

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

<b>Gregory P. Rhodes,</b>	)	
	)	
<i>Plaintiff,</i>	)	
	)	
<b>v.</b>	)	<b>CIVIL ACTION NO.</b> _____
	)	
<b>U.S. Internal Revenue Service,</b>	)	
	)	
<i>Defendant.</i>	)	

**VERIFIED COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

Plaintiff Gregory P. Rhodes (“Plaintiff” or “Plaintiff Rhodes”) brings this action against Defendant, United States Internal Revenue Service, to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). As grounds therefore, Plaintiff alleges as follows:

**INTRODUCTION**

1. Plaintiff seeks to compel the disclosure of records unlawfully withheld by the Internal Revenue Service (“Defendant” or “IRS”).

**JURISDICTION AND VENUE**

2. FOIA states that an “agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published

rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.” 5 U.S.C. § 552(a)(3)(A).

3. The Court has subject matter jurisdiction and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

4. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 552(a)(4)(B).

5. FOIA provides for venue in either: (1) the judicial district where the plaintiff resides or has her principal place of business, (2) the judicial district where the agency records are situated, or (3) the District of Columbia. 5 U.S.C. § 552(a)(4)(B).

6. Specifically, Plaintiff Gregory Rhodes, the FOIA requester, resides in and has his principal place of business in the district for the United States District Court for the Northern District of Alabama, Southern Division.

### **PARTIES**

7. Plaintiff Rhodes filed the FOIA request that is the subject of the litigation. Exhibit 1. Plaintiff Rhodes’ principal place of business is 2311 Highland Avenue South, Birmingham, Alabama 35205.

8. Defendant IRS is an agency of the U.S. Government and is headquartered at 1111 Constitution Avenue Northwest, Washington, D.C. 20224. The IRS is an agency within the meaning of 5 U.S.C. § 552(f).

## STATUTORY FRAMEWORK

9. The FOIA's purpose is "to encourage public disclosure of information so citizens may understand what their government is doing." *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1244 (11th Cir. 2008) (internal quotations omitted).

10. FOIA requires federal government agencies to promptly release requested agency records to the public unless one or more specific statutory exemptions apply. 5 U.S.C. § 552(a)(3)(A).

11. Records are agency records subject to the FOIA if the agency created or obtained them and the agency controlled them at the time the FOIA request was made. *U.S. Dep't of Just. v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

12. An agency has twenty (20) working days after receipt of a FOIA request in which to determine whether to comply with the request. 5 U.S.C. § 552(a)(6)(A)(i). If the agency fails to respond, this Court has jurisdiction upon receipt of a complaint to review, de novo, the agency's failure to respond and order the production of any agency records improperly withheld from the requester. 5 U.S.C. § 552(a)(4)(B).

13. In *Judicial Watch v. Rossotti*, the court reasoned:

Upon receipt of a FOIA request, an agency must determine within 20 days whether it will comply and "immediately notify the person making such request of such

determination and the reasons therefor . . . .”“If the agency has not responded within the statutory time limit[ ], then, under 5 U.S.C. § 552(a)(6)(C), the requester may bring suit.”

285 F. Supp. 2d 19, 22 (D.D.C. 2003) (quoting 5 U.S.C. § 552(a)(6)(A)(i) and *Oglesby v. Dep't of the Army*, 920 F.2d 57, 62 (D.C. Cir.1990)).

14. The IRS has the burden of demonstrating that the withheld documents [requested by the FOIA requester] are exempt from disclosure.” *Elec. Priv. Info. Ctr. v. Customs and Border Prot.*, 160 F. Supp. 3d 354, 357 (D.D.C. 2016) (citing *Boyd v. U.S. Dep't of Just.*, 475 F.3d 381, 385 (D.C. Cir. 2007)).

15. An agency must prove that it “fully discharged its obligations under the FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester.” *Id.* (citing *Friends of Blackwater v. U.S. Dep't of Interior*, 391 F. Supp. 2d 115, 119 (D.D.C. 2005)).

### **STATEMENT OF FACTS**

16. By letter sent by facsimile on January 7, 2022, Plaintiff Rhodes sent a FOIA request to the Internal Revenue Service’s Central Processing Unit at fax number (877) 891-6035. A true and correct copy of the Facsimile Cover Sheet and the FOIA request are attached hereto and incorporated herein as Exhibit 1. A true and correct copy of the Fax Transmission Result, showing the fax was successfully sent, is attached hereto and incorporated herein as Exhibit 1A.

17. Plaintiff Gregory Rhodes (“Plaintiff Rhodes”) serves as outside legal counsel to the LLH Investment Fund II, LLC as Tax Matters Partner (“TMP”) of Capital Ship, LLC (“Capital Ship”) since September 2018. As set forth in Exhibit 1, Plaintiff Rhodes’ FOIA request sought each and every document (exclusive of the filed income tax returns) contained in the administrative files of the Internal Revenue Service relating to the examinations of the Form 1065, U.S. Return of Partnership Income, filed by Capital Ship, LLC (EIN: 82- 2709147) (the "Taxpayer") for taxable year ended December 31, 2016 (the "Examinations"), including, but not limited to, the following:

1. The Examination Division Administrative File (the “Administrative File”) for the Examinations. The requested file includes any worksheets, work papers, notes, emails, documents, memoranda, letters, computations and other materials prepared or accumulated relative to the Audit by employees of the IRS and any other governmental agency. This request also includes internal documents, memoranda, memoranda of all interviews of persons regarding the charitable contributions by the Taxpayer, copies of all statements (sworn or otherwise) given by individuals in connection with the Audit, Case Activity record, written reports and recommendations concerning the proposed adjustment of partnership items and penalties, and any other information that is related to the determinations by the IRS as set forth in the Revenue Agent Audit Report.

2. Any documents (electronic or otherwise) relative to the Examination that may have been prepared by specialist agents, engineers, or valuation specialists, and materials created as specialty case files, desk files, or as group files, which are not otherwise included in the Administrative File. This request includes any emails, work papers, notes, documents, memoranda, transmittal letters, reports, documents describing or recording interviews, or other materials prepared or accumulated relevant to the Examinations.

3. Any documents (electronic or otherwise) relative to the Examination that may have been prepared by persons not employed by the Internal Revenue Service, including consultants, appraisers, economists, engineers, and any other specialists retained for this case and which are not otherwise included in the Administrative File. This request includes any emails, work papers, notes documents, memoranda, transmittal letters, reports, documents describing or recording interviews, or other materials prepared or accumulated relevant to the Examination.

4. Any documents (electronic or otherwise) relative to the Examination that include information and documents obtained pursuant to summonses or third-party requests issued to third parties which are not otherwise included in the Administrative File.

5. Any communications concerning Capital Ship, LLC's Examination, Capital Ship, LLC's Administrative File, or Capital Ship, LLC between the Internal Revenue Service and federal legislative branch officials including the Senate Finance Committee, its staff, and its interns.

6. Any communications concerning Capital Ship, LLC's Examination, Capital Ship, LLC's Administrative File, or Capital Ship, LLC between the Internal Revenue Service and any state or federal agency or official therein.

*See Exhibit 1.*

18. By letter dated February 2, 2022, IRS Senior Disclosure Specialist, Danielle Higgins, confirmed receipt of Plaintiff Rhodes' January 7, 2022 FOIA request. A true and correct copy of Higgins' letter dated February 2, 2022 is attached hereto and incorporated herein as Exhibit 2.

19. The February 2, 2022 letter confirmed that Higgins was "unable to provide the information you requested by February 9, 2022, which is the 20 business-day period required by law for us to respond." *See Exhibit 2.* Higgins

noted that under certain circumstances, the FOIA allows for an additional 10-day statutory extension, and that he needed additional time to: “Search for and collect the requested records from other locations” and “consult with another IRS office.” Exhibit 2, p. 2.

20. The February 2, 2022 letter extended the IRS’s statutory response date to February 24, 2022, but acknowledged that Higgins would be unable to respond by the extended statutory response date and that a final response could be expended by May 25, 2022. Exhibit 2, p. 2.

21. By letter dated May 20, 2022, IRS Senior Disclosure Specialist, Danielle Higgins, sent a second letter to Plaintiff Rhodes in response to Plaintiff Rhodes’ January 7, 2022 FOIA request/letter. A true and correct copy of Higgins’ second letter dated May 20, 2022 is attached hereto and incorporated herein as Exhibit 3.

22. In the May 20, 2022 letter from Higgins, Higgins stated that she needed additional time to obtain and review the responsive records requested in Plaintiff Rhodes’ Freedom of Information Act (FOIA) request. Higgins further stated she expected to complete the request by August 23, 2022. Exhibit 3, p. 2.

23. On or about March 21, 2022, the Dentons Sirote PC law firm provided payment to the United State Treasury in the amount of \$419.00 as payment for the

service fee/fee for FOIA documents request no. 2022-06430-CE Tax Dispute. *See* Exhibit 4.

24. By letter dated August 10, 2022, IRS Senior Disclosure Specialist, Danielle Higgins, sent a third letter to Plaintiff Rhodes in response to Plaintiff Rhodes' January 7, 2022 FOIA request/letter. A true and correct copy of Higgins' third letter dated August 10, 2022 is attached hereto and incorporated herein as Exhibit 5.

25. In the August 10, 2022 letter from Higgins, Higgins stated that she needed additional time to obtain and review the responsive records requested in Plaintiff Rhodes' Freedom of Information Act (FOIA) request. Higgins further stated she expected to complete the request by November 21, 2022. Exhibit 5, p. 2.

26. By letter dated November 8, 2022, IRS Senior Disclosure Specialist, Danielle Higgins, sent a fourth letter to Plaintiff Rhodes that she expected to provide a final response by May 19, 2023. A true and correct copy of Higgins' fourth letter dated November 8, 2022 is attached hereto and incorporated herein as Exhibit 6.

27. By letter dated April 26, 2023, IRS Senior Disclosure Specialist, Danielle Higgins, sent a fifth letter to Plaintiff Rhodes that she referred to as a "final response to your Freedom of Information Act (FOIA) request dated January 7, 2022." A true and correct copy of Higgins' fifth letter dated April 26, 2023 is attached hereto and incorporated herein as Exhibit 7.



28. In the April 26, 2023 letter from Higgins, Higgins stated we searched for, and located, 10,001 pages responsive to your request. Although the letter stated that it was releasing 8,102 pages without exemptions, it also stated that the IRS was withholding **487 pages in part, and withholding 1,412 pages in full**. The letter identified the three following FOIA exemptions:

- a. The “deliberative process privilege, which it claimed protects documents that reflect the pre-decisional opinions and deliberations on legal or policy matters”;
- b. The “attorney work product privilege, which it claimed protects materials prepared in reasonable anticipation of litigation by an attorney or other Service employee”; and
- c. The “attorney-client privilege, which it claimed protects confidential communications between an attorney and a client relating to a legal matter for which the client has sought professional advice.”

*See* Ex. 7, p. 2.

29. The April 26, 2023 letter from Higgins, further stated the total cost to process the request is \$394.00, that they received a check for \$419.00 on March 24, 2022, and that a refund was being issued in the amount of \$25.00. Ex. 7, p. 3.

30. In a separate letter dated April 26, 2023, Higgins provided password information for purposes of accessing the documents that were being produced by

the IRS. A true and correct copy of Higgins' second April 26, 2023 letter is attached hereto and incorporated herein as Exhibit 8.

31. As of the filing of this Complaint, Plaintiff Rhodes has not received any privilege logs from the IRS. Accordingly, he has not been able to determine whether the 1,412 pages of documents being withheld are truly subject to privilege. Likewise, Plaintiff Rhodes has not been able to determine whether any of the 487 pages of redactions are truly subject to one or more of the privileges asserted by the IRS. Moreover, the burden is on the IRS to show that the claimed privileges exist. *See generally Confidential Informant 59-05071 v. U.S.*, 108 Fed. Cl. 121 (U.S. Ct. Fd. Clms. 2012).

32. The FOIA request response is past due pursuant to the requirements of 5 U.S.C. § 552(a)(6)(A)(i).

### **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

33. As stated in Higgins' letter dated February 2, 2022, "[p]ursuant to 26 CFR § 601.702, there is no right to an administrative appeal for failure to meet the statutory 20 business-day, or additional 10 business-day, timeframes for response." Exhibit 2, p. 1. However, as said letter provides, there is a right to file suit for a judicial review, in this case, after February 24, 2022. Exhibit 2, p. 2.

34. Therefore, there were no administrative remedies to be exhausted prior to the filing of this Complaint pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

**CAUSE OF ACTION**

**Violation of the Freedom of Information Act, 5 U.S.C. § 552 for Failure to Disclose Responsive Records**

35. Plaintiff re-alleges paragraphs 1 through 34 as are fully stated herein.

36. Defendant is unlawfully withholding records requested by Plaintiff pursuant to 5 U.S.C. § 552.

37. Plaintiff has a legal right to obtain such records, and no legitimate basis exists for Defendant's failure to disclose them.

38. As Defendant has admitted, there are no applicable administrative remedies for Plaintiff to exhaust with respect to the IRS's failure to meet the statutory 20 business-day, or additional 10 business-day timeframe for a response to a FOIA request.

39. Plaintiff is being irreparably harmed by reason of Defendant's unlawful withholding of requested records, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to conform its conduct to the requirements of the law.

40. Capital Ship, represented by Plaintiff Rhodes, has a case – Capital Ship, LLC v. Commissioner (Docket #24997-21) – currently pending in United States Tax Court (the "Action"). Plaintiff Rhodes' FOIA request and the records being unlawfully withheld by Defendant are relevant and essential to the Action.

41. Defendant's failure and refusal to obey its statutory obligations frustrates the essential purpose of the Freedom of Information Act, are flagrant, and without any legal excuse, and evidence a total disregard for the fundamental rights the legislation in question is designed to protect. Plaintiff has been forced to pursue this action in Court to protect and exercise his rights to documents and information which are being withheld.

**RELIEF REQUESTED**

WHEREFORE, Plaintiff Rhodes respectfully requests this Court to:

- (1) Expedite this proceeding as provided for in 28 U.S.C. § 1657.
- (2) Declare Defendant is unlawfully withholding records requested by Plaintiff pursuant to 5 U.S.C. § 552.
- (3) Order Defendant to produce the responsive records being withheld and those which have been redacted in unredacted form.
- (4) Enjoin Defendant from continuing to withhold any and all non-exempt records responsive to the FOIA request.
- (5) Grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E).
- (6) Grant Plaintiff such further and additional relief as the Court deems just and proper, to which Plaintiff may show himself to be justly entitled.

Respectfully submitted this the 24<sup>th</sup> day of May 2024.

*/s/ Cheryl Howell Oswalt*

Cheryl Howell Oswalt (ASB-2975-E62O)  
Logan C. Abernathy (ASB-6278-F63M)

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*Attorneys for Plaintiff*

**VERIFICATION**

Under the penalty of perjury under the laws of the United States, I declare I have read the foregoing and that the facts alleged therein are true and correct to the best of my knowledge and belief, excepting only those allegations which are identified as based on information and belief. Such allegations are based on a good faith belief. I understand that a false statement in this Verification will subject me to penalties of perjury.



By: Gregory P. Rhodes, Esq.

Title: As Plaintiff and Legal Counsel for LLH Investment Fund II, LLC as Tax Matters Partner (“TMP”) of Capital Ship, LLC (“Capital Ship”)

Date: 5.23.24