 144, 161 (D.C. Cir. 1980)(citizen not entitled to information regarding private attorneys employed by CIA).

20. *See* Lesar v. United States Dep't of Justice, 636 F.2d 472, 488 (D.C. Cir. 1980)(court protected personal privacy of FBI informants to minimize public exposure or possible harassment). The court also protected the names of FBI personnel because disclosure would constitute an unwarranted invasion of their privacy. *Id.* at 487-88.

21. Bittker, *Federal Income Tax Returns—Confidentiality v. Public Disclosure*, 20 WASHBURN L.J. 479, 493 (1981).

formation in its general rule.[22] The Act provides in subsections (a)(1) through (a)(3) that each agency shall make certain specified types of information available to the public.[23] Therefore, the central concept of disclosure is the overriding concern of the Act. The Act, however, contains a framework within which specific areas of confidentiality may be addressed, but always with respect to the primary goal of the disclosure of information in the control of the government.

B. *The IRS Revealed*

Section (a)(1) of the Act requires publication in the Federal Register of descriptions of agency organizations, functions, procedures, and the like.[24] This section performs the important function of apprising the public of the nature of the organization that holds the information sought. Without such a description, it would be impossible for the

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22. As illustrated by the following legislative history, the approach taken in the FOIA is in large measure a response to the frustration on the part of Congress to the perceived abuse of the old Administrative Procedure Act by agencies which withheld documents that Congress saw as disclosable.

> Section 3 of the Administrative Procedure Act (5 U.S.C. § 1002), though titled "Public Information" and clearly intended for that purpose, has been used as an authority for withholding, rather than disclosing, information. Such a 180 degree turn was easy to accomplish given the broad language of 5 U.S.C. 1002.
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> Improper denials occur again and again. For more than 10 years, through the administrations of both political parties, case after case of improper withholding based upon 5 U.S.C. 1002 has been documented. The Administrative Procedure Act provides no adequate remedy to members of the public to force disclosures in such cases.

H.R. REP. NO. 1497 89th Cong., 2d Sess. 2, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 2418, 2421-22.

23. 5 U.S.C. § 552(a)(1) (1988). Section 552(a)(1) concerns organizational and procedural information that must be published in the Federal Register. *Id.* Section 552(a)(2) provides for the public inspection of agency opinions and policy statements. *Id.* § 552(a)(2). Section 552(a)(3) provides for the disclosure of any other information upon request. *Id.* § 552(a)(3).

24. 5 U.S.C. § 552(a)(1) (1988). Section 552(a)(1) provides as follows:

> (a) Each agency shall make available to the public information as follows:
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> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public —
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> (A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
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> (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
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> (C) rules of procedure, descriptions of forms available or the places at which

public to know, much less understand, the manner in which a given agency operates. Without a fundamental understanding of the agency's procedures, functions or organization, it would not be possible for an individual to identify the correct feature of an agency about which the individual seeks information. Accordingly, the publication requirement in subsection (a)(1) performs the important function of establishing a publicly available explanation of the features of each governmental agency. This explanation serves much in the same way an x-ray serves to expose the bones of the administrative beast to public scrutiny and permits the observer to locate the particular administrative bone that deserves further scrutiny.

Subsection (a)(2) of the Act requires that final opinions, policy statements and staff manuals be available for public inspection.[25] An

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forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

Id. This section of the Act was propounded in response to a failure of the State Department to disclose information about its organization. The House Report Number 1497 provides the following account of the State Department's failure to disclose information.

Earlier this year the Foreign Operations and Government Information Subcommittee uncovered a serious violation of subsection (a) of 5 U.S.C. 1002 which requires every Government agency to publish its rules and a description of its organization and method of operation. In spite of repeated demands, this clear legal requirement has been ignored by the Board of Review on Loss of Nationality in the Department of State, which has authority over questions of citizenship.

H.R. REP. NO. 1497, 89th Cong., 2d Sess. 12, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 2418, 2422.

25. 5 U.S.C. § 552(a)(2) (1988). Section 552(a)(2) provides in pertinent part:

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying -

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

Id.

agency's policy statements, manuals, or final opinions with respect to the law are the vehicles which implement the law as applied by an agency. An excellent example of the sort of information which is vital to the public's understanding of the way in which government agencies interpret and enforce the law may be found in *Taxation With Representation Fund v. IRS*.[26] The Taxation with Representation Fund was seeking access to General Counsel Memoranda (GCM's),[27] Technical Memoranda (TM's)[28] and Actions on Decisions (AOD's).[29] The plaintiff in *Taxation With Representation Fund* alleged that the documents it sought constituted final agency opinions or statements of policy within the meaning of section 552 (a)(2) of title 5. The Service denied that the documents constituted final agency opinions or

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26. Taxation with Representation Fund v. IRS, 646 F.2d 666, 677 (D.C. Cir. 1981).

27. *See Taxation With Representation Fund*, 646 F.2d at 669 (defining General Counsel Memoranda). General Counsel Memoranda are:

> legal memorandums from the Office of Chief Counsel to the Internal Revenue Service prepared in response to a formal request for legal advice from the Assistant Commissioner (Technical). They are primarily prepared by attorneys in the Interpretative Division of the Office of Chief Counsel and usually addressed to the Office of the Assistant Commissioner (Technical) in connection with the review of proposed private letter rulings, proposed technical advice memorandums, and proposed revenue rulings (hereinafter proposed determinations) of the Service. The GCM sets forth the issues presented by whichever of these proposed determinations is under review, the conclusions reached and a brief factual summary. The body of the GCM contains a lengthy legal analysis of the substantive issues, and the recommendations and opinions of the Office of Chief Counsel. The GCM is often accompanied by a draft of the proposed determination that reflects the changes and modifications recommended in the GCM.

Id.

28. *Id.* at 671 (defining Technical Memoranda). Technical Memoranda are:

> memoranda from the Commissioner of the Internal Revenue Service to the Assistant Secretary of the Treasury (Tax Policy) . . . The TMs at issue in this case are drafted by attorneys in the Legislation and Regulations Division of the Office of Chief Counsel in connection with the preparation of proposed Treasury decisions or regulations.

Id.

29. *Id.* at 672 (defining Actions on Decisions). Actions on Decisions are:

> prepared by the attorney in the Tax Litigation Division responsible for review of the case at the same time he or she prepares a formal recommendation to the Department of Justice as to whether [the] particular case should be appealed. The AOD sets forth the issue which was decided against the Government, a brief discussion of the facts and the reasoning of the attorney behind his or her recommendations that the Commissioner either 'acquiesce' or 'nonacquiesce' in a decision of the Tax Court or of the federal district court . . . . Once the proposed AOD is reviewed and approved, it is sent to the Office of the Assistant Commissioner (Technical). If the Assistant Commissioner (Technical) is not in disagreement with the recommendation to 'acquiesce' or 'nonacquiesce,' the AOD is printed and distributed.

Id.

statements of policy within the meaning of section 552(a)(2) and raised the affirmative defense that the records were exempt from disclosure pursuant to section 552(b)(5), which protects the deliberative process privilege of an agency.[30] The court of appeals affirmed the district court's determination that the documents fell within the scope of section 552(a)(2), and therefore, they were not exempt from disclosure by reason of the section 552(b)(5) deliberative process privilege exemption.[31]

Although revenue rulings and private letter rulings are available to the public, the GCM's which contain the Service's legal theory and methodology which supported these rulings were not publicly available.[32] In *Taxation With Representation Fund*, the United States Court of Appeals for the District of Columbia Circuit agreed with the plaintiff that the Freedom of Information Act required public access to the final agency opinions, with respect to specific facts and circumstances as contained in General Counsel Memorandums. The court saw General Counsel Memorandums as exactly the kind of information that the Freedom of Information Act was designed to address.[33] In other words the Act was designed to permit the public to understand why agency decisions were made the way they were. General Counsel Memorandums provide explanations with respect to revenue rulings and, in a larger context, explain why the Internal Revenue Service holds a specific view with respect to specific provisions of the Internal Revenue Code.

If section 552(a)(1) of the Act provides the public with an x-ray of the administrative beast, section 552(a)(2) provides the public with a brain scan. With respect to the IRS Office of Chief Counsel, the public can now scrutinize agency thought patterns through an examination of General Counsel Memorandums, Actions on Decision, and other internal opinions of the Office of Chief Counsel that are now publicly available.

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30. *See* Section on Civil Discovery Privileges, *infra* text accompanying notes 154-65.

31. Taxation With Representation Fund v. IRS, 646 F.2d 666, 678 (D.C. Cir. 1981), *aff'g* 485 F. Supp. 263 (D.D.C. 1980).

32. *See* I.R.C. § 6110 (1982)(public inspection of written determinations).

33. *Taxation With Representation Fund*, 646 F.2d at 677. In *Taxation With Representation Fund*, the court noted that "[e]xemption 5 does not apply to final agency actions that constitute statements of policy or final opinions that have the force of law, or which explain actions that an agency has already taken." *Id.* It later found that each of the requested documents were final agency opinions and therefore disclosable under the Act. *Id.* at 684.

C. *This Record Has a Hole in It*

Section 552(a)(3) of the Act provides the general authority for individuals to pursue specific requests for access to information contained in government agency files.[34] In concert with section 552(a)(4), these provisions of the Act permit agencies to establish regulations for the orderly access to information which the Act provides to individuals.[35] As is the case with any orderly governmental action, access to governmental information may only be obtained through a detailed, and perhaps cumbersome, procedure, but one which attempts to balance the competing interests of total access to information and the legitimate confidentiality interests of the agency.

The first requirement of any procedure under the Freedom of Information Act is that the information sought must be "records"[36] of an "agency."[37] Upon first observation, this requirement appears to be a simple, common sense requirement. However, as illustrated by the litigation that has arisen with respect to it, the concept of an agency record is not universally understood.

In a series of actions brought against the Service under FOIA by Susan Long, the scope and limits of the definition of "record," as that term is defined under the Act in the Internal Revenue Service context, have been explored.[38] Pursuant to the *Long* decisions, the term "records," in the Internal Revenue Service context, includes com-

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34. *See* 5 U.S.C. § 552(a)(3) (1988)(unless agency records are otherwise exempt agency must make records available to any person)

35. *See id.* (agency may develop procedures and establish fee-structure to process records requests). Section 552(a)(3) and (a)(4) provide specific authority to draft regulations necessary to implement the Act's purpose of the fullest possible disclosure of information.

36. *See* Wolfe v. Department of Health & Human Servs., 711 F.2d 1077, 1079-82 (D.C. Cir. 1983)(containing extensive discussion of term "record" as used in FOIA).

37. *See* 5 U.S.C. § 552(f) (1988)(defining term "agency"). Section 552(f) provides the following definition of "agency": "[Agency] includes any Executive department, military department, Government Corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including Executive Office of the President), or any independent regulatory agency." *Id.* Note that Congress is not included in the definition and the Act has no application to congressional records.

38. Long v. IRS, Civil No. C75-228S (W.D. Wash. June 1, 1976), *rev'd*, 596 F.2d 362 (9th 1979), *reh'g en banc denied*, No. 76-3734 (9th Cir. Nov. 9, 1979), *cert. denied*, 446 U.S. 917 (1980), *on remand*, 3 GDS § 82, 436 (W.D. Wash. 1982), *rev'd & remanded*, 693 F.2d 907 (9th Cir. 1982), *fee waiver granted*, 566 F. Supp. 799 (W.D. Wash. 1983), *rev'd & remanded*, 742 F.2d 1173 (9th Cir. 1984), *appeal after remand*, 825 F.2d 225 (9th Cir. 1987), *cert. granted and judgment vacated*, __ U.S. __, 108 S. Ct. 2839, 101 L. Ed. 2d 878 (1988).

puter tapes as well as printed material.[39] The court noted that although the Service is under no duty to create documents in response to a FOIA request, the Service is obligated to edit documents in order to disclose the maximum amount of information while protecting the confidentiality of exempt information.[40]

Very nearly every IRS response to a Freedom of Information Act request will contain some information that is exempt from disclosure. A quick review of the GCM's that are discussed above will reveal that all taxpayer identifying information has been deleted from those documents. As will be discussed below, the Act contains several important exemptions for information that agencies may withhold from FOIA requestors. The Act also requires, however, that "any reasonably segregable portion of a record" must be disclosed to a requester.[41] Consequently, a requester should not be surprised to receive a record in response to a FOIA request that has been edited to remove exempt information.[42] The holes in the record are bits of information that the agency believes to be exempt from disclosure under one or more of the various exemptions from disclosure contained in the Act.

Having decided that a specific record is an agency record, the individual requesting information must follow the procedures of that agency as permitted under the Freedom of Information Act for access to the record.[43] This article will now turn to those procedures that have been established by the Internal Revenue Service for access to information within the control of the Service.

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39. *Long*, 596 F.2d at 365.

40. *See Long*, 596 F.2d at 365; Department of the Air Force v. Rose, 425 U.S. 352 (1976); *see also* Internal Revenue Manual § 1272 HB (13)50 (July 21, 1981).

41. 5 U.S.C. § 552(b) (1988). If a record contains exempt and non-exempt information and if that information is inextricably intertwined so that editing would result in essentially meaningless words and phrases the entire record may be withheld. Neufeld v. IRS, 646 F.2d 661, 666 (D.C. Cir. 1981).

42. The Service uses red tape to cover the non-disclosable information. The tape is opaque and can be read through by any reviewing official. Photocopy machines, however, cannot see through red tape and generate photocopies that do not contain the exempt information.

43. *See* Church of Scientology v. IRS, 792 F.2d 146, 150 (D.C. Cir. 1986). The Service is under no obligation to organize its filing and file retrieval systems in order to respond to FOIA requests. Accordingly, it is necessary to file a request that is consistent with current IRS retrieval systems.

III. FOIA AND IRS PROCEDURES

A. *The Request*

The first procedures that should be addressed concern the request itself. A request under the FOIA must be in writing and be signed by the person making the request.[44] Consequently, under the Freedom of Information Act the Service need not address or answer oral requests. In other words, a requester may not simply telephone the District Director, or any other Service official, and make a request for information under the Freedom of Information Act. The Service is entitled to, and insists upon, a written request for access to agency information.

The chief reason for a requirement that a request for information be in writing is the potential for civil and criminal liability for wrongful disclosure of returns or return information.[45] Civil damages have been awarded against the Service for wrongful disclosure of return information in several recent cases.[46] Criminal penalties are also in the balance whenever returns or return information is disclosed by an officer or employee of the IRS.[47] As a result of the potential for civil or criminal penalties, the Service has decided that it is reasonable and prudent to require all requests for information to be in writing. In this way, the Service can ensure that the requester is legally entitled to the information he or she seeks before any disclosure takes place.

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44. Treas. Reg. § 601.702(c)(3)(i) (1986).

45. *See* I.R.C. § 7431 (1982 & Supp. V 1987)(civil penalty provision); I.R.C. § 7213 (1982 & Supp. V 1987) (criminal penalty provision).

46. *See* Rorex v. Traynor, 771 F.2d 383, 388 (8th Cir. 1985)(discusses different types of civil damages); *see also* Husby v. United States, 672 F. Supp. 442, 446 (N.D. Ca. 1987)(discussing sanctions as civil remedy).

47. I.R.C. § 7213 (1982 & Supp. V 1987). Section 7213 provides as follows:

(a) Returns and Return Information —

(1) Federal employees and other persons. — It shall be unlawful for any officer or employee of the United States or any person described in section 6103(n) (or an officer or employee of any such person), or any former officer or employee, willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b). Any violation of this paragraph shall be a felony punishable upon conviction by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution, and if such offense is committed by any officer or employee of the United States, he shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction for such offense.

Id. The Service takes the criminal penalty for wrongful disclosure very seriously and has recommended cases of wrongful disclosure to the Department of Justice.

A written request for information which is submitted to the Internal Revenue Service under the FOIA must state that it followed the guidelines of the Freedom of Information Act.[48] Therefore, it is insufficient to simply request information without the notation that the request is made pursuant to the Act. This procedure has more historic significance than current relevance. In the past, the Service argued that the exclusive means of access to returns and return information was through the Internal Revenue Code itself.[49] Requests made under the Code led to different legal redress for insufficient agency response and sometimes produced greater results depending upon the nature of the requester.[50] The distinction remains important to highlight the access to information that requesters may obtain under section 6110, and the judicial review distinction between section 6110 and the FOIA. Section 6110 remains the primary avenue for access to written determinations such as private letter rulings. If a requester is dissatisfied with a response made under section 6110, his redress is in the United States Tax Court or United States District Court.[51]

A properly drafted FOIA request must be addressed to and mailed or hand delivered to the office responsible for control of the records requested.[52] The regulations contain the addresses of each office of the Internal Revenue Service which may contain records subject to the Act.[53] It is vital that the request for information be addressed and delivered to the correct office. The Service is required to search for records in the office to which a request is addressed. Generally, the Service only will search in the office to which the request is addressed and delivered.[54] The one exception to this rule arises when the re-

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48. Treas. Reg. § 601.702(c)(3)(ii) (1986).

49. Zale Corp. v. IRS, 481 F. Supp. 486, 489 (D.D.C. 1979).

50. The only authority for withholding a taxpayer's own return information is section 6103(e)(7) of the Internal Revenue Code. I.R.C. § 6103(e)(7) (1982). A taxpayer may receive more information about himself under the Code than he would under the FOIA because none of the FOIA exceptions to disclosure would operate to authorize withholding of information.

51. *Id.* § 6110(f)(4)(A).

52. Treas. Reg. § 601.702(c)(3)(iii) (1986).

53. Treas. Reg. § 601.702(g) (1986).

54. Internal Revenue Manual § 1272 HB (13)31 (Sept. 9, 1987). Section 13(31) also requires, however, that IRS officials should transfer the request to another office if the request or research suggest the information is located elsewhere. *Id.* Section 1272 HB (13)31 provides in pertinent part:

> FOIA requests should be considered as intended to access the records of the receiving official having jurisdiction unless the request contains some indication that access to

quester addresses and delivers the request to the District Director where the requester resides. In this situation, the disclosure officer in the requester's home district will forward the request to the correct district or other office where the requested information may be found. This procedure is sometimes unsatisfactory in that the individual disclosure officer in the requester's home district may not be aware of all the locations in which information concerning the requester may be found. The best source of the correct location of information is the requester himself. The requester will know in which districts he resided during the time in which the requested information may have been generated. Information concerning the relevant time frame, and any other information that might help to properly direct the search for information, should be provided in the request.

The next requirement, and one of the most significant requirements from the standpoint of obtaining the desired information, is that the request reasonably describe the records sought.[55] A review of the legislative history concerning the Freedom of Information Act discloses that the request must describe the records in reasonably sufficient detail to enable IRS employees familiar with the subject matter of the request to find the records using only reasonable effort.[56] The requirement is generally read broadly by the courts interpreting this particular procedural requirement.[57] However, it is equally clear that the courts will not countenance a fishing expedition based upon general, nonspecific requests for a broad range of information.[58] While it is not necessary to use specific agency jargon or to employ technical terminology in requesting information, it is necessary to describe the information sought in a manner which will enable the agency to understand what the requester is seeking. For example, it would not be necessary for a requester to know that the document which is produced after the audit of a taxpayer's books and records is called a

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records located elsewhere is desired, or research suggests that transfer to another office would provide more adequate service to the requester.

Id.

55. Treas. Reg. § 601.702(c)(3)(iv) (1986).

56. H.R. REP. NO. 876, 93d Cong., 2d Sess. 6, *reprinted in* 1974 U.S. CODE CONG., & ADMIN. NEWS 6271.

57. *See* Yeager v. DEA, 678 F.2d 315, 326 (D.C. Cir. 1982). The *Yeager* Court found a request valid even though it covered over one million computer records, because the agency was able to discern "precisely what records [were] being requested." *Id.* at 326.

58. American Fed'n of Gov't Employees v. Department of Commerce, 632 F. Supp. 1272, 1278 (D.D.C. 1986).

Revenue Agent's Report in order to obtain a copy of such a report. It would be sufficient for the requester to describe the information sought as being the report or statement or result of the auditor's work concerning that particular taxpayer. It would not be sufficient, however, to simply ask for "all records concerning me."[59] If a reasonable reading of the request can identify the information which is being requested, the Service has an obligation to search for and produce the requested information.

The regulations require that the requester establish his right to the record under section 6103 if applicable.[60] Section 6103 provides an extremely detailed analysis of the types of information maintained by the IRS. It provides specific authority for the Service to withhold or disclose such information based upon the nature of the information sought and the relationship between that information and the requestor. The section 6103 rules for the disclosure of returns and return information will be discussed under the heading of section 552(b)(3) which incorporates those rules in the Freedom of Information Act.

The request must include the requester's address.[61] This is a simple requirement but one which is obviously necessary if the Service is to provide the requester with the information sought.

The procedures require that the requester state whether the requester desires to inspect or copy the records.[62] This procedure highlights the two approaches which a requester may take in obtaining the information sought. The requester may ask for copies of the documents which are responsive to his or her request. Alternatively, the

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59. Internal Revenue Manual § 1272 H.B. (13) 33 (Sept. 10, 1987) (regarding request for "all records concerning me"). Where request asks for "all records concerning me" the following procedures apply:

(1) Usually, requests for "all records concerning me or containing my name" are not specific enough to process and should be rejected as imperfect.

(2) Such requests should be thoroughly reviewed as they may contain minor references to records or investigations which would help to identify the documents requested.

(3) Requests containing enough information to permit a reasonable identification of documents should be processed. Such information could include, for example, the function where the records may be found, the tax year or years involved, the type of tax, or the type and location of any investigation conducted by the Service.

Id.

60. Treas Reg. 601.702 (c)(3)(v) (1986)(requester must establish identity and right to request disclosure where FOIA or IRC or Privacy Act restricts disclosure).

61. Treas. Reg. § 601.702(c)(3)(vi) (1986).

62. Treas. Reg. § 601.702(c)(3)(vii) (1986)(requester must state whether he wishes to inspect records or wants copies made without prior inspection).

requester may ask to inspect the documents which are responsive to his request without obtaining copies. Because of the additional fees associated with copying information, it may be prudent for a requester to inspect the requested information rather than receive copies of the records. The regulations permit the requester to pursue either of these approaches.

A proper request for information must contain a firm agreement to pay fees or a request for waiver of fees pursuant to Treasury Regulation section 601.702(f).[63] This regulation section provides the most frequently overlooked or misapplied portion of the regulations with respect to requests for information. No action can be taken with respect to a request that does not contain a firm agreement to pay fees or request for waiver of fees. The time limits within which the Service must act with respect to a request for information are not triggered until this provision of the regulation is satisfied. Consequently, it is vital that a request for information contain either a firm agreement to pay fees or a request for a fee waiver.

The requester should carefully consider a request for a fee waiver. No action can be taken on a request where the request for fee waiver is denied and there is no alternative firm agreement to pay fees. The Act itself, and the regulations thereunder, make it clear that fees will not be waived unless the requester can demonstrate that the requested records concern public interest[64] and that the requested information is likely to contribute to an understanding of government activities.[65] Disclosure of the requested information must be of value to the general public rather than of value only to the requesting individual.[66] There is no public purpose to be furthered in the disclosure of the requester's own tax information to the requester. In no case where such information is sought can there be a waiver of fees.[67]

There is, perhaps, no other aspect of agency policy that reflects the

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63. Treas. Reg. § 601.702(c)(3)(viii) (1986).

64. National Treasury Employees Union v. Griffin, 811 F.2d 644, 646-47 (D.C. Cir. 1987).

65. 5 U.S.C. § 552 (a)(4)(A)(iii) (1988).

66. *National Treasury Employees Union*, 811 F.2d at 646-47.

67. *See* 5 U.S.C. § 552(a)(4)(A)(iii)(1988) (fee waiver provisions). Under the new fee waiver provisions, fees may only be waived "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." *Id.*

original policy goals of the FOIA better than the fee waiver provisions of the Internal Revenue Manual. The manual provides a detailed analysis of the circumstances in which a requester would be entitled to a waiver of search and duplication fees.[68] The manual provides the disclosure officer with guidance in answering four basic questions: (1)

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68. Internal Revenue Manual § 1272 HB 541 (Mar. 1, 1989)(fee waiver for information of public interest). Section 1272 HB 541 provides as follows:

(1) The Freedom of Information Act provides that documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the IRS, and is not primarily in the commercial interest of the requester.

Id.

Section 1272 HB 542 provides the following procedures for requesting fee waivers or fee reductions:

(1) Waiver or reduction of fees must be requested in writing

(2) The requester must provide the rationale and any required evidence for determining to waive or reduce fees.

(3) Under some circumstances, the appropriateness of a fee waiver may be so self-evident as to warrant waiver at the initiative of the Disclosure Officer, even though there was no written request for a waiver. For instance, a request from a charitable organization, educational institution or news media for records whose release would obviously be in furtherance of a cause benefiting the general public would generally not be subject to fees, even though a waiver was not specifically requested.

Id. § 1272 HB 542 (Mar. 1, 1989).

Finally, section 1272 HB 543 of the Internal Revenue Manual describes the basis for making fee waiver provisions.

(1) Fees may be waived or reduced when, in the discretion of the determining official, it is in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the Internal Revenue Service (and is not primarily in the commercial interests of the requester).

(2) Disclosure Officers and Public Information Officers traditionally waive fees for copies and other services rendered to the news media when doing so is considered to be in the general public interest.

(3) The determination to waive fees in the general public interest must be based upon an evaluation of the information involved, its value to the public and the intent and capability of the requester.

(4) The following considerations are relevant to a determination to waive fees:

(a) Does the subject matter of the releasable records directly concern an operation or activity of IRS?

(b) Would disclosure of the releasable records be informative and lead to the public's understanding of IRS's operations or activities?

1. The information is of current significance.
2. The information is of historical scientific, or economic significance.
3. The information is not already publicly available or previously been released.

(c) Would disclosure of the releasable records contribute to any understanding of IRS's operations or activities by the larger public, and not just the requester?

Does the subject of the request concern the operation of the IRS?; (2) Would disclosure lead to an understanding of the operation of the IRS?; (3) Would disclosure contribute to understanding of the IRS by

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1. Focus on value and interest to a broad segment of the population.
2. How will the requester convey releasable records to the general public?
3. Personal benefit to requester is not determinative.

(d) How significant is the releasable record's contribution to the public's understanding of IRS's operations or activities?

1. The information is of historical, scientific or economic significance.
2. The release of the information could reduce Government costs by obviating the need for other forms of distribution or reducing the anticipated volume of further FOIA requests for the same information.

(e) Contrast any commercial interest of the requester to the significance of the general public understanding of IRS's operations or activities.

(5) The following characteristics of the requester could be relevant to a determination to waive fees:

(a) Recognition as a scholar, researcher or authority in a field related to the material requested.

(b) Association with a university, laboratory, or bona fide research activity related to the material requested.

(c) Membership in relevant professional associations.

(d) An established record of publication or dissertation on related subjects.

(e) Reputation for impartiality appropriate to scholarly, scientific or journalistic endeavors.

(f) Capacity for publication, reprinting or dissemination of the information.

(g) Capacity for the preservation of the information as in a library, archive, museum or other publicly accessible depository.

(h) A cogent proposal for utilizing the material requested in a manner primarily benefiting the general public.

(6) The following factors would tend to indicate that a fee waiver would be inappropriate:

(a) The information would be of limited interest to the public.

(b) The requester would be unlikely to disseminate the information because much of it would be personal to the requester.

(c) A considerable portion of the requested information relates to the requester's own affairs or appears wanted in connection with an administrative or judicial proceeding involving the requester and the Government.

(d) The basis for the request appears to be in pursuit of a hobby or for a personal purpose such as genealogical research.

(e) The information is to be used in the requester's entrepreneurial capacity or may be offered for and the release of the information would not reduce Government costs by obviating the need for other forms of distribution or reducing the anticipated volume of further FOIA requests for identical information.

(f) The request is one of many similar requests seeking basically the same information.

(g) The request appears prompted by, or the requester appears associated with, movements inherently inconsistent with the public interest due to the advocacy of discrimination, segregation, public disorder or illegal activity.

Id. § 1272 HB 543(1) (Mar. 1, 1989).

the public or just by the requester?; and (4) How significant is the record's contribution to the public's understanding of the IRS?[69] Recalling for a moment the purpose of the Act as described in *NLRB v. Robbins Tire & Rubber Co.*,[70] the Manual provisions on fee waiver echo the sentiment that the Act is designed to ensure an informed citizenry.[71] Consequently, where disclosures of information add to the knowledge of an informed citizenry, fees may be waived under the Act. The position is in contrast to that of a requester who wishes to gain access to his or her own tax information for the purpose of opposing the Service with respect to that requester's tax matters. Although the Act may be used to obtain such information, the costs associated with complying with such a request will not be waived by the Service under the guidelines for fee waiver as found in the manual.[72]

As a component of the fee portions of the regulations, the request should describe the requester pursuant to Treasury Regulation section 601.702(f)(3) for purposes of determining the appropriate fees to be charged to the requester.[73] The fee structure provides for a fee for search time and other fees based upon the nature of the requester. The general search fee is $17.00 per hour.[74] Additionally, there is a fee for review of documents where a commercial entity requests records.[75] In that case the fee for such review is $21.00 per hour.[76] In addition to those fees, there is a charge of $ .15 per page of information responsive to a request.[77] There are also specific fees for specific

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69. Internal Revenue Manual § 1272 HB 541(1) (Mar. 1, 1989).

70. 437 U.S. 214 (1978).

71. *Id.* at 242.

72. Internal Revenue Manual § 1272 HB 510 (Mar. 1, 1989). Section 510 provides as follows:

> 31 U.S.C. 9701 states that it is the sense of Congress that each service or thing of value provided by an agency to a person is to be self-sustaining to the extent possible. Each charge is to be fair and based upon the costs to the Government, the value of the service or thing to the recipient, the public policy or interest served and other relevant facts.

Id.

73. Treas. Reg. § 601.702(c)(3)(ix)(f)(3) (1986). Treasury Regulation section 601.702(f)(3) provides the following categories of requestors: commercial use, media, educational institution, noncommercial scientific institution, and other. *Id.* § 601.702(f)(3).

74. Treas. Reg. § 601.702(f)(5)(i)(A) (1986).

75. *See* Treas. Reg. § 601.702(f)(5)(ii)(B) (1986). Review of documents refers to the process of editing records to delete information not properly disclosable to a specific requester. *Id.* § 601.702 (f)(5)(ii).

76. Treas. Reg. § 601.702(f)(5)(ii)(B) (1986).

77. Treas. Reg. § 601.702(b)(5)(iii)(A) (1986).

requested information. For example, access to returns may be obtained after payment of a specific fee of $4.25.[78] This flat fee covers expenses for search and photocopying fees for individual income tax returns.

The request must contain proper identification of the party seeking the information.[79] The purpose of this requirement is to ensure that a requester who seeks access to tax information obtains only that information to which he is entitled, and to ensure that he does not obtain information concerning other taxpayers. To accomplish this, the regulations require a photocopy of the requester's driver's license or other photo identification.[80] A notarized statement which affirms that the taxpayer and the requester are one and the same is also acceptable.[81] The regulations provide for the option of the Internal Revenue Service to ask for additional information. This is done on rare occasion when a disclosure officer suspects that the person seeking information may not be who he claims to be in the request.[82] In such a case, the regulations allow the disclosure officer to ask for additional information that he may deem to be appropriate in making a correct identification of the requester. This precaution is provided because of civil and criminal penalties for wrongful disclosure, and it helps to ensure that a wrongful disclosure does not occur. In the event that a taxpayer's representative wishes to obtain information on behalf of a taxpayer, the representative may submit an original power of attorney and identification of the person executing the power of attorney.[83] In other words, it is necessary to establish that the actual requester is entitled to the information sought. That is accomplished by identifying the requester in the way described above. Additionally, it is necessary to establish that the requester is properly represented in the request by his representative. That is accomplished through the submission of an original power of attorney. In the case of a corporation the identification process is accomplished through the use of the corporation's letterhead and a statement that the requester is an officer of the corporation with the power to bind the corporation.[84]

78. Treas. Reg. § 601.702(f)(5)(iv)(A) (1986).
79. Treas. Reg § 601.702 (c)(4) (1986).
80. Treas. Reg § 601.702 (c)(4)(ii)(A) (1986).
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*

Those two factors being present, the disclosure officer will process a request for information from a corporation.

It is important to emphasize that it is essential to comply with the regulations provided under the Freedom of Information Act before there is a valid request.[85] Without full compliance, there is no request, and therefore, there can be no judicial enforcement of any request. Compliance with the regulations will generate an enforceable Freedom of Information Act request but the lack of compliance will result in the absence of a request which will leave the requester without recourse concerning access to the desired information.

When the Service locates documents which are responsive to the request for information, notice will be sent to the requester asking for payment of fees. This notice will of course be made pursuant to the firm agreement to pay fees that was contained in the original request. The notice will explain that the documents that are responsive to the request have been located and are now available to the requester. Payment of the fees will cause the documents to be provided to the requester. A failure to pay the fees will mean that the requester has not fulfilled his or her firm agreement to pay such fees, and the agency is therefore under no obligation to provide the documents to the requester.

The Internal Revenue Service is under an obligation to accomplish its search within ten days of receipt of a valid Freedom of Information Act request.[86] However, the Service frequently receives more Freedom of Information Act requests than it can process in the statutorily provided ten day time frame. Additionally, it sometimes happens that the information requested is not all located in one easily retrievable bundle. In either of these situations, the Service may send the requester a notice which asks for an additional amount of time, not to exceed ten days, in which to process the request.[87] The requester is not obligated to accede to the Service's requests for additional time. However, it may be noted that courts have held that a first-in, first-out approach and the use of due diligence on the part of the agency in allocating scarce agency resources does not violate the spirit of the

85. *See* Church of Scientology v. IRS, 792 F.2d 146, 150 (D.C. Cir. 1986)(where Church did not request records in accordance with regulations, court could not order disclosure).

86. 5 U.S.C. § 552(a)(6)(A)(i) (1988).

87. Treas. Reg. § 601.702(c)(7)(i)(1986)(ten-day limit to act on information request); *see also id.* § 601.702 (c)(9)(permitting 10-day extension).

Freedom of Information Act.[88] Accordingly, nonacquiesence to the Service's request for additional time will not produce the records in any quicker fashion.

B. *Remedies*

After information has been requested under the Freedom of Information Act, the requester may appeal the non-response of an agency, or an unsatisfactory response of an agency, to other officials within that agency.[89] The administrative appeal serves as a constraint upon any lower officials' unwillingness to disclose all of the information required to be disclosed under the Act.[90] The requester benefits from a fresh review of all of the withheld material by a senior agency official. Thereafter, the requester benefits from the additional material that may be disclosed and the agency benefits from consistent and uniform compliance with Act.[91]

The appeal process at the Internal Revenue Service provides that the request for information and the response to that request for information are reviewed by the Disclosure Litigation Division of the Office of Chief Counsel.[92] An attorney in that division will examine the request and the response to determine whether or not the requirements of the Freedom of Information Act and its regulations have been met. A response to the appeal in the form of a letter will be drafted and reviewed by the Assistant Chief Counsel, Disclosure Litigation Division and then mailed to the requester. The response letter will contain a detailed explanation of the reasons for denial of specific information requested under the Act. The letter may also contain information not originally released under the Act but which has been determined to be disclosable upon review.

The review by the Disclosure Litigation Division amounts to a second look at every aspect of the request for information. In this way, the Service maintains uniformity in its response to disclosure requests by providing a central reviewing authority for all such requests. The

88. Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 615 (D.C. Cir. 1976).

89. Treas. Reg. § 601.702(c)(8) (1986)(outlining administrative appeal process).

90. J. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 7.04 (1988).

91. Statistical studies have shown that additional information is often released to FOIA requesters pursuant to an administrative appeal. *See* B. BRAVERMAN & F. CHETWYND, INFORMATION LAW § 14-5 (1985).

92. Treas. Reg. § 601.702(c)(8) (1986).

process also ensures that all of the information which should be made available to the requesting public is made available under the Freedom of Information Act.

If the agency fails to respond to a request within the ten day period the requester may file suit in United States District Court or treat the request as having been denied and send a letter of appeal.[93] The Act requires the agency to respond to an appeal within twenty working days after the receipt of such appeal.[94] Should the agency fail to respond within the twenty day period, the requester may file suit in United States District Court.[95] If the agency denies the appeal in whole or in part, it must inform the requester of the right to seek judicial review, and the requester may then file suit in United States District Court.[96] Accordingly, at both the request and appeal stages a judicial remedy exists where the agency fails to respond to the determination within the statutory time periods. A timely denial of the documents at the request stage also entitles the requester to administratively appeal the decision.[97] Failure of the requester to administratively appeal a decision will preclude the requester from seeking judicial review because the court will determine that the requester has failed to exhaust his administrative remedies before bringing the legal action.[98] If the agency does not respond timely to an appeal request, administrative remedies will be deemed to have been exhausted and the requester need not file an additional administrative appeal.[99]

The Freedom of Information Act lawsuit is the ultimate remedy available to a requester who does not receive an adequate response from an agency. If an agency fails to comply with any time limit contained in the act, then the administrative remedies open to the requester are deemed to be exhausted.[100] It is at this point that the requester may bring a Freedom of Information Act action. The proper venues for such an action are the United States District Court

93. Treas. Reg. § 601.702(c)(7)(iv), (10) (1986)(provisions permitting appeal where IRS cannot locate records or where IRS did not respond to request within 10 days).

94. 5 U.S.C. § 552(a)(6)(A)(ii) (1988).

95. Treas. Reg. § 601.702(c)(11) (1986).

96. Treas. Reg. § 601.702(c)(8) (1986).

97. Treas. Reg. § 601.702(c)(7)(iii) (1986).

98. Spannaus v. Department of Justice, 824 F.2d 52, 57-59 (D.C. Cir. 1987); Crooker v. United States Secret Serv., 577 F. Supp. 1218, 1219 (D.D.C. 1983).

99. Virginia Transformer Corp. v. United States Dep't of Energy, 628 F. Supp. 944, 947 (W.D. Va. 1986).

100. 5 U.S.C. § 552 (a)(6)(C) (1988).

where the requester resides, where the requester's principal place of business is located, where the records which the requester seeks are located, or the District of Columbia.[101] It is important to remember that in order to obtain proper service in a Freedom of Information Act lawsuit, it is necessary to serve both the Commissioner and the United States Attorney for the district in which the action is brought.[102]

When a Freedom of Information Act lawsuit is brought in United States District Court, the court will review the case de novo.[103] In other words, the court will not ask whether the Commissioner has abused his discretion in withholding records but instead will ask whether the records should be withheld. The court will act as a new participant in the process and decide for itself whether the requester is entitled to access to the information sought under the Freedom of Information Act. The burden of proof with respect to withholding specific pieces of information rests with the Service.[104] The Act provides for disclosure of information and disclosure will occur unless the Service can carry its burden of proof that information should be withheld from the requester under the Act.[105] Where there is a large volume of information which has been denied to the requester, and the court wishes to avoid an in camera inspection of the records, it may require a detailed index of the withheld information. This so-called *Vaughn* index will provide the court with its basis for determining whether the service was correct to withhold specific information.[106] Whether information should be withheld will be determined

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101. 5 U.S.C. § 552 (a)(4)(B) (1988).

102. FED. R. CIV. P. 4(d)(4),(5) (service requirements when United States and government agencies are parties).

103. 5 U.S.C. § 552 (a)(4)(B) (1988).

104. *Id.* Section 552(a)(4)(B) provides in pertinent part:

> (B) On complaint, the district court of the Unites States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

Id.

105. J. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 8.04, at 8-16 (1988).

106. Vaughn v. Rosen, 484 F.2d 820, 827 (D.C.Cir. 1973).

by the court with reference to the exceptions to disclosure provided in subsections (b)(1) through (b)(9) of the Act.

IV. FOIA EXCEPTIONS TO DISCLOSURE

A. *National Security*

Exception (b)(1) protects national security information. It is obvious from the plain language of the section that the Freedom of Information Act is not intended as a vehicle through which national security information may be disclosed to the public.[107] In asserting the (b)(1) exception, the burden of proof lies with the agency attempting to withhold information under the national security exception for disclosure. However, that burden can be met by an affidavit from the agency that details the national security interests that would be at risk through disclosure.[108] This particular exception has been of very little historical relevance in the tax context.

B. *Internal Guidelines*

The second exception, found in subsection (b)(2), protects matters related solely to the internal personnel rules and practices of an agency.[109] This exception has been broken into two separate and distinct subgroups. The first is the so called low (b)(2) protection for internal rules such as those concerning parking facilities or lunch hour regulations. The authority for the so called low (b)(2) exception comes from the legislative history which addresses the (b)(2) exception and expresses an intent to exclude trivial, administrative-type information from disclosure.[110] The second component of the exception is known as the high (b)(2) exception. It protects substantial internal rules, the disclosure of which would allow circumvention of statute or agency regulation. The authority for the high (b)(2) component of the

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107. 5 U.S.C. § 552(b)(1) (1988)(FOIA provision specifically exempts from disclosure secrets pertaining to national security and foreign policy).

108. Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981).

109. 5 U.S.C. § 552 (b)(2) (1988)(internal personnel rules and policies exempt from disclosure).

110. S. REP. No. 813, 89th Cong., 1st Sess. 8 (1965). The Senate Report stated:

> Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.

Id.

exception also comes from the legislative history.[111]

In both cases, the reason for the exception under section (b)(2) is to limit the administrative burden on the agency.[112] That is accomplished in the first or a low (b)(2) context in that it protects the agency from responding to requests for frivolous information. The second or high (b)(2) exception limits the administrative burden by protecting agency rules which would, if disclosed, permit individuals to circumvent agency regulation or statutes. The low (b)(2) exception has been cited to protect the bargaining history and interpretation of internal revenue service contracts.[113] The high (b)(2) exception has been cited to protect law enforcement manuals, the disclosure of which would enable taxpayers to circumvent the Internal Revenue Code and the service's attempt at enforcement of the code.[114]

It is the high (b)(2) exemption which provides the most meaningful exemption from disclosure of the two (b)(2) exemptions. In *Crooker v. Bureau of Alcohol, Tobacco and Fire Arms*, the court found that the disclosure of manual provisions promulgated by the agency as a tool to be used in its mission to enforce the law would permit individuals to escape detection for violations of the law.[115] In relying upon the legislative history found in the House Report in connection with the (b)(2) exception, the United States Court of Appeals for the District of Columbia Circuit viewed the circumvention of regulations and law as sufficient to meet the (b)(2) requirement that the matters be solely related to internal personnel rules and practices of the agency.[116] Consequently, law enforcement manuals[117] in the hands of the Internal Revenue Service are also exempt from disclosure to the extent that

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111. H.R. REP. No. 1497, 89th Cong., 2d Sess. 10, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 2418, 2427. The House Report states:

> [O]perating rules, guidelines, and manuals of procedure for Government investigators or examiners [which] would be exempt from disclosure, but [that] this exemption would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are withheld under present law.

Id.

112. Department of Air Force v. Rose, 425 U.S. 352, 369 (1976).

113. National Treasury Employees Union v. Department of Treasury, 487 F. Supp. 1321, 1324 (D.D.C. 1980).

114. *See* Crooker v. Bureau of Alcohol, Tobacco and Firearms, 670 F.2d 1051, 1075 (D.C. Cir. 1981)(discussing the confusion generated by inconsistent legislative history of (b)(2) exception).

115. *Id.*

116. *Id.*

117. Law Enforcement Manual (LEM) provisions are those parts of the Internal Revenue

they provide the personnel rules and regulations for enforcement of agency regulations and the Internal Revenue Code.[118]

C. *Confidential Tax Information*

The exception to disclosure provided under FOIA subsection 552(b)(3) has particular significance for returns and return information. This exception incorporates into the Act other provisions of law which exempt information from disclosure.[119] In other words, it protects information specifically exempted from disclosure by statutes other than the Freedom of Information Act. The most important piece of legislation concerning tax information other than the Freedom of Information Act is section 6103 of the Internal Revenue Code. That section has universally been held to be within the ambit of FOIA exemption (b)(3).[120] However, the Service has also argued that the Internal Revenue Code in general and section 6103 in particular is the exclusive means of access to return and return information.[121]

Before discussing the distinction between section 6103 as a 552(b)(3) statute and section 6103 as an exclusive means of access to returns and return information, it may be helpful to consider the type of information covered by section 6103. The concept of returns and return information as found in section 6103 is an extremely broad one. Under section 6103 (b)(1), the definition of returns includes any tax or information returns such as forms 1040, 1120, 1065, Declarations of Estimated Tax, claims for refund, also return amendments

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Manual that provide guidance to agents in how to enforce the internal revenue code. Therefore, these provisions are not subject to public disclosure.

118. The so-called high (b)(2) exemption is now incorporated into the new (b)(7)(E) exemption which protects law enforcement information "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) (1988).

119. 5 U.S.C. § 552(b)(3) (1988). Section 552 (b)(3) provides as follows:

> (b) This section does not apply to matters that are—
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> (3) Specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Id.

120. Grasso v. IRS, 785 F.2d 70, 75 (3rd Cir. 1986); Chamberlain v. Kurtz, 589 F.2d 827, 838-39 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979).

121. Zale Corp. v. IRS, 481 F. Supp. 486, 490 (D.D.C. 1979).

and schedules.[122] Return information as defined in section 6103 (b)(2) includes anything gathered or prepared by the Secretary with respect to a tax matter.[123] If an agent of the Internal Revenue Service gathers any information concerning the tax liability of any individual, that information is covered by the definition of return information. For example, newspaper clippings gathered by a special agent in connection with the possible civil or criminal liability of an individual would be return information. Information gathered by an agent in the form of interviews with potential witnesses or documents collected in connection with the tax liability under investigation also would be return information. As illustrated by the example of the newspaper clipping, the otherwise public nature of information does not prevent an item from becoming protected return information when that information is gathered by an agent.

Although section 6103 is now firmly established as incorporated into the FOIA through subsection (b)(3) of the Act, the Service has

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122. I.R.C. § 6103 (b)(1) (1982). Section 6103 (b)(1) provides as follows:

(1) RETURN — The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

Id.

123. *Id.* § 6103(b)(2)(A),(B). Section 6103 defines "returns" and "return information" as follows:

The term "return information" means—

(A) A taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b) which is not open to public inspection under section 6110,

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

I.R.C. § 6103 (b)(2)(A) (1982).

successfully argued in the past that section 6103 is the exclusive means of access to returns and return information.[124] In other words, the Service has argued that section 6103 displaced the FOIA with respect to all questions of access to returns and return information. Access to such information would be limited according to the provisions of section 6103 regardless of which approach was pursued, but the standard of judicial review will differ significantly.[125] Other commentators[126] have eloquently explored the de novo standard of review under the FOIA. This standard requires a fresh disclosure decision by the court concerning all of the information at issue. The A.P.A. standard of review of decisions to withhold information by an agency outside the FOIA context applicable under section 6103 requires only that the court be satisfied that the agency did not act in an "arbitrary or capricious"[127] manner in withholding specific information from the requester.[128] The United States Court of Appeals for the District of Columbia Circuit effectively has closed the debate over these approaches in the IRS context by repudiating *Zale v. IRS*, the District of Columbia District Court decision that gave life to the exclusivity argument concerning section 6103.[129] Consequently, the Service no longer asserts the *Zale* position and now acknowledges the inclusion

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124. White v. IRS, 707 F.2d 897, 900-01 (6th Cir. 1983); King v. IRS, 688 F.2d 488, 495-96 (7th Cir. 1982); Zale Corp. v. IRS, 481 F. Supp. 486, 489-90 (D.D.C. 1979).

125. Long v. IRS, 742 F.2d 1173, 1178 n.12 (9th Cir. 1984). In *Long*, the court described the distinction as follows:

> [I]f section 6103 is subject to FOIA, the court will proceed *de novo* and the agency bears the burden of establishing the exempt status of the information. If, on the other hand, section 6103 were considered to operate independently of FOIA, review would proceed under the narrower standard of the Administrative Procedure Act (APA).

Id.

126. *See* Raby, *The Freedom of Information Act and The IRS Confidentiality Statute: A Proper Analysis*, 54 U. CIN. L. REV. 605, 623 (1985).

127. 5 U.S.C. §§ 701-706 (1988); *see also* Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414 (1971)(action by citizens' organization to enjoin Secretary of Transportation from releasing federal funds for construction of highway through park); Environmental Defense Fund v. Castle, 657 F.2d 275, 283 (D.C. Cir. 1981)(action to compel federal defendants to act concerning water quality standards).

128. *See* Reilly, *The Freedom of Information Act; The Freedom of Information Act and The Withholding of documents under Section 6103 of The Internal Revenue Code*, 55 GEO. WASH. L. REV. 937, 940 (1987); Note, *Long v. Internal Revenue Service: A Miscalculation of The Freedom of Information Act's Applicability to Section 6103(b) of the Internal Revenue Code*, 5 VIRGINIA TAX REVIEW 441, 443 (1985); Raby, *The Freedom of Information Act and the IRS confidentiality Statute: A Proper Analysis*, 54 U. CIN. LAW REV., 605, 623 (1985).

129. Church of Scientology v. IRS, 792 F.2d 146, 149 (D.C. Cir. 1986).

of section 6103 into the Act through subsection (b)(3).[130]

Having provided for a vast class of information that is protected by section 6103, Congress included within the statute a mechanism for gaining access to that information. Section 6103(e) provides for disclosure to persons having material interests in the specific returns or return information at issue.[131]

As mentioned earlier, the first group of requesters with a recognizable material interest are individuals who file tax returns.[132] The return and return information are disclosable to the individual who filed the return.[133] By way of example, consider the case of husband and wife who file joint returns for 1987 and separate returns for 1988. While either party may request and receive access to the joint returns, only the party who filed the individual return may gain access to that return.[134] In other words, the taxpayer's wife may inspect their 1987 joint return and her own 1988 return, but she may not inspect her husband's 1988 return.

In the case of partnership returns, any person who was a member of the partnership during any part of the period covered by the return may receive or inspect the partnership return for that period.[135] The material interest of a partner in the partnership return flows from the pass-through nature of the partnership entity. Items on the partnership return will pass through to the individual partner's return. Consequently, it is not necessary that the partner seeking access to a partnership return be a partner at the time he or she requests partnership information. It is only necessary that the partner have been a partner during the time covered by the partnership return to which he seeks access. Consider the example of P who was a partner in "X" partnership from January 1, 1982 through December 31, 1985. Any

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130. *See* Internal Revenue Manual § 1272 HB (13)52 (Feb. 24, 1987) (procedures for handling requests for third party return information).

131. I.R.C. § 6103(e) (1982 & Supp. V 1987). Those persons include individuals about whom information was collected, partners of a partnership, directors of a corporation and the administrator of an estate.

132. I.R.C. § 6103 (e)(1)(A) (Supp. V 1987).

133. *See* I.R.C. § 6103(e)(7) (1982)(return information disclosable to all authorized to receive or inspect return of taxpayer).

134. *Id.* § 6103(e)(1)(A), (B).

135. *Id.* § 6103(e)(1)(C). Section 6103(e)(1)(C) provides that any person who was a member of a partnership may request a copy of the partnership return for any periods during which the requester was a partner.

partnership return covering those periods would be available to P for inspection regardless of when he requests access to those returns.

Access to corporate returns may be obtained by the corporation itself and by a bona fide shareholder of record owning at least one percent of the outstanding corporate stock at the time of the request.[136] If, for example, A owned one percent of the stock of C Corporation at the time of his request for a return of the corporation, then he would be permitted to inspect any return of the Corporation, regardless of when such return was filed or what period it covered. In contrast, if A sells his shares of C Corporation, the fact of his prior ownership is irrelevant for purposes of determining his right to receive or inspect C Corporation returns, and he would no longer be entitled to view any of the corporation's returns.

The distinction between access to returns and return information by partners and by shareholders of a corporation highlights the materiality criteria for access to confidential tax information. Partnerships are "flow-through" entities.[137] Moreover, the flow-through or conduit nature of partnerships is mandatory and not elective.[138] Consequently, the items reflected on any partnership return must flow through the partnership and also be reflected on a partner's individual return covering the same period. The fact that an individual may no longer be a partner does not change that requirement for past partnership years. Accordingly, information on a partnership return is always material to any individual partner of a given partnership for the year in which that individual was a partner. Corporations, on the other hand, are independent taxable entities.[139] Items on a corporate return do not flow through to individual shareholders. Individuals who cease to be shareholders do not have a material interest in corporate returns for periods in which they held shares of the corporation because no item on any such return would be required to be shown on an individual's return.

Section 6103(e)(7) provides a limit upon the disclosure of returns or

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136. *See* I.R.C. § 6103(e)(1)(D) (1982). Also, sub-chapter S corporations are treated similarly to partnerships under the provisions of section 6103 (e)(1)((D). *Id.* § 6103(e)(1)(c).

137. I.R.C. §§ 701-761 (1982).

138. C. BERGER & P. WIEDENBECK, CASES AND MATERIALS ON PARTNERSHIP TAXATION § 1.01 (1989).

139. "Corporations" in this context refers to regular or "(C)" corporations. *See* I.R.C. §§ 301-386 (1986)(tax provisions applicable to corporations).

return information.[140] If the Secretary determines that such disclosure would seriously impair federal tax administration, he may deny access to that information. The concept of impairment of federal tax administration has been scrutinized by the courts and has been distilled to mean that an agency may withhold documents which would give earlier or greater access to a government investigation than the taxpayer would otherwise have.[141] Through the application of section 6103(e)(7), the Commissioner is able to protect investigatory material, the disclosure of which would which would significantly hamper an investigation into the civil or criminal liability of individual taxpayers. As we shall see, this concept tracks with other provisions of the Freedom of Information Act and enables the Internal Revenue Service to conduct investigations without disclosing the nature of those investigations prematurely.

The specific types of harm that may trigger the application of section 6103 (e)(7) include alerting the taxpayer to "[1] the nature and direction of the Government's Case; [2] the types of evidence being relied upon; [3] the identity of witnesses, [prospective witnesses and or informants]; [4] the specific transactions being investigated; and [5] the scope and limits of the government's investigation."[142] If a disclosure officer finds any one of those potential harms to be likely from the disclosure of return information, he or she can invoke section 6103 (e)(7) through section (b)(3) of the Act to withhold the offending information.[143] That is not to say that the results of investigations are never available to the taxpayer who is being investigated. At the close of the investigation or at the resolution of all the issues in litigation, the taxpayer would be entitled to access the information in his file. Thereafter, disclosure would no longer seriously impair federal tax administration because disclosure would not give earlier or greater access to the government's case than the taxpayer would otherwise have. Consequently, the general rule of section 6103(e)(7) is that un-

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140. I.R.C. § 6103(e)(7) (1982). Section 6103(e)(7) provides as follows:

(7) Return Information — Return information with respect to any taxpayer may be open to inspection by or disclosure to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair Federal tax administration.

Id.

141. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 240 (1978).

142. Internal Revenue Manual § 1272 HB (13)51 (Sept. 10, 1987).

143. I.R.C. § 6103(e)(7) (1982)(section does not apply to returns).

less the Service can show disclosure of the return information would seriously impair federal tax administration by apprising the taxpayer about the details of an open tax investigation, section 6103(e)(7) will not be triggered, and the taxpayer may gain access to that information.[144]

The Internal Revenue Manual contains a list of records that will ordinarily be released to a taxpayer who requests access to an open criminal investigatory file concerning himself.[145] Included on that list are statements of the taxpayer, tax returns, "correspondence between the taxpayer and the [Service]," newspaper clippings, and what the manual calls "file debris."[146] The manual instructs agents to be alert to the possibility that the specific case may require greater or lesser levels of disclosure, but it generally encourages the release of records that do not endanger the success of the investigation.

One example of the usefulness of the FOIA in the IRS context is the collection of assessed tax liabilities. At this point there is no ongoing investigation and neither FOIA subsection (b)(7)(A) nor IRC section 6103(e)(7) would operate to deny a taxpayer access to his or her own return or return information. In the collection context, therefore, the FOIA generally will permit significant access to a taxpayer's file concerning the assessed tax liability at issue.

Section 6103(k)(6), and the regulations thereunder, permit the disclosure of return information to the extent necessary to obtain information not otherwise available to the Service.[147] It is this section that

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144. 5 U.S.C. § 552(b)(3), (7)(D), (7)(E), (7)(F) (1988); *see also* I.R.C. § 6103(e)(7) (1982)(working in conjunction with section 552(b)(3)). Information concerning informants or confidential sources may remain exempt from disclosure since such disclosure could seriously impair Federal tax administration. 5 U.S.C. § 552(b)(3) (1988).

145. Internal Revenue Manual § 1272 HB (13)51 (Sept. 10, 1987).

146. *Id.*

147. I.R.C. § 6103(k)(6) (1982). Section 6103(k)(6) provides as follows:

(k) Disclosure of certain returns and return information for tax administration purposes.—

. . . .

(6) Disclosure by Internal Revenue officers and employees for investigative purposes.—An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

Id.

permits Service personnel to disclose a limited amount of return information in order to obtain otherwise unobtainable but necessary information.[148] An example of the application of section 6103(k)(6) would be the disclosure by a revenue agent of the taxpayer's name and the fact of an investigation to a client of the taxpayer for the purpose of learning the amount paid by the client to the taxpayer.[149] Another example of the application of section 6103(k)(6) arises when the Service properly issues a levy against a taxpayer's bank account.[150] The levy will disclose the taxpayer's name and the amount owed among other items of return information. If the levy is properly executed against the taxpayer, section 6103(k)(6) will permit such disclosure. However, when the levy is unlawful, section 6103(k)(6) does not authorize the disclosure of return information, and the taxpayer may be awarded money damages under section 7431 of the Internal Revenue Code.[151] The Service has not taken the position that in all instances inappropriate levies result in unauthorized disclosures. Case law indicates that the area remains unsettled.[152]

D. *Trade Secrets and Commercial Information*

The next exception in the Freedom of Information Act that pertains to information in the possession or control of the Internal Revenue Service is section (b)(4) of the Act which protects trade secrets and commercial or financial information obtained from a person which is privileged or confidential.[153] This type of information is primarily directed at commercial information and is generally not relevant to IRS information.[154] A hypothetical example of the application of the exemption might be to protect a study about the

148. Treas. Reg. § 301.6103(k)(6)-1(a) (1980).

149. Treas. Reg. § 301.6103(k)(6)-1(b)(2) (1980).

150. Treas. Reg. § 301.6103(k)(6)-1(b)(6) (1980).

151. Rorex v. Traynor, 771 F.2d 383, 388 (8th Cir. 1985); William E. Schrambling Accountancy Corp. v. United States, 689 F. Supp. 1001, 1008 (N.D. Ca. 1988); Husby v. United States, 672 F. Supp. 442, 445 (N.D. Ca. 1987).

152. *See* Flippo v. United States, 670 F. Supp. 638, 642 (W.D.N.C. 1987)(issuance of improper lien did not result in unauthorized disclosure because authorized collection activity is excepted from section 6103), *aff'd without opinion*, 849 F.2d 604 (4th Cir. 1988); Haywood v. United States, 642 F. Supp. 188, 192 (D. Kan. 1986)(wrongful levy will not support action for wrongful disclosure because would unduly hamper speedy collection of taxes).

153. 5 U.S.C. § 552(b)(4) (1988)(trade secrets, commercial and financial information exempt from disclosure).

154. *See* Gulf & W. Indus. v. United States, 615 F.2d 527, 529 (D.C. Cir. 1979).

cost of running an automobile done by an outside contractor but which has relevance to the tax administration purpose. The Internal Revenue Service might publish and use the results of such a study to permit taxpayers to deduct certain amounts for the operation for their motor vehicles. The actual report, however, would be the product of an outside contractor. That contractor sells the product in the public forum. If the product were available for free from the Internal Revenue Service, that company would quickly go out of business. Consequently, such information, and other information like it, is exempt from disclosure under Freedom of Information Act section (b)(4).

E. *Civil Discovery Privileges*

The next exception to disclosure, and one which is frequently invoked, is the (b)(5) exemption for documents normally privileged from civil discovery.[155] This exemption incorporates into the Freedom of Information Act the historically accepted civil discovery privileges.[156] Included in these privileges is the "deliberative process privilege."[157] In order to meet the requirements of the "deliberative process privilege," the documents must be pre-decisional[158] and deliberative.[159] In other words, the documents must be prepared in advance of a decision and must contain the deliberations of agency personnel with respect to that decision.[160] The purpose of the deliberative process privilege is to protect honest and frank communication within the agency.[161] Generally, it is thought that no agency can function without the honest and frank discussion and attendant dissent that must occur prior to reaching a decision. If agency officials knew that their deliberations, and possible dissents, were to be avail-

155. 5 U.S.C. § 552(b)(5) (1988). Section 552(b)(5) provides as follows: "(b) This section does not apply to matters that are—(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." *Id.*

156. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

157. *Id.* at 150.

158. Jordan v. United States Dep't of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978).

159. Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

160. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980).

161. H. REP. NO. 1497, 89th Cong., 2d Sess. 10, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 2418, 2427. The efficiency of government would be greatly hampered if, with respect to legal and policy matters, all government agencies were prematurely forced to "operate in a fishbowl." *Id.*

able publicly, they would not engage in the rigorous analysis that is desired with respect to any decision-making process. Accordingly, the deliberative process privilege exemption protects that internal debate. The privilege applies to drafts, but not to post-decisional documents or facts.[162] Consequently, the agency must edit a document that contains facts to disclose just the facts while protecting the deliberative component of the document.

The next privilege incorporated into the Act under the (b)(5) exception is the attorney work product privilege. The attorney work product privilege applies to information which is produced by the attorney in anticipation of litigation.[163] In the Internal Revenue Service context that includes most of the information generated by the Office of the Chief Counsel in connection with any tax litigation.

A similar and related privilege that is also a part of the (b)(5) exception is the attorney-client privilege. In the attorney-client context, facts provided to the attorney by the client are protected from disclosure under the attorney client privilege. In the litigation context, information provided by the client, in this case the Internal Revenue Service, to the attorney, that is the attorney for the office of Chief Counsel, would be protected by the attorney-client privilege.[164] Courts applying the Freedom of Information Act in the litigation context will not permit disclosure of information outside of the avenues of normal litigation. The Freedom of Information Act is not intended and may not be used as an alternative to discovery.[165] When parties are in a litigation posture, they may only use litigation discovery tools to obtain information from opposing parties.

The Commissioner may waive the (b)(5) exception.[166] A prior disclosure of information to the public acts as a waiver of the (b)(5) privilege. Accordingly, information that ordinarily would have been deliberative process, or might have been attorney-client communications or attorney-work-product, no longer retains that privilege if the information is disclosed to the public.

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162. EPA v. Mink, 410 U.S. 73, 87-88 (1973).

163. *Coastal States Gas Corp.*, 617 F.2d at 864-65 (D.C. Cir. 1980).

164. *See* Mead Data Central, Inc. v. United States Dep't of Air Force, 566 F.2d 242, 252-55 (D.C. Cir. 1977)(intra-agency correspondence containing legal advice from agency counsel falls within exception from disclosure due to attorney-client privilege).

165. Barney v. IRS, 618 F.2d 1268, 1273 (8th Cir. 1980); Kanter v. IRS, 433 F. Supp. 812, 816-17 (N.D. Ill. 1977).

166. *Mead Data*, 556 F.2d at 253.

F. *Personnel Records*

Exception (b)(6) of the Freedom of Information Act protects personnel or medical files.[167] This exemption is not frequently used to protect returns and return information but is occasionally used to protect information concerning individual agents of the Internal Revenue Service when that information is sought by a taxpayer. The exemption occasionally comes into play when a disgruntled taxpayer seeks access to returns or return information of himself and additionally seeks access to the personnel records of the agent who did the audit work concerning the taxpayer.[168] In this context, the exception under subsection (b)(6) of the Freedom of Information Act will protect the personnel files of the agent from the scrutiny of the disgruntled taxpayer.

G. *Law Enforcement Records*

Subsection (b)(7) of the Freedom of Information Act concerns law enforcement records.[169] In October 1986, subsection (b)(7) of the FOIA was amended by deleting the word "investigatory" and by adding the words "or information" to the general rule of exception (b)(7).[170] Accordingly, the exception now covers all "records or in-

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167. 5 U.S.C. § 552 (b)(6) (1988)(personnel and medical files not subject to disclosure due to invasion of privacy).

168. *See* Chamberlain v. Kurtz, 589 F.2d 827, 841-42 (5th Cir. 1979)(taxpayer not entitled to names of IRS agents subject to discipline).

169. 5 U.S.C. § 552(b)(7) (1988). Section 552(b)(7) provides as follows:

> (b) This section does not apply to matters that are—
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> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) 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, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

Id.

170. *Id.*

formation compiled for law enforcement purposes."[171] It is no longer necessary for an agency to establish that records were compiled for investigatory purposes in order to be within the (b)(7) exception to disclosure. The agency need only establish that records were compiled for law enforcement purposes. Every court to consider the issue has determined that IRS records are compiled for law enforcement purposes.[172]

Subsection (b)(7)(A) is one of the most frequently used exemptions in the Freedom of Information Act. It tracks very closely with the previously discussed IRC section 6103(e)(7) in that it is designed to protect law enforcement materials prior to a foreseeable resolution of the case. The foreseeable resolution of the case may either be in litigation or through administrative action, but in either case the anticipated judicial or nonjudicial resolution of the case will permit withholding law enforcement materials until that resolution occurs.[173] Consequently, information gathered by a revenue agent or a special agent is protected from disclosure under section (b)(7)(A) until a resolution of the case occurs. Subsection (b)(7) goes on in other subsections to include other areas of protection for investigative materials, the disclosure of which would either hamper the investigation or deny those involved their rights to either personal privacy or a fair and impartial adjudication.[174] Any of those issues may be raised with respect to investigative materials and are used by the Internal Revenue Service to protect information in its control where disclosure would either hamper the investigation or adversely affect the rights of the individuals involved.

H. *Wrapping Up the Disclosure Exemptions*

The remaining two FOIA exemptions from disclosure concern the supervision of financial institutions and the custody of geological and geophysical information.[175] These sections are of no relevance to the disclosure of IRS information.

The final sentence of the exemption provisions of the Act provides a

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171. *Id.*

172. Barney v. IRS, 618 F.2d 1268, 1272-73 (8th Cir. 1980); Lewis v. IRS, 823 F.2d 375, 379 (9th Cir. 1987).

173. National Public Radio v. Bell, 431 F. Supp. 509, 513-14 (D.D.C. 1977).

174. *See supra* note 169 and accompanying text.

175. 5 U.S.C. § 552(b)(8), (b)(9) (1988). Sections 552(b)(8) and (9) provide as follows:

(b) This section does not apply to matters that are—

capstone to the concept of the fullest possible disclosure of agency information.[176] It requires agencies to edit records in order to provide the fullest possible disclosure of non-exempt information. Harkening back to the purpose of the FOIA as articulated by the Supreme Court,[177] this requirement furthers the goal of achieving an informed citizenry by requiring that every item of non-exempt information be disclosed. Generally, the FOIA, as applied in the Internal Revenue Service context, will require a line-by-line review of the records and editing on that basis. Unless the editing leaves a meaningless array of words, the edited document will be disclosed to the requester.[178] Pursuant to the Act and IRC section 6103, requesters will obtain not only information about the Service in general but about themselves in particular.[179] Although information about the individual may not fit neatly within the general purpose of attaining an informed citizenry vital to the functioning of a democratic society, the aggregation of all such requesters and their access to their own information does operate to "check against corruption" which is also a goal of the Act. The Service must treat each taxpayer fairly because it knows that any taxpayer may gain access to the agency records that document the taxpayer's travails with the Service.

V. PRIVACY ACT

The Privacy Act[180] was designed to protect the information contained in government files from abuse or misuse.[181] It also permits individuals about whom information has been collected to gain access to that information and prohibits disclosure of that information in

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(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Id.

176. 5 U.S.C. § 552(b) (1988). "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." *Id.*

177. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

178. *See* Neufeld v. IRS, 646 F.2d 661, 665-66 (D.C. Cir. 1981).

179. The new exclusion provisions of section 552a as enacted by Pub. L. No. 99-570, § 1802 (1986) are not addressed herein because the author does not believe that they have significant effect in the IRS context.

180. Privacy Act of 1974, 5 U.S.C. § 552a (1988).

181. Pub. L. No. 93-579, § 2(a), (b), 88 Stat. 1896 (1975).

ways not sanctioned in the Privacy Act.[182] Therefore, the Privacy Act provides another means of access to information by the subject of that information.[183]

In contrast to the FOIA, the Privacy Act focuses on individual privacy, not disclosure. To accomplish that goal the Privacy Act establishes various systems of records into which all agency information must fall.[184] Criminal investigation files would be in one system while IRS personnel files would be in another. The Federal Register publishes the names and description of those systems of records. In addition, the Federal Register also contains an explanation of the manner in which information contained in any given system will be disclosed and a list of those systems which are exempt from disclosure.[185]

The Privacy Act establishes a general rule that no record subject to the Act may be disclosed without the written consent of the individual.[186] In this way individual privacy is preserved by including the individual in the process of maintaining confidential information. There are, however, exceptions to the general rule. The most significant exception for disclosure is pursuant to a "routine use."

Each system of records will contain in its description a section on routine use.[187] Generally, disclosures that are necessary to carry out an agency's mission are incorporated into a system of records as a routine use. Any disclosure which is consistent with a published routine use is permissible under the Privacy Act.[188] Section 6103, as de-

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182. 5 U.S.C. § 552a(b) (1988). Section 552a(b) provides as follows:

(b) Conditions of disclosure

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section.

Id.

183. 5 U.S.C. § 552a (1988).

184. By definition "system of records" means any group of records retrievable by individual identifier. Consequently, all IRS tax information is in an identifiable "system of records." 5 U.S.C. § 552a(a)(5) (1988).

185. 5 U.S.C. § 552a(e)(4) (1988).

186. 5 U.S.C. § 552a(b) (1988).

187. 5 U.S.C. § 552a(e)(4)(D) (1988).

188. 5 U.S.C. § 552a(b)(3) (1988).

scribed above, is the repository of all permissible disclosure restrictions for returns and return information maintained by the Service. Therefore, the incorporation of section 6103 into the Privacy Act through the mechanism of the routine use is a logical and efficient means for regulating the disclosure of returns and return information in the Privacy Act context. Nearly every system of records maintained by the Service includes a routine use for any disclosure authorized by section 6103 of the Internal Revenue Code. Accordingly, the discussion of this section in the FOIA context is equally applicable in the Privacy Act context. In other words, a taxpayer may gain access to his own confidential tax information under the Privacy Act to the same extent as he could under section 6103.

Although the Privacy Act generally provides for the access to records by the individual about whom the records were compiled, subsections (j) and (k) permit agencies to exempt from disclosure entire systems of records. In this way agencies may shield entire systems of records from disclosure as long as the agency notifies the public through the Federal Register that a given system is exempt from disclosure under the Privacy Act. Nearly every system of investigative IRS records published in the Federal Register is exempt under either subsection (j) or (k) of the Privacy Act. The exemption from disclosure of entire systems of records constitutes the primary reason why The Privacy Act is less satisfactory as a means of access to information than is the FOIA.

Unlike the Internal Revenue Code, the Privacy Act is not incorporated into the FOIA under section (b)(3) of the Act. This means that the Privacy Act does not provide any greater or lesser access to information than would be available under the Freedom of Information Act.[189] Accordingly, information which is subject to the Privacy Act will not be more readily available to the taxpayer because it is subject to the Privacy Act.

In addition to its access provisions, the Privacy Act generally permits individuals to amend their own records. That privilege does not apply to tax information,[190] section 7852(e) of the Internal Revenue Code specifically provides that the amendment provisions of the Privacy Act do not apply to tax information.

189. 5 U.S.C. §§ 552a(b)(2),(q) (1988).
190. 5 U.S.C. § 552a(d)(2) (1988).

VI. CONCLUSION

The Freedom of Information Act is preeminent among the three statutory avenues of access to confidential tax information. At its core is the principal of open government. As discussed above, agencies implementing the Act and courts interpreting the Act have never lost sight of that principal. Consequently, the FOIA remains today the best mechanism for gaining access to information in the control of the Internal Revenue Service.

The requirements of a self-assessing tax system require confidentiality of information concerning individual taxpayers. The provisions of the Internal Revenue code that protect taxpayer confidentiality have been carefully crafted to permit access to information by those who need access while preserving the privacy of tax information. As we have seen, the detailed analysis of the Code is melded into the general requirement of the FOIA to form a unified system for the treatment of confidential tax information.

The Privacy Act does not provide the public with additional access to confidential tax information. Its goal is diametrically opposed to that of the FOIA in that the Privacy Act seeks to protect information from unwarranted disclosure and the FOIA seeks to disclose all information not specifically warranting confidentiality. Consequently, the Privacy Act is a poor means of access to confidential tax information.

The chief value of the FOIA to the tax practitioner, lies in the non-litigation context. If there is a dispute with the service and the taxpayer may not avail himself of discovery because there is not current litigation, the FOIA may be used to obtain information not otherwise freely forthcoming from the Service.

One example of such a dispute might concern the collection of assessed taxes and interest. If the taxpayer wishes to examine the support for the Service's assessment or the calculations concerning interest, both of which may be important in deciding whether to bring an action for refund of wrongfully collected tax, the FOIA would provide a method for obtaining that information. Another example concerns the occasional need to examine IRS documents to verify the collection of tax in the employment tax context. Additionally, a taxpayer may wish to obtain tax information of a partnership in which he is a partner or in a corporation in which he has an interest. For all of these purposes, the FOIA provides the best means of access to IRS information.