

ATTACHMENT J

Internal Revenue Service

Appeals Office
P.O. Box 24018
Fresno, CA 93779-4018

Date: JAN 12 2018

MARESCA, ELIZABETH
LINCOLN SQUARE LEGAL SERVICES INC
150 W 62ND ST 9TH FLOOR
NEW YORK NY 10023

Department of the Treasury

Person to Contact:

Theresa Carrillo
Employee ID Number: 1000157528
Tel: (559) 454-6337
Fax: (855) 223-7117

Refer Reply to:

AP:EX:FRC:TC

In Re:

Freedom of Information Act

Tax Period(s) Ended:

FOIA Case Number: F16270-0041

Dear Ms. Elizabeth Maresca:

This letter is in response to your December 21, 2017 Freedom of Information Act (FOIA) appeal of the November 13, 2017 response of Disclosure Specialist to your September 20, 2016 FOIA request.

You requested all agency records and other documents within or related to the file for Rev. Proc. 20016-47 (waiver of the 60 rollover retirement) and all agency records and other documents within or related to the file for Rev. Proc. 2003-16 effective January 27, 2003.

The Disclosure Specialist responded to the request in two parts. The Disclosure Specialist responded to the 1st part of your request for documents in the file for Rev. Proc. 2016-47 on November 1, 2017. The Disclosure Specialist stated that they found 90 pages of responsive documents. The Disclosure Specialist stated that they are withholding 4 pages in part and 75 pages in full citing FOIA exemptions (b)(3) in conjunction with IRC §6103(a) and (b)(5).

The Disclosure Specialist responded to the 2nd part of your as a final response. The Disclosure Specialist responded to the request on November 13, 2017 for documents in the file for Rev. Proc. 2003-16. The Disclosure Specialist stated that they found 1,325 pages of responsive documents. The Disclosure Specialist stated that the are withholding 76 pages in part and 916 pages in full citing FOIA exemptions (b)(5) and (b)(6).

You submitted an appeal appealing the denial of records. You stated that the IRS failed to meet its burden of an adequate search for the documents. You stated that the IRS did not establish or explain their methods of search. You state that the exemptions should be narrowly construed and that the IRS failed to meet the production burden by withholding a significant number of documents. You state that you do not believe that the stated exemptions should apply to the type of documents requested since they are

not individual tax records. You are requesting that the IRS to reconsider and review the redactions and withholding and release additional information.

Please be aware that 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. 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 withheld was properly through the FOIA exemptions cited.

We have reviewed the response of the Disclosure Specialist and have determined that it is appropriate under the circumstances. We are satisfied that a reasonable search for records was performed and that to the extent that the records existed in the audit file at the time of your request, they were obtained, reviewed, and provided if appropriate.

In regards to the material withheld, we sustain its redaction under FOIA exemption (b)(3) in conjunction with Internal Revenue Code § 6103. The information you are seeking is the return information of a third party taxpayer. "Return information" is defined in I.R.C. § 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. § 6103(a) from providing you with a copy of that information. 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. § 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).

We are sustaining the redactions under FOIA exemption (b)(5). FOIA 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 Supreme Court has held that the attorney work-product and the attorney-client privileges fall within the ambit of the (b)(5) exemption of the FOIA. NLRB v. Sears,

Roebuck & Co., 421 U.S. 132, 149 (1975).

The attorney work-product privilege protects documents and other memoranda prepared by an attorney in contemplation of litigation. See Hickman v. Taylor, 329 U.S. 495, 509-10 (1947). Its purpose is to protect the adversarial trial process by insulating the attorney's preparation from scrutiny. See Jordan v. Department of Justice, 591 F.2d 753, 775 (1978) (en banc). The attorney-client privilege concerns "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." Mead Data Cent., Inc. v. Department of the Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977).

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 decision-making 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).

We are also sustaining the redaction under FOIA exemption (b)(6). FOIA exemption (b)(6) exempts from disclosure files that, if released, would clearly be an unwarranted invasion of personal privacy. These include medical, personnel and similar files. The determination of whether a disclosure constitutes a clearly unwarranted invasion of personal privacy is based on a "balancing of interests between the protection of an individual's privacy from unnecessary public scrutiny, and the preservation of the public's right to governmental information." Department of the Air Force v. Rose, 425 U.S. 352 (1976). The Supreme Court has redefined the nature of the public and private interests that are to be balanced. Department of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749 (1989). The Supreme Court reviewed the legislative history of the FOIA to conclude that the central purpose of the statute is to "contribut[e] significantly to public understanding of the operations or activities of the government." 489 U.S. at 775 (emphasis in original). Reporters Committee requires a balancing of

the public interest in the disclosure of information which will add to "the public understanding of the operations or activities of the government" with the countervailing privacy interests of the affected individuals. Because the data you are seeking has no public interest and a strong privacy interest, it is exempt under subsection (b)(6).

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,



P. Perez
Appeals Team Manager