

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS – HOUSTON DIVISION

CRESTEK, INC. & SUBSIDIARIES, and	§	
J. MICHAEL GOODSON	§	Civil No
	§	
<i>Plaintiffs,</i>	§	
	§	Judge
v.	§	
	§	
	§	Magistrate Judge
INTERNAL REVENUE SERVICE	§	
	§	
<i>Defendant</i>	§	

COMPLAINT

Plaintiffs Crestek Inc., & Subsidiaries and J. Michael Goodson, by and through their undersigned counsel, bring this action against Defendant Internal Revenue Service to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”).

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
2. Venue is proper in this district pursuant to 28 U.S. C. § 1391(e).

PARTIES

3. Plaintiffs, Crestek Inc. & Subsidiaries and J. Michael Gordon are the requestors of the records which Defendants are now withholding.
4. Defendant Internal Revenue Service is an agency of the United States government and is headquartered at 1111 Constitution Avenue, NW, Washington D.C. 20224. Defendant has possession, custody, and control of the documents to which Plaintiffs seek access.

STATEMENT OF FACTS

5. This is an action under the Freedom of Information Act, 5 U.S.C. §552, to order the production of agency records which Defendant has improperly withheld from Plaintiffs.

6. On December 16, 2015, Plaintiff Crestek Inc., & Subsidiaries sent a FOIA request to Defendant seeking access to the following:

- (1) The Examination Division Administrative File for IRS Large Business & International exam and administrative appeals which handled the audits of Crestek, Inc. and Subsidiaries for tax years ending a) 6/30/07; b) 6/30/08; c) 6/30/09; d) 6/30/11; e) 6/30/12; and f) 6/30/13. The information provided from the Examination Division Administrative File should include any emails, worksheets, workpapers, notes, documents, memoranda, 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, memoranda, memoranda 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 records, 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 Agents Report (30 Day Letter).
- (2) Training materials, white papers, and other briefing documents prepared or accumulated by employees of the IRS, any other governmental agency relative to the examination of Crestek, Inc. and Subsidiaries for tax years ending a) 6/30/07; b) 6/30/08; c) 6/30/09; d) 6/30/11; e) 6/30/12; and f) 6/30/13.
- (3) All email or other correspondence between IRS counsel, examiners and/or the IRS Whistleblowers Office relative to the examination of Crestek, Inc. and Subsidiaries for tax years ending a) 6/30/07; b) 6/30/08; c) 6/30/09; d) 6/30/11; e) 6/30/12; and f) 6/30/13.
- (4) All email or other correspondence between the IRS appeals, IRS counsel, examiners and/or the IRS Whistleblowers Office relative to the appeal of the examination of Crestek, Inc. and Subsidiaries for tax years ending a) 6/30/07; b) 6/30/08; c) 6/30/09; d) 6/30/11; and e) 6/30/12.
- (5) All written communications, emails, and other documents provided by the IRS examination team or appeals personnel that examined Crestek, Inc. and Subsidiaries for tax years ending a) 6/30/07; b) 6/30/08; c) 6/30/09; d) 6/30/11; and e) 6/30/12 to Chief Counsel, Internal Revenue Service, Lisa M. Rodriguez, Carmen N. Presinal-Roberts, and Patricia Y. Taylor regarding Mary Trongone or Anthony (Tony) Hearn, the IRS Whistleblower's office, Crestek, Inc. and Subsidiaries and/or J. Michael Goodson.

- (6) All written extensions of time for the IRS to assess tax liability for Crestek, Inc. and Subsidiaries for tax years ending a) 6/30/07; b) 6/30/08; c) 6/30/09; d) 6/30/11; e) 6/30/12; and f) 6/30/13 including, but not limited to Form 872s signed by Crestek, Inc. and Subsidiaries or representative.
- (7) A list of any information and documents maintained electronically identifying each document by subject matter and format (i.e., tape, disk, etc.).
- (8) Any and all files relative to this audit and/or resulting administrative appeal, that includes information and documents obtained pursuant to summonses issued to third parties which are not otherwise included in the Administrative File.
- (9) Any and all files relative to the audits and/or resulting administrative appeal of Crestek, Inc. and Subsidiaries for tax years ending a) 6/30/07; b) 6/30/08; c) 6/30/09; d) 6/30/11; and e) 6/30/12 that may have been prepared by independent consultants, international examiners, economists, engineers, and any other specialists assigned which are not otherwise included in the Administrative File.
- (10) Any and all IRS Form 872s, Consent to Extend the Time to Assess Tax, executed by the taxpayer, or a representative of the taxpayer, related to tax years ending 2006/06 through 2014/06.
- (11) Any and all documents signed by Anthony "Tony" Hearn as an appointed representative of Crestek, Inc. & Subsidiaries during tax years ending 2006/06 through 2014/06.

See FOIA Requests attached as Ex. 1.

7. By letter dated January 22, 2016, Defendant acknowledged receiving Plaintiff's request on December 23, 2015 and assigned the request case number F16357-0038. Defendant also informed Plaintiff that Defendant had invoked a 10-day extension of time to process the request, as authorized by 5 U.S.C. § 552(a)(6)(B), and unilaterally granted itself an additional, unauthorized extension until February 8, 2016:

We have extended the statutory response date to February 8, 2016, after which you can file suit. An administrative appeal is limited to a denial of records, so it does not apply in this situation... You may file suit after February 8, 2016.

See Ltr Responses attached as Ex. 2.

8. By letter dated February 9, 2016, Defendant asked for more time to obtain the records requested and informed Plaintiff that it would be in contact by March 11, 2016. *Id.*

9. By letter dated March 10, 2016, Defendant asked for more time to obtain the records requested and informed Plaintiff that it would be in contact by June 30, 2016. *Id.*

10. By letter dated June 24, 2016, Defendant asked for more time to obtain the records requested and informed Plaintiff that it would be in contact by September 2, 2016. *Id.*

11. On July 8, 2016, Plaintiff Crestek Inc., & Subsidiaries and J. Michael Gordon, CEO of Crestek Inc., and Subsidiaries, sought to supplement Crestek Inc.'s prior FOIA request and sent an additional FOIA request to Defendant seeking access to the following:

- (1) Correspondence or communications between any of the following individuals regarding the Taxpayers: Internal Revenue Agent Kathleen M. Mitchell, Employee Identification Number 15-54465; Internal Revenue Agent Robert E. Bell, Employee Identification Number 1000212828; and/or Team Manager Patricia A. Katzmar.
- (2) Any and all correspondence, documents, communications, or work papers regarding the Taxpayer created by or submitted to Internal Revenue Agent Kathleen M. Mitchell, Employee Identification Number 15-54465.
- (3) Any and all correspondence, documents, communications, or work papers regarding the Taxpayer created by or submitted to Internal Revenue Agent Robert E. Bell, Employee Identification Number 1000212828.
- (4) Any and all correspondence, documents, communications, or work papers regarding the Taxpayer created by or submitted to Team Manager Patricia A. Katzmar.
- (5) Correspondence or communications regarding the Taxpayer between Internal Revenue Agent Kathleen M. Mitchell, Employee Identification Number 15-54465 and former Power of Attorney Richard J. Sapinski in his role as Taxpayer Representative.
- (6) Communications, both internal and among any exam team, issue management team, issue practice groups, counsel, technical advisors, engineers, or their functional equivalents concerning any IRS inquiry of the Taxpayer.
- (7) Any and all Forms 9984, *Examining Officer's Record* or functional equivalent related to any IRS inquiry into the Taxpayer's activities under IRM 4.10.9.4 (Aug. 11, 2014). This request includes, but is not limited to, Forms 9984 produced by Internal Revenue Agent Kathleen M. Mitchell, Employee Identification Number 15-54465 or Internal Revenue Agent Robert E. Bell, Employee Identification Number 1000212828.

- (8) Correspondence or memoranda related to Taxpayer or any IRS inquiry into the Taxpayer regarding consultation with the Director of Abusive Transactions and Technical Issues, IRS Criminal Investigation, or any examiner or supervisor.
- (9) Memoranda prepared by any examiner or special agent for a territory manager or special agent in charge regarding the status of a civil or criminal investigation of Taxpayer.
- (10) Any LB&I, IRS Criminal Investigation, or Department of Justice referrals or functional equivalent regarding Taxpayer.
- (11) Any conflict or deconfliction memoranda or notes to IRS Criminal Investigation or any documentation produced by IRS Criminal Investigation in regards to the Taxpayer under IRM 4.32.2.3.5 (June 08, 2012).

See Suppl. FOIA Request attached as Ex. 3.

12. By letter dated August 5, 2016, Defendant acknowledged receiving Plaintiffs' request on July 12, 2016 and assigned the request case number F16194-0031. Defendant also informed Plaintiff that Defendant had invoked a 10-day extension of time to process the request, as authorized by 5 U.S.C. § 552(a)(6)(B), and unilaterally granted itself an additional, unauthorized extension until August 23, 2016:

The FOIA allows an additional ten-day statutory extension in certain circumstances. To complete your request I need additional time to search for, collect, and review responsive records from other locations. We have extended the statutory response date to August 23, 2016, after which you can file suit.

See Resp. to Suppl FOIA Request attached as Ex. 4.

13. As of the date of this complaint, Defendant has failed to: (i) determine whether to comply with the request; (ii) notify Plaintiff of any such determination or the reasons therefor; (iii) advise Plaintiff of the right to appeal any adverse determination; and/or (iv) produce the requested records or otherwise demonstrate that the requested records are exempt from production.

14. Because Defendant failed to comply with the time limit set forth in 5 U.S.C. § 552(a)(6)(A), Plaintiffs are deemed to have exhausted any and all administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C).

COUNT 1
(Violation of FOIA, 5 U.S.C. § 552)

15. Plaintiff realleges paragraphs 1 through 13 as if fully stated herein.

16. Plaintiff has a right of access to the requested information under 5 U.S.C. §552(a)(3), and there is no legal basis for Defendant's denial of such access.

17. Defendant is unlawfully withholding records requested by Plaintiff under FOIA.

18. Plaintiffs are being irreparably harmed by reason of Defendant's unlawful withholding of records responsive to Plaintiffs' FOIA request, and Plaintiffs will continue to be irreparably harmed unless Defendant is compelled to conform its conduct to the requirements of the law.

COUNT II
(Request for Vaughn Index)

19. Plaintiff realleges paragraphs 1 through 13 as if fully stated herein.

20. Plaintiff moves this Court for an order requiring Defendant to provide within 30 days after service of the Complaint in this action, an itemized, indexed, inventory of every agency record or portion thereof responsive to Plaintiff's request which Defendant asserts to be exempt from disclosure, accompanied by a detailed justification statement covering each refusal to release records or portions thereof in accordance with the indexing requirements of Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert denied, 415 U.S. 977 (1974).

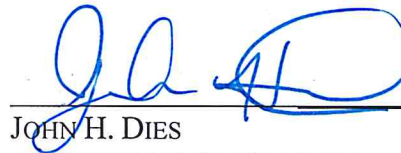
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests that the Court:

- (1) order Defendant to provide access to the requested documents;
- (2) order Defendant to conduct a search for any and all records responsive to Plaintiffs' FOIA request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiffs' FOIA request; and
- (3) expedite this proceeding as provided for in 28 U.S.C. §1657;
- (4) order Defendant to produce, by a date certain, any and all non-exempt records responsive to Plaintiffs' FOIA request;
- (5) order Defendant to provide a Vaughn index of any responsive records withheld under claim of exemption;
- (6) grant Plaintiffs an award of attorney's fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (7) grant Plaintiffs such other relief as the Court deems just and proper.

Respectfully submitted,

ZERBE, MILLER, FINGERET, FRANK & JADAV



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