

# **EXHIBIT F**

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September 12, 2016

**Via Certified Mail  
Return Receipt Requested**

IRS Appeals  
Attention: FOIA Appeals  
M/Stop 55202  
5045 E. Butler Ave.  
Fresno, CA 93727-5136

**Freedom of Information Request Appeal**

Dear Disclosure Appeals Officer:

On May 6, 2016, I, on behalf of Thomas Montgomery, made a request to the Internal Revenue Service (“IRS”) under the Freedom of Information Act, 5 U.S.C. § 552, as amended (“FOIA”) and the Privacy Act of 1974, 5 U.S.C. § 552a, as amended. That request is attached hereto as Exhibit A. Exhibit A also contains a power of attorney authorizing me to act on behalf of Mr. Montgomery in this matter.

I requested access to, and copies of, certain documents maintained by the IRS. Specifically, I requested that a copy of the following documents be provided to me.

1. Any IRS Form 211, Application for Award for Original Information, and any related documents, filed by any person, bearing Mr. Montgomery’s name or Taxpayer Identification Number (463-11-5608), between January 1, 2000, and December 31, 2007.
2. Any IRS Form 211A, State or Local Law Enforcement Application for Reimbursement for Original Information, and any related documents, filed by any person, bearing Mr. Montgomery’s name or Taxpayer Identification Number, between January 1, 2000, and December 31, 2007.

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3. Any IRS Form 3949A, Information Referral, and any related documents, filed by any person, bearing Mr. Montgomery's name or Taxpayer Identification Number, between January 1, 2000, and December 31, 2007.
4. Any IRS Form 11369, Confidential Evaluation Report on Claim for Award, and any related documents bearing Mr. Montgomery's name or Taxpayer Identification Number, created between January 1, 2000, and December 31, 2007.
5. Any IRS Form 13976, Itemized Statement Component of Advisee List, and any related documents, bearing Mr. Montgomery's name or Taxpayer Identification Number, provided to the IRS between January 1, 2000, and December 31, 2007.
6. Any list prepared by or on behalf of a material advisor as defined under 26 U.S.C. § 6112 and the regulations thereunder, bearing Mr. Montgomery's name or Taxpayer Identification Number, provided to the IRS between January 1, 2000, and December 31, 2007, whether or not related to any IRS Form 8918, Material Advisor Disclosure Statement, or 8264, Application for Registration of a Tax Shelter.
7. Any correspondence or other document created or received by the IRS, dated between January 1, 2000, and December 31, 2007, between any IRS employee and any third party, regarding Mr. Montgomery and/or his potential tax liability.
8. Any document created or received by the IRS memorializing any discussion, meeting, or third-party correspondence occurring between January 1, 2000, and December 31, 2007, between any IRS employee and any third party, regarding Mr. Montgomery and/or his potential tax liability.
9. Any document created or received by the IRS memorializing any discussion, meeting, or third party correspondence occurring between January 1, 2000, and December 18, 2006, between any IRS employee and any third party, regarding any transaction referred to in *Southgate Master Fund, LLC v. United States*, 651 F. Supp. 2d 596 (N.D. Texas 2009).
10. Any document received by the IRS from any third party between January 1, 2000, and December 18, 2006, regarding any transaction referred to in *Southgate Master Fund, LLC v. United States*, 651 F. Supp. 2d 596 (N.D. Texas 2009).
11. Any document created or received by the IRS memorializing any discussion, meeting, or third party correspondence occurring between January 1, 2000, and January 9, 2007, between any IRS employee and any third party, regarding any transaction referred to in *Bemont Investments, LLC v. United States*, 106 A.F.T.R.2d 2010-5542 (E.D. Texas 2010).
12. Any document received by the IRS from any third party between January 1, 2000, and January 9, 2007, regarding any transaction referred to in *Bemont Investments, LLC v. United States*, 106 A.F.T.R.2d 2010-5542 (E.D. Texas 2010).

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Also on May 6, 2016, I made similar requests on behalf of Beth Montgomery; Southgate Master Fund, LLC; Southbrook Master, LLC; Classic Paragon Management, LLC; and Pinnacle Management, LLC. These requests, including powers of attorney authorizing me to act on behalf of those individuals and entities, are attached hereto as Exhibits B through F.

I received response letters dated June 6, 2016 regarding my requests on behalf of all of the above individuals and entities. These responses were signed by Patricia A. Williams, ID # 1000183705, Senior Disclosure Specialist, Disclosure Office 9. The responses requested additional time. I received a further response letter, dated July 18, 2016, requested additional time to respond to the requests relating to Thomas Montgomery; Beth Montgomery; Southgate Master Fund, LLC; Southbrook Master, LLC; and Classic Paragon Management, LLC.

On August 8, 2016, my colleague Nicholas Wilkins spoke to Ms. Williams by phone; she indicated that Pinnacle Management, LLC would also be searched through Mr. Montgomery's file.

I received a final response dated August 18, 2016. The response was signed by Pamela S. Tompkins, Disclosure Manager, Disclosure Office 9. That response is attached hereto as Exhibit G. The response identifies Ms. Williams as the contact person and provides case number references of F16131-0059, F16191-0062, F16131-0061, F16131-0050, and F16131-0049. Ms. Tompkins' letter explicitly responds to the requests regarding Thomas Montgomery; Beth Montgomery; Southgate Master Fund, LLC; Southbrook Master, LLC; and Classic Paragon Management, LLC. Given the phone conversation described above, however, I consider this letter to also be a final response to the request regarding Pinnacle Management, LLC. I have not otherwise received a final response regarding my request with respect to that entity.

The response refuses to confirm or deny the existence of records responsive to requests 1 through 5, asserting that FOIA exemption (b)(7)(D) applies. The response also states that the disclosure officer "found no documents specifically responsive" to requests 6 through 12. The response did not describe the search that was undertaken.

### **Requests 1 through 5**

I appeal the denial of my request. I request that the Commissioner grant my request in full and provide copies of all records requested.

The response does not specifically state whether responsive records exist with respect to these requests. Because the response cites FOIA exemption (b)(7)(D), I assume that such records do exist and are being withheld on the basis of that exemption. As the Internal Revenue Manual states, "[u]se of this exemption by itself provides an indication that a confidential source exists."<sup>1</sup> Please confirm whether there are such responsive records.

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<sup>1</sup> I.R.M. § 11.3.13.7.2.7.4(6).

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The IRS's own procedures further direct disclosure personnel to "[u]se this exemption only where Disclosure personnel have confirmed, through consultation with the affected function(s), that the requester knows a confidential source exists and asserting the exemption is not likely to indirectly reveal the identity of the source."<sup>2</sup> Please describe any steps taken obtain such confirmation, including identifying the relevant functions.

To the extent the Commissioner's position is that a record contains information exempt under FOIA exemption (b)(7)(D), FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."<sup>3</sup> Thus, "an agency cannot justify withholding an entire document simply by showing that it contains some exempt material."<sup>4</sup> To the extent that you maintain that any records requested contains some exempt material, please provide all reasonably segregable portions of those records.

FOIA exemption (b)(7)(D) permits the withholding of records or information only to the extent that the record or information could reasonably be expected to disclose the identity of a confidential source.<sup>5</sup> It does not permit withholding the existence of a confidential source or (except in certain circumstances not applicable here) the information provided by that source.<sup>6</sup> Indeed, the statutory limitation of protection for "information furnished by a confidential source" to specific cases (criminal and national security intelligence investigations) demonstrates that there is no such protection in other cases (such as this one, involving at most a civil investigation).

A response refusing to admit or deny the existence of any responsive records is inappropriate and contrary to the law. An agency cannot refuse to confirm or deny the existence of responsive documents except in "exceptional" circumstances—which at least one court has found not to exist with respect to a FOIA request for Forms 211 and 211A.<sup>7</sup> A response refusing to admit or deny the existence of responsive records is particularly inappropriate with respect to this exemption because the exemption is only applicable where there is a confidential source. Further, because "the fact of the confidential nature of the informant is a question of fact to be determined in regard to each source," a requester is "entitled to challenge [an agency's] invocation of FOIA exemption (b)(7)(D) and such challenge . . . would be unduly disadvantaged by the refusal of the agencies to disclose even the existence of records responsive to [the] request."<sup>8</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> 5 U.S.C. § 552(b). Further, it requires that the amount of information deleted be indicated. *Id.*

<sup>4</sup> *Mead Data Central, Inc. v. United States Dept. of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

<sup>5</sup> 5 U.S.C. § 552(b)(7)(D).

<sup>6</sup> *Id.*

<sup>7</sup> *Leonard v. Dept. of Treas.*, 109 AFTR 2d 2012-1395 (D.N.J. 2012).

<sup>8</sup> *Schulze v. FBI*, 2010 U.S. Dist. LEXIS 74360 (E.D. Cal. 2010).

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Thus, even where the (b)(7)(D) exemption is applicable, it is only “appropriate for the Service to have excised from released documents portions which directly disclose this source’s identity or which contain information that might lead to such disclosure,”<sup>9</sup> not to withhold documents entirely—and certainly not to refuse to even state whether the documents exist. Again, FOIA requires production of any reasonably segregable portions of responsive records. Therefore, I request that any responsive records be provided to me, with any necessary redactions “blacked out” rather than “whited out” or “cut out” for any portions for which an exemption is claimed, so that we may ascertain where information has been redacted.

The Department of Justice states that a response refusing to confirm or deny the existence of responsive documents should be used only in “very rare circumstances” and, further, that “no agency should attempt to apply it without consulting with the Department of Justice.”<sup>10</sup> Please confirm whether the Department of Justice was consulted in the provision of the response and, if so, who at the Department of Justice was consulted.

To the extent that any responsive records or portions of responsive records continue to be withheld, I request that you complete and provide a log containing, for each record withheld in whole or in part, the date of the record, the type of record, the general nature or description of the record, the author or authors of the record, the location of the record, and the basis for withholding that record or portion thereof (the “Log”).<sup>11</sup>

### **Requests 1 through 12**

Please also provide verification that an appropriate search was conducted. In particular, please describe the type of search performed, the databases or other sources searched, and any search terms used.<sup>12</sup> Please also state whether all files likely to contain responsive documents were searched and the location of those files.<sup>13</sup> If not, please identify any files not searched that are likely to contain responsive documents, state why any such files were not searched, and provide the location of those files. To the extent that an inadequate search was performed, please conduct an appropriate search and provide me copies of any responsive documents or complete and provide the Log requested above. Without limiting my original request, I note that the Internal Revenue Manual states that certain of the documents requested pursuant to my request are to be entered into the Criminal Investigation Management Information System (“CIMIS”) for tracking purposes.<sup>14</sup> Please confirm that the CIMIS system has been searched for all requested documents

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<sup>9</sup> *Stauss v. Int. Rev. Serv.*, 48 AFTR 2d 81-5617 (D.D.C. 1981).

<sup>10</sup> Dept. of Justice, *FOIA Update Vol. IV, No. 2* (1983), available at <https://www.justice.gov/oip/blog/foia-update-foia-counselor-questions-answers-22>.

<sup>11</sup> *See, e.g., Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); *Batton v. Evers*, 598 F.3d 169 (5th Cir. 2010).

<sup>12</sup> *See Sea Shepherd Conservation Society v. Internal Revenue Service*, 89 F. Supp. 3d 81, 90 (D.D.C. 2015).

<sup>13</sup> *Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

<sup>14</sup> *See, e.g., I.R.M. 9.4.1.5.1.1.*

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related to Montgomery Capitol Advisors, LLC (or bearing Montgomery Capital Advisors, LLC's name or Taxpayer Identification Number), and provide any responsive documents. Further, and again without limiting my original request, I understand that the IRS Whistleblower Office uses or has used various databases, including the ICEWEB, ITRAK, Access, and Entellitrak (or "E-TRAK") systems.<sup>15</sup> Please confirm that these systems have been searched for all requested documents and provide any responsive documents. Please identify other databases that the IRS Whistleblower Office uses or has used, confirm that these systems have been searched for all requested documents and provide any responsive documents. To the extent that any documents are withheld, in whole or in part, please complete and provide the Log requested above.

Please also clarify what is meant by "specifically responsive" and whether any documents have been withheld as responsive, "generally" responsive, or otherwise, but not "specifically responsive" to my requests. To the extent that any documents have been so withheld, please provide those documents or complete and provide the Log requested above.

The determination on appeal, copies of any responsive documents, and the Log should be sent to me at the address below:

Kim Marie Boylan  
White & Case LLP  
701 Thirteenth Street, NW  
Washington, DC 20005

Best regards,



**Kim Marie Boylan**

T +1 202 626 3685  
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<sup>15</sup> Treasury Inspector General for Tax Administration, *Deficiencies Exist in the Control and Timely Resolution of Whistleblower Claims*, August 20, 2009, at 7-8; Treasury Inspector General for Tax Administration, *Improved Oversight Is Needed to Effectively Process Whistleblower Claims*, April 30, 2012, at 5-6.