

FOIA Requests: A Look Into the IRS Examination File

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The Freedom of Information Act request is an important part of every practitioner's procedural toolbox. If an examination is not favorably resolved, the practitioner must consider submitting a FOIA request.

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Practitioners should consider submitting a Freedom of Information Act¹ request to the IRS following the unagreed resolution of every tax examination. Although not always a wealth of information, the government response to a FOIA request will provide insight into why the examining agent made certain adjustments and asserted penalties. It will also help tailor discussions before an IRS Appeals officer at the next administrative level and provide insight into what the Appeals officer will be looking at before meeting with the practitioner. Often the FOIA response will include the agent's notes and thoughts, which may prove invaluable in explaining why the matter was not resolved (or capable of resolution) during the initial examination.

FOIA requires that federal agency records be made available to the public unless specifically required or permitted to be withheld.² If information is not prohibited from disclosure, an IRS disclosure officer determines whether, "as an exercise of administrative discretion," the information should be released or withheld.³ The Internal Revenue Manual instructs that any IRS discretionary decision to release FOIA-protected information should be made "only after considering the institutional (i.e., public accountability, safeguarding national security, law enforcement effectiveness, and candid and complete deliberations), commercial, and personal privacy interests that could be implicated by disclosure of the information."⁴

The form or format of the requested information doesn't affect its availability. The IRS can provide hard-copy documents, tape recordings, photographs, maps,

computer printouts, computer disks, or similar items. The IRS must provide requested information in any requested format if it can readily reproduce the information in that format. In fact, the IRS is required to make "reasonable efforts" to keep information in reproducible formats for that purpose.⁵ Generally, there is no charge for the first 100 pages, and \$0.20 per page thereafter.⁶

The IRS is required to look only for existing records or documents in response to a FOIA request. FOIA doesn't obligate the IRS to collect information it doesn't have or to research or analyze data. Although the IRS has no duty to create a new record to comply with a FOIA request, the process of retrieving information from a computer may result in the creation of a new document.⁷

Form of FOIA Request

There is no required form of FOIA request. It can be an informal letter requesting every document in the government's administrative files relating to the taxpayer's tax liabilities for the years at issue. IRS FOIA requests should be submitted to the IRS Disclosure Office based on the taxpayer's location. IRS Disclosure Offices are listed at <http://www.irs.gov> (search FOIA). The request should identify the documents as specifically as possible. A general form of FOIA request, addressed to the appropriate IRS Disclosure Office, should be tailored to the specific client situation involved and state substantially the following:

We represent [Client] and have attached an Internal Revenue Service Power of Attorney (Form 2848) confirming the foregoing. This letter is intended to formally request, under the Freedom of Information Act, 5 U.S.C. section 552, and the regulations promulgated thereunder, each and every document (exclusive of the filed income tax returns) contained in the administrative files of the Internal Revenue Service relating to the individual income tax liabilities of [Client] (TIN 123456789) for taxable years [state the tax years].

This request does not include copies of the foregoing tax returns, nor does it include copies of correspondence generated by our office. Subject to the foregoing, the requested information includes, but is not limited to:

1. The Examination Division administrative file for the audit. This information should include any worksheets, workpapers, notes,

¹5 U.S.C. section 552.

²See Internal Revenue Manual 1.2.19.1.1(2).

³IRM 1.2.19.1.1(3).

⁴*Id.*

⁵IRS, *Guide to the Freedom of Information Act* 2 (Jan. 12, 2004).

⁶*Id.* at 22 (Appendix B).

⁷*Id.* at 3.

e-mails, documents, memorandums, computations, and other materials prepared or accumulated relative to this examination by employees of the IRS, any other governmental agency, or otherwise, including internal documents, memorandums, memorandums of all interviews of persons regarding the individual income tax liabilities of the taxpayer, copies of all statements (sworn or otherwise) given by individuals in connection with the investigation of the individual income tax liabilities of the taxpayer, case activity record, written reports and recommendations concerning the proposed assessment of additional tax and penalties, and any other information that is related to the determinations by the IRS as set forth in the revenue agent's report (30-day letter).

2. A list of any information and documents maintained electronically identifying each document by subject matter and format (i.e., tape, disk, etc.).

3. Any and all files relative to this audit that include information and documents obtained pursuant to summonses issued to third parties which are not otherwise included in the administrative file.

4. Any and all files relative to this audit that may have been prepared by independent consultants, international examiners, economists, engineers, and any other specialists assigned to this case which are not otherwise included in the administrative file.

5. We have determined that the information requested is not exempt under disclosure laws, is not a classified document, is not a protected internal communication, is not protected by "privacy," and is not a "protected investigative record" within the meaning of the Freedom of Information Act. If any material is deemed to be exempt, we hereby request a detailed statement of the portion deleted or withheld, a full statement of the reasons for the refusal or access, and specific citations or statutory authority for the denial. Specifically, if the Disclosure Section determines an exemption applies to some or all of the requested information, we request that a privilege log be provided in the form of a Vaughn Index. In *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), the court rejected an agency's conclusory affidavit stating that requested FOIA documents were subject to exemption. *Id.* at 828. "A Vaughn Index must: (1) identify each document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure would damage the interests protected by the claimed exemption." *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995). A Vaughn Index "permit[s] the court system effectively and efficiently to

evaluate the factual nature of disputed information." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 149 n.2 (1989) (quoting *Vaughn*, 484 F.2d at 826). With a Vaughn Index we will have the means to adequately assess if any claimed exemptions have merit, thereby avoiding potentially costly litigation to seek that item.

Since the requested information relates directly to [Client], we have determined that the information requested is not exempt under disclosure laws, is not a classified document, is not a protected internal communication, is not protected by "privacy," and is not a "protected investigative record" within the meaning of the Freedom of Information Act.

We believe that your office has custody of the requested information, but if not, we hereby request prompt notice of the current location of the information. To expedite this request, we are willing to discuss specific instances of deletion or other exemption claims in advance of a final decision. If any material is deemed to be exempt, we hereby request a detailed statement of the portion deleted or withheld, a full statement of the reasons for the refusal of access, and specific citations or statutory authority for the denial.

This letter shall confirm that [Client] hereby agrees to pay for all reasonable search and copying costs that may be associated with this request. However, we would appreciate the opportunity to inspect these records before any documents are copied. If search and copying costs exceed \$200, please telephone us in advance for an agreement as to such additional costs.

The FOIA Response

Once the IRS receives a FOIA request, it has 20 business days to determine whether to comply.⁸ It can extend that period by an additional 10 days in unusual circumstances,⁹ which generally include the need to collect information from field locations, review large amounts of documents, and consult with other agencies.¹⁰ If a request is denied in whole or in part, the IRS must state the reasons for the denial and advise that there is a right to appeal any adverse determination to the IRS commissioner or his designee.¹¹

A delay resulting from a predictable IRS workload is not an unusual circumstance. The IRS may try to limit the scope of the request or arrange an alternative time frame for processing it. If the request is denied to any extent, the IRS must state the reasons for the denial. If the IRS fails to comply with the request within the applicable time limit, the requester is deemed to have exhausted his administrative remedies regarding the request and may

⁸5 U.S.C. section 552(a)(6)(A)(i).

⁹5 U.S.C. section 552(a)(6)(B)(i)-(iii); reg. section 601.702(c)(11)(i)(A)(1)-(4).

¹⁰5 U.S.C. section 552(a)(6)(B)(i).

¹¹5 U.S.C. section 552(a)(6)(A)(i).

proceed to filing an action in federal district court. In practice, the IRS typically requests an additional 30 days within which to provide the requested information. It is often appropriate to grant that request, since the IRS usually provides the requested information within the extended period, and any appeal would likely exceed the additional time in any event.

FOIA Exemptions

The IRS may withhold an IRS document that is specifically exempted or excluded by statute. The exemptions protect against the disclosure of information that would harm national security, the privacy of individuals, the proprietary interests of a business, the functioning of the government, and other important recognized interests.

When a document contains some information that qualifies as exempt, the entire document is not necessarily exempt. Instead, FOIA requires that any reasonably segregable portions of a document be provided after deletion of the exempt portions. The IRS must identify the location of deletions in the released portion of the document and, when technologically feasible, show where the deletion was made on the document, unless including that indication would harm an interest protected by an exemption.¹²

Exemption 1 — Classified documents regarding national defense and foreign policy.¹³ This exemption allows the withholding of matters that are properly classified as secret, under criteria established by an executive order, in the interest of national defense or foreign policy. Because the IRS doesn't generally deal with these types of matters, this exemption is rarely used.

Exemption 2 — Internal personnel rules and practices.¹⁴ This exemption covers matters related to the IRS's internal personnel rules and practices. Two separate classes of documents are generally held to fall within this exemption: (1) information relating to personnel rules or internal IRS practices, which may be exempt if it is a trivial administrative matter of no genuine public interest; and (2) more substantial internal IRS matters whose disclosure would risk circumvention of a legal requirement.¹⁵

Exemption 3 — Information exempt under other laws.¹⁶ This exemption incorporates non-FOIA laws that restrict the availability of information. For a statute to qualify, it must leave no room for discretion on the required withholding of the matter from the public. Alternatively, the statute must establish criteria for withholding or refer to specific types of matters to be withheld. Section 6103, which restricts the disclosure of tax returns and return information, is a qualifying statute.

Exemption 4 — Trade secrets and confidential commercial or financial information.¹⁷ This exemption protects from public disclosure trade secrets (as narrowly

defined by the courts for FOIA purposes) and confidential commercial or financial information obtained from a person.

Exemption 5 — Interagency or intra-agency memorandums or letters.¹⁸ This exemption applies to interagency or intra-agency memorandums or letters that by law would be unavailable to a nonagency party in litigation with the agency. A possible example is a letter from one IRS office to another about a decision that has not yet been adopted. As the IRS explains, one purpose of this exemption is to protect the deliberative policymaking process of government (the deliberative process privilege), which encourages open discussion of policy matters between IRS officials by allowing some predecisional, deliberative documents to be withheld from public disclosure.¹⁹ It also prevents premature disclosure of deliberations before final adoption of an agency policy or position.

Although this exemption protects the policymaking process, it generally doesn't protect purely factual information related to that process. The deliberative process privilege distinguishes between pre- and postdecisional documents. Given the public's greater interest in knowing the basis for a decision underlying an adopted policy, the deliberative process privilege usually doesn't apply to postdecisional documents. The exemption also incorporates other privileges that apply in government litigation, including the attorney-client and work product privileges.²⁰

Exemption 6 — Personal privacy.²¹ This exemption covers personnel, medical, and similar files whose disclosure would constitute "a clearly unwarranted invasion of personal privacy."²² It allows the IRS to withhold personal data kept in its files when there is an expectation of privacy. The exemption applies to the privacy rights of individuals. With the exception of closely held companies and similar entities, corporations and business associations have no privacy rights under this exemption.²³

Exemption 7 — Law enforcement.²⁴ This exemption allows agencies to withhold records or information compiled for law enforcement purposes, but only if disclosure could reasonably be expected to interfere with ongoing enforcement proceedings or it would deprive a person of the right to a fair trial or an impartial adjudication. The exemption also applies if disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy or reveal the identity of a confidential source. Information is exempted from disclosure if it would reveal techniques and procedures for law enforcement investigations or prosecutions, or if it would disclose guidelines for law enforcement investigations or prosecutions — if disclosure of the information could reasonably be expected to risk circumvention of the law.

¹²See IRS, *supra* note 5, at 9.

¹³5 U.S.C. section 552(a)(7)(B)(1).

¹⁴5 U.S.C. section 552(a)(7)(B)(2).

¹⁵See IRS, *supra* note 5, at 9.

¹⁶5 U.S.C. section 552(a)(7)(B)(3).

¹⁷5 U.S.C. section 552(a)(7)(B)(4).

¹⁸5 U.S.C. section 552(a)(7)(B)(5).

¹⁹IRS, *supra* note 5, at 10.

²⁰*Id.*

²¹5 U.S.C. section 552(a)(7)(B)(6).

²²IRS, *supra* note 5, at 10.

²³*Id.* at 11.

²⁴5 U.S.C. section 552(a)(7)(B)(7).

This exemption also applies if disclosure could reasonably be expected to endanger the life or physical safety of any individual.²⁵

Exemption 8 — Financial institutions.²⁶ This exemption protects information 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 (such as the FDIC, the Federal Reserve, or similar agencies).²⁷

Exemption 9 — Geological information. The ninth FOIA exemption covers geological and geophysical information, data, and maps concerning wells.²⁸

FOIA Exclusions

FOIA also has special protection provisions that authorize federal law enforcement agencies to treat especially sensitive records as not subject to FOIA under specified circumstances. The IRS may not be required to even confirm the existence of those records. It may respond that there are no records responsive to the request. However, these exclusions don't broaden the IRS's authority to withhold documents from the public; they apply only to information that is otherwise exempt from disclosure.²⁹

Exclusion 1. This exclusion may be used when a request seeks information compiled for law enforcement purposes, to the extent that production of the information could reasonably be expected to interfere with enforcement proceedings.³⁰ The exception applies if the investigation involves a possible violation of criminal law, there is reason to believe the subject of the investigation is not already aware that the investigation is under way, and disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings. When each of these conditions exists, the IRS may respond to a FOIA request for investigatory records as if the records aren't subject to FOIA. The IRS response does not have to reveal that it is conducting an investigation.³¹

Exclusion 2. This exclusion is intended to protect the identity of confidential informants. It applies to informant records maintained by IRS criminal law enforcement that are filed under the informant's name or personal identifier. The IRS isn't obligated to confirm the existence of these records unless the informant's status has officially been confirmed.³²

Exclusion 3. This exclusion is limited to FBI records involving foreign intelligence, counterintelligence, or international terrorism. When the existence of these types of records is classified, the FBI may treat them as not subject to FOIA.³³

FOIA Administrative Appeal Procedures

Whenever a FOIA request is denied, the IRS must clearly provide the reasons for the denial and state that the requester has a right to appeal the denial. An appeal may be based on the withholding of a document, denial of a fee waiver request, the type or amount of fees charged, the IRS's failure to conduct an adequate search for the requested documents, or any other type of adverse FOIA determination.³⁴ However, an appeal may not be filed for the lack of a timely response. If the IRS agrees to disclose some but not all of the requested documents, the filing of an appeal doesn't affect the release of the documents that are otherwise disclosable. A FOIA appeal is an administrative appeal. Reg. section 601.702(c)(10) sets out the procedural requirements. There is no charge for filing an appeal.³⁵

The appeal should include reasons why the IRS's response to the FOIA request was inadequate, and it must be postmarked within 35 days after the date of the denial letter or of other adverse determinations.³⁶ An administrative appeal for denial of a request for expedited processing must be made by letter postmarked within 10 days after the date of the response letter denying expedited processing.³⁷ An appeal is filed by sending a letter to: IRS Appeals, Attn: FOIA Appeals, 5045 E. Butler Avenue, M/Stop 55201, Fresno, Calif. 93727-5136. The appeal should include copies of the FOIA request and the initial IRS decision responding to the request. The envelope containing the appeal should be marked in the lower left-hand corner with the words "Freedom of Information Act Appeal." When a FOIA request is filed, the IRS assigns it a number, which should be set forth in the appeal.³⁸

The IRS must make a decision on an appeal within 20 business days after the date of receipt of the appeal unless extended.³⁹ It can extend the time limits by an additional 10 days under unusual circumstances.⁴⁰ If the IRS fails to comply with the time limitations, the FOIA requester will be deemed to have exhausted administrative remedies and may proceed with a judicial appeal in a federal district court.⁴¹

Judicial Action

If an administrative appeal is denied, a complaint against the IRS may be filed in a federal district court to seek disclosure of the requested information.⁴² The complaint must be served on the Commissioner of Internal Revenue, Attention: CC:PA, 1111 Constitution Ave., NW, Washington, D.C. 20224. Attorney fees and litigation costs reasonably incurred may be awarded if the requester substantially prevails in litigation.

²⁵IRS, *supra* note 5, at 11.

²⁶5 U.S.C. section 552(a)(7)(B)(8).

²⁷IRS, *supra* note 5, at 12.

²⁸5 U.S.C. section 552(a)(7)(B)(9).

²⁹IRS, *supra* note 5, at 12.

³⁰See 5 U.S.C. section 552(b)(7)(A).

³¹IRS, *supra* note 5, at 12.

³²*Id.* at 12-13.

³³*Id.* at 13.

³⁴Reg. section 601.702(c)(10).

³⁵IRS, *supra* note 5, at 14.

³⁶Reg. section 601.702(c)(10).

³⁷*Id.*

³⁸IRS, *supra* note 5, at 14.

³⁹Reg. section 601.702(c)(10)(iii).

⁴⁰Reg. section 601.702(c)(11)(i).

⁴¹Reg. section 601.702(c)(12).

⁴²5 U.S.C. section 552(a)(4)(B); reg. section 601.702(c)(13).

Summary

The FOIA request represents an important component of every practitioner's procedural toolbox when pursuing the administrative appeal following an examination. The information received will almost always justify the limited effort required to submit a FOIA request. Sometimes it might be a key document or some comment within the

agent's narrative statement. At other times, it might simply represent affirmation of the lack of adverse information within the government's administrative file. If not requested, the information will not be forthcoming. If requested, the responsive information may be the key to a favorable resolution.

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