

EXHIBIT __2__

Internal Revenue Service

Appeals Office M/S 55203
5045 E Butler Ave
Fresno, CA 93727-5136

Date: **MAR 15 2016**

Philip Garrett Panitz, Esq.
Panitz & Kossoff, LLP
5743 Corsa Avenue, Ste 208
Westlake Village, CA 91362

Department of the Treasury

Person to Contact:

Alexis Lindauer
Employee ID

Number: 1000157545

Tel: (559) 454-6328

Fax: (877) 818-6361

Refer Reply to:

AP:W:A10:T5:FSC

In Re:

Freedom of Information Act

Disclosure Case Number(s):

F15272-0116

(Mike Ireland)

Tax Period(s) Ended:

Trust Fund Recovery Penalty

6/30/08, 9/30/08, and 3/31/09

Dear Philip Garrett Panitz,

This letter is in response to your appeals request dated 2/23/2016 for Freedom of Information Act (FOIA) information. According to your letter you are appealing the response of 1/20/2016 from the Disclosure Office of your request for information dated 9/29/2015.

You requested for copies of all documents, correspondence, procedures or manuals relating to the Trust Fund Recovery Penalty for 6/30/08, 9/30/08, and 3/31/09 for Mike Ireland.

The Disclosure Specialist located 215 pages in response to your request and they released 198 pages in full. The Disclosure Specialist withheld 87 pages in part and 17 pages in full. They notated the applicable FOIA exemption on the partially redacted documents and referenced the applicable FOIA exemption for the documents withheld in full in their response dated 1/20/2016.

Your appeal states that you are appealing the documents withheld and are now requesting access to all of the documents.

We have reviewed the response of the Disclosure Specialist, the Disclosure database, as well as the documents withheld and have determined that it is appropriate under the circumstances. Appeals responsibility concerning the appeal of FOIA cases is limited to a de novo review to ensure the documents withheld or redacted for the specific requester and documents requested fall within the FOIA exemption(s) cited. Appeals only has jurisdiction over the denial of documents in response to a FOIA request. We address the adequacy of the search, the appropriateness of the redactions and documents withheld through

determined FOIA exemptions. Our written notice is your determination that the redacted information was properly withheld through the FOIA exemptions cited. Our sole responsibility is to determine if the documents were properly withheld under the FOIA.

The information you are seeking is the return information of a third party taxpayer. "Return information" is defined in I.R.C. Section 6103(b)(2)(A) as

a taxpayer's identity ... 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 [under the Internal Revenue Code]....

To the extent that such information exists, the Service is prohibited under I.R.C. Section 6103(a) from providing you with a copy of that information without authorization. Section 6103(a) provides that returns and return information are confidential. FOIA exemption 3 provides that the disclosure provisions of the FOIA do not apply to matters that are

specifically exempted from disclosure by statute ... provided that such statute (A) requires that the matters be withheld ... 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.

Exemption 3 is being asserted in conjunction with I.R.C. Section 6103(a) to withhold any third party return information. Section 6103 of the Internal Revenue Code has been determined to be an exemption 3 statute. Church of Scientology v. IRS, 484 U.S. 9 (1987).

Some of the documents withheld under Exemption 3, was information redacted based on the determination that the information is outside the purview of your authorities, as we cannot release the information or the documents in full to you or to your clients. The FOIA grants you the right to information and documents as requested through the request received and the authorities provided at the time of the request. The Internal Revenue Service's Statement of Procedural Rules, 26 C.F.R. Section 601.702(c)(1) requires that FOIA requests be for reasonably described records. Reasonably described records are defined in 26 C.F.R. Section 601.702(c)(4). It is not the duty of Disclosure officer to make determinations of documents required through the request. The Disclosure office's duty is to provide documents within the purview of the FOIA within the files or records requested.

We are asserting FOIA exemption (b)(5) to withhold 1 page in full. Exemption (b)(5) of the FOIA protects inter- and intra-agency memoranda or letters which would not be available by law to a party in litigation with the agency. 5 U.S.C. Section 552(b)(5). As such, it has been interpreted to exempt from disclosure

those documents that are normally privileged in the civil discovery context. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Thus, "[t]his language contemplates that the public will not be entitled to government documents which a private party could not discover in litigation with the agency." *Schell v. U.S. Dept of Health & Human Services*, 843 F.2d 933, 939 (6th Cir. 1988). Exemption 5 has been interpreted as preserving to the agencies such recognized evidentiary privileges as the attorney client privilege, the attorney work product privilege and the deliberative process privilege. *Parke, Davis & Co. v. Califano*, 623 F.2d 1, 5 (6th Cir. 1980).

The primary purpose of the deliberative process privilege is to protect the integrity of the decision making process and preventing the "disrobing of an agency decision-maker's judgment." *Russell v. Dept. of the Air Force*, 682 F.2d 1045, 1049 (D.C. Cir. 1982). Because exemption 5 is concerned with protecting the deliberative process itself, "the key question in exemption 5 cases is whether disclosure of material would expose an agency's decisionmaking process in such a way as to discourage discussion within the agency and thereby undermine the agency's ability to perform its functions." *Schell v. HHS*, 843 F.2d at 940, citing *Dudman Communications Corp. v. Dept. of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987). Specifically, three policy purposes have been held to constitute the basis for this privilege: (1) to encourage frank, open discussions on matters of policy between subordinates and superiors; (2) to protect against the premature disclosure of proposed policies before they are finally adopted; and (3) to protect the public from confusion that might result from the disclosure of reasons and rationales that were not the ultimate ground for the agency action. *Russell*, 682 F.2d at 1048. See also *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

This document is also exempt from disclosure under the governmental privilege encompassed in FOIA exemption (b)(5). *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Subsection (b)(5) exempts "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." The 1 page withheld in total falls within the purview of the governmental privilege. The governmental privilege doctrine exempts materials that reflect the recommendations, opinions, and analyses which represent the agency's deliberative process. *Id.* at 150. The underlying policy of the privilege is to encourage the full and frank exchange of opinions among agency personnel. Because the memorandum contains the opinions, recommendations, and analyses of Service employees, it is exempt from disclosure pursuant to the governmental privilege embodied in FOIA exemption (b)(5).

We are also asserting FOIA subsection (b)(7)(A) as it exempts from disclosure records or information compiled for law enforcement purposes if the production of such law enforcement records could reasonably be expected to interfere with pending or prospective law enforcement proceedings. The term "law enforcement" refers to enforcement through civil, criminal, or regulatory

proceedings. Subsection (7)(A) applies "whenever the government's case in court would be harmed by the premature release of the evidence or information," NLRB v. Robbins Tire & Rubber Co., 473 U.S. 214, 232 (1978), or where the disclosure would impede any necessary investigation prior to the proceeding, National Public Radio v. Bell, 431 F. Supp. 509, 514-15 (D. D.C. 1977). In the instant case, disclosure could interfere with administrative proceedings.

And finally, we are asserting Subsection (b)(7)(C) as it exempts from disclosure records or information compiled for law enforcement purposes to the extent that disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy. See United States Dep't of Justice v. Reporters Committee, 459 U.S. 749 (1989). Exemption (b)(7)(C) requires a balancing of the public interest in the disclosure of third party identities with the privacy interests of those individuals. Case law makes clear that there is no public interest in the disclosure of the identities of third parties who were subjects of law enforcement investigations or potential witnesses or employees of an agency. See, Senate of Puerto Rico v. U.S. Dep't of Justice, 823 F.2d 574, 587-88 (D.C. Cir. 1987); see also, Nix v. United States, 572 F.2d 998 (4th Cir. 1978). Again, we believe that the Disclosure office properly searched for the files requested and properly provided the documents. The Disclosure office properly withheld the documents per the FOIA.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and the Office of Disclosure as a non-exclusive alternative to litigation. The Office of Appeals is not a part of this mediation process. Using OGIS services does not affect your right to pursue litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you disagree with the Appeals determination and wish to pursue mediation, you may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - OGIS
College Park, MD 20740
E-mail: ogis@nara.gov
Web: <https://ogis.archives.gov>
Telephone: 202-741-5770
Facsimile: 202-741-5769
Toll-free: 1-877-684-6448

The FOIA requires us to advise you of the judicial remedies granted in the Act.. You may file a complaint in the United States District Court for the District in

which you reside, or have your principal place of business, or in which the agency records are located, or in the District of Columbia.

Sincerely,

A handwritten signature in black ink, appearing to be 'P. Perez', written in a cursive style.

P. Perez
Appeals Team Manager