

# The Strategic Use of FOIA in Your Tax Practice

By Sebastian Voth\*

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## I. Introduction

For practitioners navigating tax controversies, knowing when to submit a Freedom of Information Act (FOIA) request is crucial to obtaining Internal Revenue Service (IRS) records that can support a client's case. The IRS frequently asserts specific statutory exemptions to withhold information, which can limit disclosure and require careful analysis. Against this backdrop, understanding the interplay between Tax Court discovery and FOIA requests is essential to coordinate requests efficiently and secure non-privileged material. Practitioners must further weigh the strategic advantages and potential pitfalls of filing a FOIA suit in District Court, including considerations around jurisdiction, delay, and procedural hurdles. And developing productive working relationships with the IRS' Office of Chief Counsel can facilitate smoother FOIA processing and dispute resolution. Depending on the stage, IRS Counsel plays a vital role in advising on exemptions and managing disclosures to ensure compliance with the law.

This overview addresses these key issues to equip tax practitioners with practical tools for effectively using FOIA in the context of tax disputes. It also underscores the complexity involved in managing FOIA matters as part of a broader tax controversy strategy, highlighting the importance of thoughtful timing, coordination, and advocacy.

## II. Statutory Framework

Let us start with the basics to establish the framework for our analysis. The FOIA gives the public the right to access records from any federal agency, unless one or more statutory exemptions apply.<sup>1</sup> As explained by the Supreme Court, “the basic purpose of the [FOIA is] to open agency action to the light of public scrutiny.”<sup>2</sup> And Congress did so by requiring agencies to adhere to “a general philosophy of full agency disclosure” unless specifically exempted by statute.<sup>3</sup> Congress believed that this philosophy would help “ensure an informed citizenry, vital to the functioning of a democratic society.”<sup>4</sup>

To be clear, there are very specific exemptions set forth in the FOIA. However, these limited exemptions do not undermine the fundamental policy that

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disclosure, not secrecy, is the FOIA's primary objective.<sup>5</sup> This means that these exemptions "must be narrowly construed."<sup>6</sup> And "the burden is on the agency to sustain its action" in a FOIA suit in District Court.<sup>7</sup>

To be sure, the statutory exemptions are intended to have meaningful reach and application.<sup>8</sup> On more than one occasion, the Supreme Court has upheld the Government's assertion of FOIA exemptions.

In short, the FOIA's broad provisions favoring disclosure, together with its specific exemptions, reflect the careful balance Congress sought to strike.<sup>9</sup>

So what are agency records? The Supreme Court has explained that records are "agency records" subject to FOIA if an agency either created or obtained them and was in control of them at the time the FOIA request was made.<sup>10</sup>

And how long does an agency have to comply with a FOIA? An agency has 20 working days after receipt of a FOIA request in which to determine whether to comply with the request.<sup>11</sup>

And what happens if the agency fails to respond? The appropriate District Court has jurisdiction upon receipt of a complaint to review, *de novo*, an agency's failure to respond and to order the production of any agency records improperly withheld from the requester.<sup>12</sup>

The FOIA, however, allows agencies to toll the 20-day response period under two circumstances: (1) to obtain information "reasonably requested" from the requester; and (2) as necessary to clarify fee-related issues with the requester. Receipt by the agency of the requester's response to the request for information or clarification ends the tolling period.<sup>13</sup> Although an agency may toll the time period only once for this purpose, sound administrative practice does not prohibit the agency from contacting the requester multiple times as needed to facilitate the processing of the request.

In "unusual circumstances," an agency may extend the 20-day time limit for processing a FOIA request by providing written notice to the requester that explains the unusual circumstances and specifies the date by which a determination is expected to be made. The FOIA defines "unusual circumstances" as (1) the need to search for and collect records "from field facilities or other establishments that are separate from the office" processing the request; (2) the need to search for, collect, and examine "a voluminous amount" of records "demanded in a single request"; and (3) the need to consult with another agency or two or more agency components. If the required extension exceeds 10 days, the agency must give the requester an opportunity to modify the request or to agree on

an alternative timeline for completing the agency's processing. Additionally, each agency must provide access to a FOIA Public Liaison to assist the requester and help resolve any disputes that may arise.<sup>14</sup>

At first glance, the FOIA statutory framework might seem straightforward. But it is not. The FOIA statutory framework raises various questions, including the following, in the context of a tax dispute:

1. At what stage of a tax controversy should a FOIA request be submitted?
  2. What are the pros and cons of filing a FOIA suit in District Court?
  3. What statutory exemptions are routinely claimed by the IRS?
  4. What is the impact of not pursuing administrative remedies?
  5. What is the interplay between discovery requests in Tax Court matters and FOIA requests?
  6. How should practitioners work with the IRS' Disclosure Office and Office of Chief Counsel?
  7. What role does IRS Counsel play in FOIA matters?
- The answers to these questions depend on the stage and context of the dispute.

### III. Timing of Making a FOIA Request

One of the first issues to consider is when to make a FOIA request. Should it be done during audit, appeals, before the issuance of a statutory notice of deficiency (SNOD), after the issuance of the SNOD, or at some other time? It depends.

Generally, it is best to submit a FOIA request before the filing of a Tax Court petition in response to a SNOD. This ensures the requester has the complete file that the IRS developed during the audit of the taxpayer. It also avoids the inherent tension between the spirit of discovery rules under the Tax Court and an all-encompassing FOIA request. Although there is no prohibition from submitting a FOIA request in connection with a docketed case, the IRS Counsel attorney will likely frown upon what may appear as an attempt to circumvent the discovery rules of the Tax Court.

In litigation, practitioners should be mindful not to overwhelm the IRS by submitting simultaneous discovery and duplicative FOIA requests. Granted, the Tax Court has explained that it will not seek to resolve FOIA disputes.<sup>15</sup> But that does not mean that the Tax Court will not consider the impact of a duplicative FOIA request when deciding whether to grant a motion to compel the production of documents promulgated under its Rules of Practice and Procedure.

Instead, ensure to work with IRS Counsel and explain that you have submitted a FOIA request. If you are having issues with your FOIA request, consider notifying IRS Counsel. Attorneys at IRS Counsel often assist with dealing with delays. You can also reach an agreement with IRS Counsel that if you proceed with discovery requests, the documents will be produced in lieu of the FOIA request. That does not mean you should withdraw your FOIA request (*i.e.*, it is important to keep your options open). But it does mean that transparency will most likely help you secure the documents you are actually seeking. And in doing so, you will also establish a working relationship with the assigned IRS Counsel attorney and likely avoid unnecessary discovery disputes.

The Internal Revenue Manual (IRM)<sup>16</sup> provides some guidance about what to expect, explaining that FOIA requests for records that involve a Tax Court case must be processed in coordination with Counsel:

Documents pertaining to litigation include not only documents prepared by Counsel attorneys, but also documents maintained in the administrative files of the Service to which the litigation pertains. Litigants have sometimes used the FOIA as a discovery tool. Therefore, coordinate FOIA responses carefully with the Counsel employee responsible for the litigation. Good coordination will help to ensure that material which is privileged in discovery is also appropriately withheld pursuant to FOIA exemption (b)(5), and that other material which could impair the government's case is reviewed for withholding pursuant to applicable FOIA exemptions. Counsel employees will provide disclosure and withholding recommendations in accordance with CCDM 30.11.1, FOIA Requests for Chief Counsel Records.<sup>17</sup>

## IV. The Request

Once you have decided that you will submit a FOIA request, ensure you comply with the applicable FOIA regulations,<sup>18</sup> which require the following:

1. *Be made in writing and signed by the person making the request;*
2. *State that it is made pursuant to FOIA or its regulations;*
3. *Be mailed, faxed, or provided through an online portal to the GLDS Support Services (GSS), or hand delivered to the Disclosure office having jurisdiction for the records, generally this is the office serving the state where the requester resides;*
4. *Reasonably describe the records sought;*

5. *Provide an address for making a response;*
6. *State whether the requester wishes to inspect the records or desires to have a copy made and furnished without first inspecting them;*
7. *State the requester's agreement to pay for search, review, and reproduction charges as applicable; and*
8. *Furnish an attestation under penalty of perjury as to the status of the requester, unless the requester is an "other" requester. Valid categories of requester include commercial use, media, noncommercial, scientific, educational, or other.*

What documents should a tax practitioner consider asking for in a FOIA request? The requester should first consider whether to request all records for a specific taxpayer that relate to years under examination. And in doing so, the requester should consider whether such a broad request would result in lengthy delays notwithstanding the statutory rights provided by the FOIA.

There is an inherent tension between ensuring all a taxpayer's records are secured and the delays associated with seeking so many documents. So consider narrowing the request by excluding all documents sent to or received by the taxpayer from the IRS. This is not always possible because you may have been retained after the audit started, and you want to ensure all records are secured. But it is an option you should consider to simultaneously narrow the request and expedite the process.

At the very least, a broad request should include all records that relate to any matter regarding the IRS' or any other governmental agencies, examination, audit, collection, or other governmental process concerning the taxpayer's year(s) under examination. These documents would include, but are not limited to:

- *Case Activity records;*
- *Workpapers;*
- *Penalty Approval Forms;*
- *Documents prepared with respect to the taxpayer's matter by employees or agents of the IRS;*
- *Files retained by examiners, economists, engineers, and other specialists that may have been assigned to the case;*
- *Files that may have been prepared by independent experts or consultants retained by the IRS;*
- *Information and documents obtained pursuant to summonses issued to third parties; and*
- *Drafts, alterations, modifications, changes, and amendments of any of the foregoing.*

And when necessary, consider requesting these documents in native format should the circumstances warrant such a request.

To expedite the process, consider stating in your request that it is not necessary to inspect the documents prior to

their release. You can explain that the requested information relates directly to the taxpayer and that you 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 FOIA. Granted, this does not mean the IRS will agree with your interpretation. But it can help ensure your FOIA request is not delayed due to a technicality.

## V. Exemptions to FOIA Requests

Let us move on to the main statutory exemptions the IRS will likely rely on when considering a FOIA request. The most common are Exemptions 3 and 5, which we will examine in turn.

### A. Exemption 3

Exemption 3 incorporates into the FOIA certain non-disclosure provisions that are contained in other federal statutes, which specifically prohibit disclosure.<sup>19</sup> One of two conditions must be met. The statute must either (i) leave no discretion in withholding the information, or (ii) establish clear criteria for withholding or identify specific types of information to be withheld. Additionally, under the OPEN FOIA Act of 2009, any statute enacted after its passage must explicitly cite to Exemption 3 to qualify.<sup>20</sup>

#### 1. Code Sec. 6103

The IRS will likely invoke Code Sec. 6103, which provides for confidentiality to tax returns and tax return information. The Supreme Court and multiple appellate courts have consistently held that Code Sec. 6103 qualifies as an Exemption 3 statute under the FOIA because it refers to specific categories of information to be withheld. In *Church of Scientology of California*,<sup>21</sup> the Court acknowledged the parties’ agreement that Code Sec. 6103 is the type of statute contemplated by FOIA’s Exemption 3, as it “specifically exempt[s] [matters] from disclosure by statute.” Code Sec. 6103 mandates that “returns and return information shall be confidential,” except as otherwise provided by narrowly defined exceptions.

Practitioners should also be cognizant that under Code Secs. 6103(c) and 6103(e)(7), individuals are not entitled to obtain tax return information regarding themselves if it is determined that release would impair enforcement of tax laws by the IRS. To invoke Exemption 3 of the FOIA in conjunction with Code Sec. 6103(e)(7), the IRS must

meet a two-part test. First, the materials at issue must qualify as “return information” within the meaning of Code Sec. 6103(b)(2). Second, the agency must show that releasing the information would seriously interfere with federal tax administration.<sup>22</sup>

#### 2. Code Sec. 6105

If you work in the transfer pricing arena, you are likely familiar with Code Sec. 6105, which governs the withholding of tax convention information, including information exchanged under bilateral agreements. These agreements often provide for the exchange of foreign “tax relevant information” with the United States and “mutual assistance in tax matters.”

Both the Ninth Circuit and the U.S. District Court for the District of Columbia (DDC) have held that Code Sec. 6105 qualifies as a FOIA Exemption 3 because it mandates the confidentiality of tax convention information exchanged between the United States and treaty partners. In *Pacific Fisheries, Inc.*,<sup>23</sup> the Ninth Circuit concluded that information exchanged between the United States and Russia fell within the scope of tax convention information and was properly withheld under Exemption 3 and Code Sec. 6105. Similarly, in *Tax Analysts*,<sup>24</sup> the DDC upheld the IRS’ withholding of international tax convention records deemed confidential under applicable treaties.

In an earlier decision,<sup>25</sup> the court upheld the IRS’ withholding of a Technical Advice memorandum prepared in response to a foreign treaty partner’s request for legal guidance because it constituted “tax convention information” under Code Sec. 6105. The decision emphasized that Code Sec. 6105 was enacted to “avoid adversely affecting the working relationship among treaty partners.”

In short, Code Sec. 6105 satisfies Exemption 3’s criteria by identifying specific types of information (*i.e.*, tax convention communications) that must be withheld from disclosure.

### B. Exemption 5

Exemption 5 of the FOIA applies to memoranda or letters exchanged between or within agencies that would not be legally available to a party outside the agency in litigation involving the agency.<sup>26</sup> This language has been construed “to exempt those documents, and only those documents, normally privileged in the civil discovery context.”<sup>27</sup> Allowing a weaker application of the privilege under FOIA would effectively undermine its purpose by enabling litigants to bypass discovery restrictions.

There are three primary privileges incorporated into Exemption 5:

1. Deliberative process privilege;
2. Attorney work product; and
3. Attorney–client privilege.

### 1. Deliberative Process Privilege

The deliberative process privilege generally protects the decision-making process of government agencies, shielding from disclosure “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.”<sup>28</sup> For a document to be protected under this privilege, the IRS must show that the document is both predecisional and deliberative.<sup>29</sup> A document is predecisional if it was “generated before the agency’s final decision on the matter” and deliberative if it was “prepared to help the agency formulate its position.”<sup>30</sup>

The deliberative process privilege is not absolute. And it is not all-encompassing. The deliberative process privilege is limited in scope and applies only to materials related to the formulation or exercise of policy-oriented judgment. It is intended to protect the decision-making processes behind policy development, not just any internal communication. After all, its main purpose is to “prevent injury to the quality of agency decisions.”<sup>31</sup> If the material does not reflect how policy judgments are made or considered, the privilege does not apply.<sup>32</sup>

The IRM provides a great overview of FOIA Exemption 5<sup>33</sup>:

- Explains that the IRS may withhold internal communications under the deliberative process privilege if they meet two key requirements: the communication must be pre-decisional (made before a final decision or policy is issued) and deliberative (involving recommendations or opinions). This includes internal discussions on whether to issue guidance or make decisions, even if the outcome is a choice not to act. Additionally, discussions about how to respond to FOIA requests are typically considered deliberative and are therefore withheld. However, the agency must justify that the withheld records meet these criteria.
- Provides that while internal records that reflect finalized policy or legal interpretations must generally be disclosed, factual content is only withheld if it is closely tied to the deliberative content or selectively included to support internal analysis. Documents related to published IRS guidance, including regulations and procedural documents, may be withheld if protected by FOIA exemptions or legal privileges. The

rationale is to avoid public confusion from disclosing internal viewpoints that do not represent final policy and to protect the integrity of IRS decision-making by encouraging open internal dialogue without fear of premature disclosure.

Ensure to review IRM procedures so you know what to expect and advocate accordingly while being cognizant that the IRM neither has the force of law nor confers any rights on taxpayers.

### 2. Work Product Doctrine

The work product doctrine protects from disclosure documents and other tangible things prepared or created by an attorney in anticipation of litigation or trial.<sup>34</sup> And a dual-purpose document, “that is, where it was not prepared exclusively for litigation,” is protected from disclosure as attorney work product if the document was prepared “because of” expected or anticipated litigation.<sup>35</sup>

In the context of a FOIA dispute, here is what you can expect the IRS to consider:

- Work product privilege protects records prepared by an attorney or other Service employee during litigation or in reasonable contemplation of litigation. Generally, it does not cover records written by attorneys in the ordinary course of business (*i.e.*, routine review of statutory notices of deficiency or summonses); it only covers those records which, under the particular facts and circumstances, were created primarily because of ongoing, or reasonably expected, litigation.
- A discussion with the Counsel attorney is required prior to the release of any work product.
- Generally, discretionary FOIA exemptions for documents pertaining to these matters may be waived only by the Associate Area Counsel in consultation with the affected Service client at the supervisory level.<sup>36</sup>

These IRM provisions provide a very helpful context so you are not blindsided by the IRS’ position. It obviously does not mean that you must agree with the IRS’ interpretation, but it provides a transparent window into the agency’s process.

### 3. Attorney–Client Privilege

The attorney–client privilege applies to communications made in confidence (1) by a client to an attorney for the purpose of obtaining legal advice; and (2) by an attorney to a client, where the communication contains legal advice or reveals confidential information relating to such advice.<sup>37</sup>

So what does the IRM tell us about how the IRS applies the attorney–client privilege in the context of FOIA dispute?

- A discussion with the Counsel attorney is required prior to releasing any attorney–client communication.
- This privilege also applies to communications among Counsel attorneys regarding the legal advice sought or provided.
- Discretionary FOIA exemptions for documents pertaining to these matters may be waived only by the Associate Area Counsel in consultation with the affected Service client at the supervisory level.
- This privilege also applies when IRS Counsel seeks legal advice from the Department of Justice (including the Offices of the U.S. Attorneys).
- Once it is determined that there is a sound factual and legal basis for asserting the exemption, a decision must be made about whether the IRS should exercise its discretion not to claim the exemption. The IRS makes the decision to disclose information in response to a FOIA request only after a full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosing.<sup>38</sup>

These IRM provisions are very helpful to practitioners to ascertain how the IRS will likely apply the attorney–client privilege, deliberative process privilege, and work product doctrine in the context of a FOIA dispute. Any such privilege assertions can be challenged successfully in the proper forum if the privilege is not supported by credible evidence. ®

## VI. The Importance of Administrative Appeals

Ok, so you finally receive a response to your FOIA request. The response will likely withhold or redact documents based on one or more of the exemptions discussed above. What do you do next?

The first step is to ascertain whether the response constitutes a “determination” within the meaning of FOIA. And why does this matter? Because it dictates whether you are required to file an administrative appeal challenging any redactions or withheld documents. If you fail to do so, you may be precluded from later filing suit for the reasons discussed below.

So what constitutes an agency “determination” under the FOIA sufficient to trigger a requester’s obligation to file an administrative appeal (*i.e.*, the exhaustion requirement) before bringing suit? To make a “determination” and thereby trigger the exhaustion requirement, an agency must at least: (i) gather and review the requested

documents; (ii) determine and communicate the scope of the documents it intends to release or withhold, along with the reasons for any withholdings; and (iii) inform the requester of the right to appeal any adverse portion of the determination.<sup>39</sup>

But even where an agency issues a timely response, a requester’s duty to exhaust administrative remedies may be excused if the response fails to provide the required notice of appeal rights under 5 USC §552(a)(6)(A)(i), or fails to inform the requester of the right to seek judicial review after the administrative appeal process.<sup>40</sup>

So, ensure the IRS correspondence is actually a “determination” that starts the clock ticking. After all, you have 90 days to file an administrative appeal.<sup>41</sup> Carefully review the letter from the IRS. Does it actually notify you about appeal rights? It is not uncommon for Appeals Officers or IRS Counsel to assist with the production of documents under a FOIA request, and such correspondence may omit the standard language typically found in final determinations issued by the Disclosure Office.

Also, be cognizant that there is a discrepancy between the text of the IRS FOIA regulation and the agency’s internal guidance. The IRS’ FOIA regulation at 601.702 still provides that a requester must file an administrative appeal within 35 days of an adverse determination. However, the FOIA Improvement Act of 2016 amended 5 USC §552 to require that agencies allow no less than 90 days to appeal an adverse determination.<sup>42</sup> Although the regulation has not yet been updated as of the submission of this article, the IRM provisions governing FOIA appeals incorporate the 90-day period and in practice the IRS follows that timeframe consistent with the statute.

If you decide to file an administrative appeal, follow the regulations and IRM guidance for administrative appeals to avoid having your request denied due to a technicality. Administrative appeals must:

- Be in writing and signed by the requester.
- Addressed to the IRS Commissioner and mailed to the correct address.
- Clearly describe the records sought.
- Provide a notification address for the appeal determination.
- Reference the date and office of the initial FOIA request, including copies of the request and initial determination if available.
- Request the IRS Commissioner to grant the records, fee waiver, expedited processing, or favorable fee status, or to verify that an appropriate search and response were conducted.<sup>43</sup>

The FOIA then requires an agency to make a determination on an administrative appeal within 20 working days of its receipt.<sup>44</sup> In short, be sure to file an administrative appeal if there is a strong likelihood that you will pursue litigation. But before doing so, consider carefully whether filing suit is truly the best course of action.

## VII. Complaints in U.S. District Courts

Let us move on to considerations about filing a FOIA suit. But first, what is the deadline for doing so? The statute of limitations is six years.<sup>45</sup> Interestingly, the FOIA does not include its own statute of limitations.<sup>46</sup> Courts have held instead that a six-year statute of limitations applies to FOIA suits based on 28 USC §2401(a) (“every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues”).

And when does a FOIA claim accrue? It accrues when a requester has exhausted his or her administrative remedies, either actually or constructively.<sup>47</sup> And requesters are considered to have done so when an agency does not respond to a request within 20 business days (or 30 in certain circumstances).<sup>48</sup>

But what if the agency responds to a request after the 20-day deadline? Then you must seek an administrative appeal before seeking judicial review.<sup>49</sup> And the same is true if the agency timely complies, but you disagree with the substance of its interpretation regarding the application of statutory exemptions to redact or withhold documents.<sup>50</sup>

In short, if the agency never responds within 20 working days, you may file a FOIA suit under the constructive exhaustion doctrine. But if the agency responds (even after the 20-day deadline but before you file a FOIA suit) and you seek to challenge the redacted or withheld documents, then you must complete the agency’s administrative appeal process before filing suit.

And where can the plaintiff file suit? In the District Court: (1) where the plaintiff resides; (2) where the plaintiff has a principal place of business; (3) where the agency records are located; or (4) the District of Columbia.<sup>51</sup>

Having established these essential requirements, practitioners should carefully consider whether to file suit in a U.S. District Court to enforce a FOIA request. IRS Counsel and the Department of Justice will heavily coordinate these matters. And this may actually benefit a trial team at the IRS because it forces IRS Counsel and Department of Justice attorneys to gather and review

documents to determine if an exemption applies and to organize and produce the documents that are not subject to exemptions.

## A. National Office Coordination at IRS Counsel

The IRM once again provides a roadmap for how these matters are handled:

The Associate Chief Counsel (Procedure & Administration) (P&A) oversees all litigation related to the Freedom of Information Act (FOIA), under 5 U.S.C. §552. While litigation is coordinated by P&A, administrative processing of FOIA requests is governed separately under CCDM 30.11.1.

When a FOIA complaint is filed, the assigned attorney must:

1. **Determine the Nature of the Lawsuit:** Whether it stems from the agency’s failure to respond to the initial FOIA request or from a denial (partial or complete) of a FOIA appeal.
2. **Review the Record:** This includes examining the appeal file (or, if absent or incomplete, the initial request file from the responsible Disclosure Office), the administrative record, and all withheld documents. Procedural issues like fee waivers, search adequacy, or request clarity should also be evaluated.
3. **Coordinate with the Disclosure Office:** Especially if there was no record search or if the search’s adequacy is questioned.
4. **Preparation of a Defense Letter:** The defense letter to the Department of Justice’s Tax Division must include:
  - **Background:** A summary of the events leading up to the lawsuit, including details of the FOIA request and, when applicable, relevant tax matters of the plaintiff. A short index may be added if records are numerous or multiple exemptions are cited.
  - **Affirmative Defenses:** Such as dismissing individual defendants, since FOIA suits can only be brought against agencies.
  - **Legal Analysis:** In-depth discussion of applicable FOIA law, tailored to the case facts, with citations from relevant judicial opinions. Any unfavorable binding precedent must be disclosed to the Tax Division.

5. **Supporting Declarations:** Attorneys must also prepare detailed declarations to support the agency's legal positions, including:

- The exemption claims and any other defenses.
- Facts supporting motions for summary judgment or other dispositive motions, such as how the FOIA request was processed and how the record search was conducted.<sup>52</sup>

This process illustrates how thorough and coordinated the efforts of IRS Counsel are in this context. Consider carefully whether you want the IRS to organize its efforts this well.

## B. Index Requirements

What about an index of the documents withheld? Such an index may be required during litigation.

In *Vaughn v. Rosen*,<sup>53</sup> the court rejected an agency's conclusory affidavit stating that the requested FOIA documents were subject to an exemption.<sup>54</sup> "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."<sup>55</sup> A Vaughn Index "permit[s] the court system effectively and efficiently to evaluate the factual nature of disputed information."<sup>56</sup> A Vaughn Index enables taxpayers to meaningfully assess whether the IRS' claimed FOIA exemptions are valid, potentially avoiding costly federal district court litigation for both the government and the taxpayers.

Ensure that the IRS is following its own procedures. IRM 37.2.2.5(2) (Aug. 9, 2018) explains that:

The index should be detailed, nonconclusory, and avoid the use of inadmissible hearsay. For any record for which it has been determined that there are no segregable portions that may be released, such that the record is being withheld in its entirety, the *Vaughn* index should include a statement that nonexempt material in the record could not reasonably be segregated from exempt material and the justification for that determination.

## VIII. Reliance on Code Sec. 7803

Practitioners should also consider relying on Code Sec. 7803(e)(7) in lieu of submitting a FOIA request if they

are before the IRS Independent Office of Appeals and the taxpayer meets the criteria of a "specified taxpayer."

When a conference is scheduled with the IRS Independent Office of Appeals at the request of a "specified taxpayer," the IRS is required to provide access to the non-privileged portions of the case file related to the disputed issues.<sup>57</sup> This access must be granted no later than 10 days before the conference.<sup>58</sup> A "specified taxpayer" is defined as either an individual whose adjusted gross income (AGI) does not exceed \$400,000 for the relevant tax year or a non-individual entity, such as a business, whose gross receipts do not exceed \$5 million for that year.<sup>59</sup>

This statutory right ensures that "specified taxpayer[s]" can review the IRS' position and supporting materials in advance, giving them a fair opportunity to prepare for the conference. Ensure to exercise this right if applicable.

## IX. Recommendations

Effectively navigating FOIA in the context of tax controversies requires both legal knowledge and strategic planning. Consider the following when deciding how to proceed:

1. Review the U.S. Department of Justice Guide to the Freedom of Information Act, which is a comprehensive legal treatise on the FOIA.
2. Know what to expect from the IRS by relying on key sections of the IRM.
3. Exemptions may or may not apply depending on the stage of the tax controversy.
4. Exhaust your administrative remedies.
5. Work with IRS Counsel to avoid simultaneous and duplicative discovery and FOIA requests.
6. Be cognizant that filing a complaint in District Court may actually help IRS Counsel, making careful evaluation of that decision essential.
7. Do not forget to work closely with IRS Counsel. You can zealously advocate for your clients while fostering and developing productive relationships with the attorneys at IRS Counsel.

Thoughtful coordination and strategic use of FOIA requests can significantly enhance a taxpayer's position while preserving professional rapport with the Service. Indeed, it is often the case that balancing assertive advocacy with cooperative engagement is the key to reaching effective tax controversy resolutions.

## ENDNOTES

- \* The firm specializes in civil and criminal tax matters. Prior to joining the firm, Mr. Voht served 15 years at the IRS Office of Chief Counsel, including six years as a Special Trial Attorney. In that role, he handled some of the IRS' most complex litigation matters.
- An earlier version of this article appeared in the coursebook for the State Bar of Texas' 43rd Annual Tax Law in the Digital Age Conference. The author retains full copyright and may republish or distribute this material independently. Use by the State Bar is under a nonexclusive license.
- <sup>1</sup> 5 USC §552(a)(3)(A).
  - <sup>2</sup> *Reporters Committee for Freedom of Press*, S Ct, 489 US 749, 772, 109 S Ct 1468 (1989). Quoting *Rose*, S Ct, 425 US 352, 372, 96 S Ct 1592 (1976).
  - <sup>3</sup> *Rose*, S Ct, 425 US 352, 360, 96 S Ct 1592 (quoting S.Rep.No.813, 89th Cong., 1st Sess., 3 (1965)).
  - <sup>4</sup> *LRB v. Robbins Tire & Rubber Co.*, S Ct, 437 US 214, 242, 98 S Ct 2311 (1978).
  - <sup>5</sup> *Rose*, S Ct, 425 US 352, 361, 96 S Ct 1592.
  - <sup>6</sup> *Id.*
  - <sup>7</sup> 5 USC §552(a)(4)(B).
  - <sup>8</sup> *John Doe Agency v. John Doe Corp.*, S Ct, 493 US 146, 152, 110 S Ct 471 (1989).
  - <sup>9</sup> *EPA v. Mink*, S Ct, 410 US 73, 79-80, 93 S Ct 827 (1973).
  - <sup>10</sup> *Tax Analysts*, S Ct, 89-1 USTC ¶9386, 492 US 136, 144-45, 109 S Ct 2841.
  - <sup>11</sup> 5 USC §552(a)(6)(A).
  - <sup>12</sup> 5 USC §552(a)(4)(B).
  - <sup>13</sup> 5 USC §552(a)(6)(A).
  - <sup>14</sup> 5 USC §552(a)(6)(B).
  - <sup>15</sup> *M.A. Kapp*, 118 TCM 20, Dec. 61,501(M), TC Memo. 2019-84 ("We have held that FOIA establishes an orderly procedure for enforcement of the act through the commencement of an action in the U.S. District Courts, see 5 U.S.C. §552(a)(4)(B) (2012), and therefore FOIA matters do not affect issues before this Court, *Davis v. Commissioner*, 65 T.C. 1014, 1024 (1976); *Bennett v. Commissioner*, TC Memo. 1997-505, *Maple v. Commissioner*, TC Memo. 1990-567. Therefore, this Court will not undertake to implement the provisions of FOIA and will not consider FOIA requests in deciding the admissibility of evidence.").
  - <sup>16</sup> The IRM does not have the force of law and does not confer any rights on taxpayers. *R. Eichler*, 143 TC 30, 39, Dec. 59,970 (2014); *C.G. Fargo*, CA-9, 2006-1 USTC ¶150,326, 447 F3d 706, 713.
  - <sup>17</sup> IRM 11.3.41.13.6.2.6(9) (Aug. 26, 2021).
  - <sup>18</sup> Reg. §601.702(c)(4); see also IRM 11.3.41.13.3 (Apr. 18, 2025), which provides initial analysis guidance to the assigned IRS caseworker.
  - <sup>19</sup> 5 USC §552(b)(3).
  - <sup>20</sup> OPEN FOIA Act of 2009, P.L. 111-83, 123 Stat. 2184.
  - <sup>21</sup> 484 US 9, 11-12 (1987).
  - <sup>22</sup> *Currie*, CA-11, 83-1 USTC ¶9340, 704 F2d 523, 531 (concluding the IRS properly withheld documents under Exemption 3 that related to "internal agency memoranda reflecting the direction and scope of the investigation of the appellants' tax liability, memoranda of interviews with witnesses and confidential informants, draft affidavits of confidential informants, correspondence with a state law enforcement agency and other third parties relating to financial transactions with the appellants, federal tax returns of third parties, and IRS personnel's notes and work papers concerning the scope and direction of the investigation"); *Highland Cap. Mgmt., LP*, DC-TX, 408 FSupp3d 789, 809 (2019) (holding that the IRS' explanation for invoking FOIA Exemption 3 was insufficient. Although the agency identified the types of documents withheld under Code Sec. 6103(e)(7), it offered only conclusory statements and failed to show how disclosure would actually impair federal tax administration.).
  - <sup>23</sup> CA-9, No. 09-35618, 2010-2 USTC ¶150,617, 395 FedAppx 438, 2010 WL 3611645, at \*2 (unpublished).
  - <sup>24</sup> DC-DC, 217 FSupp2d 23, 27-29 (2002).
  - <sup>25</sup> *Tax Analysts*, DC-DC, 152 FSupp2d 1, 12-14 (2001).
  - <sup>26</sup> 5 USC §552(b)(5) (2018).
  - <sup>27</sup> *Zander*, DC-DC, 885 FSupp2d 1, 15 (2012) (holding that the attorney-client privilege must be interpreted consistently in both the discovery and FOIA contexts, the court emphasized that FOIA should not serve as a backdoor to obtain information otherwise protected in civil discovery).
  - <sup>28</sup> *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, S Ct, 592 US 261, 267, 141 S Ct 777 (2021) (quoting *NLRB v. Sears, Roebuck & Co.*, S Ct, 421 US 132, 150, 95 S Ct 1504 (1975)).
  - <sup>29</sup> *Id.* at 268.
  - <sup>30</sup> *Id.*
  - <sup>31</sup> *Sears*, S Ct, 421 US 132, 151, 95 S Ct 1504.
  - <sup>32</sup> *Petrol. Info. Corp.*, DC-DC, 976 F2d 1429, 1435 (1992) (recognizing that the "key question" is whether disclosure of the documents would impair candor within the agency).
  - <sup>33</sup> IRM 11.3.13.4.2.6 (Oct. 6, 2025).
  - <sup>34</sup> *Hickman v. Taylor*, S Ct, 329 US 495 at 510-11, 67 S Ct 385 (1947).
  - <sup>35</sup> *M. Richey*, CA-9, 2011-1 USTC ¶150,168, 632 F3d 559, 568.
  - <sup>36</sup> IRM 11.3.13.4.2.6 (9), (10) (Oct. 6, 2025).
  - <sup>37</sup> *Upjohn Co.*, S Ct, 81-1 USTC ¶9138, 449 US 383, 389, 101 S Ct 677; *B.C. Bernardo*, 104 TC 677, 682, Dec. 50,705 (1995).
  - <sup>38</sup> IRM 11.3.13.4.2.6(11), (12) (Oct. 6, 2025).
  - <sup>39</sup> *Citizens for Responsibility & Ethics in Washington*, DC-DC, 711 F3d 180, 186 (2013).
  - <sup>40</sup> *Nurse v. Secretary of the Air Force*, DC-DC, 231 FSupp2d 323, 328-29 (2002) (an agency's duty to inform a requester of their right to file an administrative appeal also includes the obligation to advise the requester to seek judicial review).
  - <sup>41</sup> IRM 8.714.8 (Apr. 17, 2023).
  - <sup>42</sup> 5 USC §552(a)(6)(A)(i)(III)(aa).
  - <sup>43</sup> Reg. §601.702(c)(10)(ii); IRM 8.714.5(2) (Apr. 17, 2023) (Requesters should exercise caution, as the addresses for submitting FOIA appeals differ between the regulation and the IRM).
  - <sup>44</sup> Reg. §601.702(c)(10)(iii).
  - <sup>45</sup> *Spannaus*, DC-DC, 824 F2d 52, 56 (1987).
  - <sup>46</sup> *Howard v. Pritzker*, DC-DC, 775 F3d 430, 437 (2015).
  - <sup>47</sup> *Kenney*, DC-DC, 700 FSupp2d 111, 115 (2010).
  - <sup>48</sup> *Citizens for Responsibility & Ethics in Washington*, DC-DC, 711 F3d 180, 184.
  - <sup>49</sup> *Oglesby*, DC-DC, 920 F2d 57, 63 (1990).
  - <sup>50</sup> *Hidalgo*, DC-DC, 344 F3d 1256, 1258 (2003) (quoting *Oglesby*, DC-DC, 920 F2d 57, 61); *Weinberger v. Salfi*, S Ct, 422 US 749, 765, 95 S Ct 2457 (1975) (explaining that exhaustion prevents premature interference with agency processes, allows the parties the benefit from the agency's expertise, and provides courts with a record adequate for judicial review).
  - <sup>51</sup> 5 USC §552(a)(4)(B).
  - <sup>52</sup> IRM 37.2.2.1-3 (Aug. 9, 2018).
  - <sup>53</sup> DC-DC, 484 F2d 820 (1973).
  - <sup>54</sup> *Id.* at 828.
  - <sup>55</sup> *Citizens Comm'n on Human Rights*, CA-9, 45 F3d 1325, 1326 n.1 (1995).
  - <sup>56</sup> *John Doe Agency v. John Doe Corp.*, S Ct, 493 US 146, 149 n.2, 110 S Ct 471 (1989) (quoting *Vaughn*, DC-DC, 484 F2d 820, 826).
  - <sup>57</sup> Code Sec. 7803(e)(7)(A).
  - <sup>58</sup> *Id.*
  - <sup>59</sup> Code Sec. 7803(e)(7)(C).

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