

# **EXHIBIT 9**



1776 K STREET NW  
WASHINGTON, DC 20006  
PHONE 202.719.7000

www.wileyrein.com

Matthew W. Beato  
202.719.7518  
mbeato@wileyrein.com

June 1, 2018

**VIA OVERNIGHT COURIER AND CERTIFIED U.S. MAIL,  
RETURN RECEIPT REQUESTED**

David Kautter, Acting Commissioner of Internal Revenue  
IRS Appeals  
Attention: FOIA Appeals  
M/Stop 55202  
5045 E. Butler Ave.  
Fresno, California 93727-5136

IRS Appeals  
9733A Riverside Avenue, Suite 110  
Riverside, California 92506-FOIA Appeal

Re: Freedom of Information Act Request (F16193-0012)

Dear Mr. Kautter:

This firm has been retained to represent Randy Sowers in connection with the request that he submitted to the Internal Revenue Service (“IRS”) under the Freedom of Information Act (“FOIA”) on July 7, 2016. Please direct all correspondence intended for Mr. Sowers to my attention.<sup>2</sup> Pursuant to FOIA and the applicable implementing regulations,<sup>3</sup> and as set forth more fully below, Mr. Sowers appeals the decision of the IRS to withhold certain documents, in part and full, that are responsive to his FOIA request.

**I. BACKGROUND**

**A. Mr. Sowers submits a FOIA request on July 7, 2016.**

On July 7, 2016, Mr. Sowers requested “all documents pertaining to the petition for

---

<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> A Form 2848, Power of Attorney and Declaration of Representative, is enclosed with this letter as Exhibit A, in which Mr. Sowers authorizes me to act on his behalf. Pursuant to 26 C.F.R. § 601.702(10)(ii)(D), the determination on appeal intended for Mr. Sowers may be directed to me at the address listed on this letterhead.

<sup>3</sup> 26 C.F.R. § 601.702.



David Kautter, Acting Commissioner of Internal Revenue  
RE: FOIA Appeal (F16193-0012)  
June 1, 2018  
Page 2

remission or mitigation that [he] submitted on July 16, 2015.”<sup>4</sup> As Mr. Sowers explained, his petition sought the return of \$29,500 that was seized from his bank account on or about February 28, 2012 and ordered forfeited to the IRS by the U.S. District Court for the District of Maryland on May 30, 2012. Mr. Sowers then specifically indicated that he was requesting the following documents:

- *All memoranda, emails, or other written correspondence generated by the IRS pertaining to my petition for remission or mitigation.*
- *All memoranda, emails, or other written correspondence received by the IRS pertaining to my petition for remission or mitigation.*
- *A copy of any written recommendation made by the IRS to the Department of Justice concerning the appropriate resolution of my petition for remission or mitigation.*

Mr. Sowers’s request further explained that his petition for remission or mitigation had been the subject of significant media attention as well as congressional oversight, and that disclosure of the requested information would contribute significantly to the public understanding of the government’s consideration of that petition.

**B. The IRS provides some, but not all, requested documents—many with heavy redactions—nearly two years after Mr. Sowers’s request.**

Under the applicable regulations, the IRS was required to respond to Mr. Sowers’s request by August 5, 2016 and, if “unusual circumstances” applied to seek an extension until August 19, 2016.<sup>5</sup> There should have been no “unusual circumstances” here—the records were not voluminous, and Mr. Sowers specifically indicated in his initial letter that he believed that relevant records were held within the office of Richard Weber, Chief, IRS-CI. Even though Mr. Sowers was entitled to a response by August 2016, the IRS issued a series of letters that purported to “extend” the deadline for a response again and again—first until November 2016, then until February 2017, then until April 2017, then until June 2017, then until September 2017. The IRS then indicated to Mr. Sowers that it hoped to have a response in November 2017. When that date passed without a substantive response, the IRS indicated that it would have a response in

---

<sup>4</sup> A copy of this letter is enclosed as Exhibit B. The letter was directed to an IRS FOIA mailbox in Atlanta, Georgia.

<sup>5</sup> 5 U.S.C. § 552(a)(6)(A)(i) (response required within 20 days); 5 U.S.C. § 552(a)(6)(b) (ten day extension allowed in certain circumstances).



David Kautter, Acting Commissioner of Internal Revenue  
RE: FOIA Appeal (F16193-0012)  
June 1, 2018  
Page 3

December 2017. It then said that it hoped to respond in January 2018. Throughout this time, Mr. Sowers and his counsel consistently cooperated with the IRS's questions concerning Mr. Sowers's FOIA request.

Finally, on March 5, 2018, the IRS issued a partial denial of Mr. Sowers's request.<sup>6</sup> The IRS indicated that it located 389 pages in response to Mr. Sowers's request and was producing 341 pages, withholding 81 pages in part and 48 pages in full.<sup>7</sup> To support its decision, the IRS purported to invoke FOIA exemptions (b)(3), (b)(5), (b)(6), (b)(7)(A), (b)(7)(C), and (b)(7)(E).<sup>8</sup> A substantial number of the unredacted pages to Mr. Sowers are documents that are publicly available or were already in his possession—for instance, the copy of Mr. Sowers's petition for remission or mitigation and the attached exhibits makes up approximately 210 out of the 260 unredacted pages.

Mr. Sowers timely submits this appeal from the March 5, 2018 denial of his request.<sup>9</sup> Specifically, pursuant to 26 C.F.R. § 601.702(c)(10)(F), Mr. Sowers asks that you “verify that an appropriate search was conducted and the responsive records were either produced or an appropriate exemption asserted.”

## II. ARGUMENT

As you know, FOIA “creates a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed.”<sup>10</sup> Exemptions to FOIA are “limited” and “narrowly construed,” and must “not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.”<sup>11</sup>

Under FOIA, “[a]ny reasonably segregable portion of a record [must] be provided to any person requesting such record after deletion of the portions of which are exempt under [FOIA].”<sup>12</sup> Agencies cannot withhold an entire document simply by showing

<sup>6</sup> A copy of this letter is attached as Exhibit C.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Pursuant to 5 U.S.C. § 552(a)(6)(A)(III)(aa) and 26 C.F.R. § 601.702, this appeal is timely because it is postmarked within 90 days from March 5, 2018 (*i.e.*, prior to June 3, 2018).

<sup>10</sup> *E.g.*, *Ctr. for the Study of Servs. v. United States Dep't of Health & Human Servs.*, 130 F. Supp. 3d 1, 4 (D.D.C. 2015).

<sup>11</sup> *Judicial Watch, Inc. v. United States Dep't of Justice*, 118 F. Supp. 3d 266, 270 (D.D.C. 2015).

<sup>12</sup> *See* 5 U.S.C. § 552(b).



David Kautter, Acting Commissioner of Internal Revenue  
RE: FOIA Appeal (F16193-0012)  
June 1, 2018  
Page 4

that it contains some exempted material, and agencies must construe exemptions narrowly, resolving all doubts in favor of disclosure.<sup>13</sup> Yet in response to Mr. Sowers's request, many documents have been withheld in their entirety, and other documents have significant redactions.

It is very likely that the withheld documents contain at least some non-exempt material. It is, however, impossible for Mr. Sowers to evaluate the propriety of all of the IRS's claimed exemptions. In order to justify withholding or redacting material, the IRS must offer "a *relatively detailed* justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the *particular part* of a withheld document to which they apply."<sup>14</sup> Instead, the IRS has redacted the *entirety* of many pages, and has provided no "justification" for any of its redactions beyond (i) the exemption number listed on certain partially redacted documents and (ii) a boilerplate summary of the FOIA exemptions in the IRS's March 5, 2018 correspondence. No other explanation was provided. The IRS has not met its burden to specifically identify why a given exemption is relevant or to correlate its justifications with particular parts of documents.

In light of the foregoing, it is impossible to evaluate the propriety of many of the exemptions claimed by the IRS. However, a review of the specific redactions made by the IRS confirms that many of the IRS's redactions are legally questionable at best. For instance, the IRS has asserted FOIA Exemption (b)(5) as the basis for a number of its redactions in its October 5, 2015 memorandum. That exemption is for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."<sup>15</sup> To assert this exemption, the agency must provide sufficient specificity to permit Mr. Sowers to understand its rationale for withholding the responsive information. Not only must the agency identify the particular privilege invoked, it must identify the particular issue or policy to which the redacted information contributed.<sup>16</sup> The IRS has failed to meet this standard and has instead provided a general, conclusory statement invoking Exemption (b)(5),

---

<sup>13</sup> See, e.g., *Wightman v. Bureau of Alcohol, Tobacco & Firearms*, 755 F.2d 979, 982–83 (1st Cir. 1985).

<sup>14</sup> E.g., *Schiller v. N.L.R.B.*, 964 F.2d 1205, 1210 (D.C. Cir. 1992) (emphasis added).

<sup>15</sup> 5 U.S.C. § 552(b)(5).

<sup>16</sup> See, e.g., *Judicial Watch v. USPS*, 297 F.Supp.2d 252, 259 (D.D.C. 2004) (when invoking the deliberative process privilege, an agency must also either "pinpoint an agency decision or policy to which the document contributed" or "identify a decisionmaking process to which a document contributed.") (internal citations omitted).



David Kautter, Acting Commissioner of Internal Revenue  
RE: FOIA Appeal (F16193-0012)  
June 1, 2018  
Page 5

only providing a boiler-plate description of the bases for its redactions.

The IRS appears to have adopted an overbroad interpretation of FOIA Exemption (b)(6) as well. That exemption shields individuals from the disclosure of “intimate personal details.”<sup>17</sup> It does not allow the IRS to shield names of all IRS employees.<sup>18</sup> Nor does it allow the IRS to redact the names of persons whose names are easily ascertainable by the public.<sup>19</sup> Indeed, the IRS has repeatedly (but not uniformly) redacted the name of Mr. Sowers’s wife, Karen, even though Mr. and Mrs. Sowers have publicly disclosed their petition for remediation or mitigation,<sup>20</sup> and this case has been widely publicized. Yet rather than engaging in the careful balancing required by Exemption (b)(6), the IRS appears to have blindly redacted almost every name of a person that appears in the documents.

The IRS’s interpretation of FOIA Exemption (b)(7) is also overbroad. For instance, subpart (A) of that exemption authorizes withholding of “records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings.”<sup>21</sup> Because this is a temporary protection that only applies to *pending* proceedings, there is no basis for applying subpart (A) here.<sup>22</sup> And, the IRS appears to have claimed that subpart (E) justifies redacting paragraphs of the IRS’s October 5, 2015 memorandum that characterize portions of the Internal Revenue Manual. Because this exemption only protects against the disclosure of “techniques and procedures not already well-known to the public,”<sup>23</sup> the IRS cannot rely on it to shield disclosure of its routine and publicly-known investigatory procedures.

---

<sup>17</sup> *Ripskis v. Dep’t of Hous. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984).

<sup>18</sup> *Aguirre v. SEC*, 551 F. Supp. 2d 33, 54 (D.D.C. 2008) (“Correspondence does not become personal solely because it identifies government employees.”).

<sup>19</sup> *Hall v. DOJ*, 552 F. Supp. 2d 23, 30-31 (D.D.C. 2008) (stating that “[t]he court agrees that, to the extent that the non-redacted portions specifically identify the names of individuals in specific redacted portions of the documents, DOJ cannot redact these names” because “[t]he FOIA exemptions do not apply once the information is in the public domain”).

<sup>20</sup> See <http://ij.org/wp-content/uploads/2015/07/irs-forfeiture-petitions-randy-sowers-petition.pdf>.

<sup>21</sup> 5 U.S.C. § 552(b)(7)(A).

<sup>22</sup> See, e.g., *Hamilton v. Weise*, No. 95-1161, 1997 U.S. Dist. LEXIS 18900, at \*25-26 (M.D. Fla. Oct. 1, 1997) (declaring that Exemption (b)(7)(A) was enacted “mainly to overrule judicial decisions that prohibited disclosure of investigatory files in ‘closed’ cases”).

<sup>23</sup> *Rugiero v. DOJ*, 257 F.3d 534, 551 (6th Cir. 2001).



David Kautter, Acting Commissioner of Internal Revenue  
RE: FOIA Appeal (F16193-0012)  
June 1, 2018  
Page 6

### III. CONCLUSION

Because the IRS has not met its burden to justify withholding responsive documents, in whole or in part, Mr. Sowers asks the IRS to produce unredacted copies of all documents responsive to his July 7, 2016 request. As previously, Mr. Sowers asks that the IRS waive all fees associated with production in response to this letter.

If this appeal is denied, Mr. Sowers is entitled to receive “the reasons [for the denial], the name and title or position of the official responsible for the denial on appeal, and the provisions of 5 U.S.C. 552(a)(4) for judicial review of that determination.”<sup>24</sup> If this appeal is denied or if the IRS does not respond within 20 working days, Mr. Sowers reserves all of his rights under FOIA, including to initiate a civil proceeding to compel disclosure of the records that have been withheld in whole and in part, and to seek attorneys’ fees under 5 U.S.C. § 552(a)(4)(E)(i).

I look forward to receiving your prompt reply to this appeal submitted on behalf of Mr. Sowers. Please do not hesitate to contact me with any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Matthew W. Beato".

Matthew W. Beato

Enclosures

---

<sup>24</sup> See 26 C.F.R. § 601.702(c)(10)(iii).