

# **EXHIBIT 10**

**Internal Revenue Service**

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

Date: June 25, 2018

Robert Johnson  
The Institute for Justice  
901 N. Glebe Rd., Suite 900  
Arlington, VA 22203

Re: Randy Sowers

**Department of the Treasury**

**Person to Contact:**

Brett Ziegler  
Employee ID Number: 1000094813  
Tel: (559) 253-4828  
Fax: (559) 253-4890

**Refer Reply to:**

AP:W:A8:T7:FSC

**In Re:**

Freedom of Information Act

**Disclosure Case Number(s):**

F16193-0012

Dear Robert Johnson,

This letter is in response to your appeals request received on June 05, 2018 for Freedom of Information Act (FOIA) information. According to your letter you are appealing the response from the Disclosure Specialist of your request for information dated March 05, 2018.

You asked for the following:

1. All memos, emails, or other written correspondence generated by the IRS pertaining to Mr. Sower's petition for remission or mitigation.
2. All memos, emails, or other written correspondence received by the IRS pertaining to Mr. Sower's petition for remission or mitigation.
3. A copy of any written recommendation made by the IRS to the Just Department concerning the appropriate resolution of Mr. Sower's petition for remission or mitigation.

Of the 389 pages the Disclosure Specialist located in response to your request, they withheld 81 pages in part and 49 pages in full under the following FOIA exemptions:

FOIA subsection (b)(3) states that the disclosure provisions of the FOIA do not apply to matters specifically exempted by statute from disclosure, provided that such statute:

(A) requires that the matters be withheld from the public 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.

When material is obtained in conjunction with a Grand Jury investigation, that documentation is protected from disclosure under the Federal Rules of Criminal Procedure (Rule 6(e)) whether or not prosecution follows. In addition, because

Rule 6(e) has been amended by Congress it qualifies as an FOIA exemption (b)(3) statute. See, e.g., Fund for Constitutional Government v. Nat. Archives & Records Services, 656 F.2d 856, 867 (D.C. Cir. 1981) (concluding that Rule 6(e) of the Federal Rules of Criminal Procedure, regulating disclosure of matters occurring before grand jury, satisfies Exemption 3's "statute" requirement because it was specially amended by Congress in 1977).

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).

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.

FOIA subsection (b)(7)(A) 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).

I.R.C. Section 6103 has been held to be a subsection (b)(3) statute under the FOIA. *Church of Scientology v. IRS*, 484 U.S. 9 (1987); *Chamberlain v. Kurtz*, 589 F.2d 827 (5th Cir. 1979), cert. denied, 444 U.S. 842 (1979). When disclosure of return information will seriously impair Federal tax administration, it may be withheld. *Chermack v. IRS*, 81-1 USTC Paragraph 9337 (N.D. Tex. 1981). It has been determined that the disclosure of some of the information withheld would impair Federal tax administration by interfering with the pending administrative proceedings; and, therefore, this information is exempt from disclosure pursuant to exemption (b)(3) in conjunction with I.R.C. Section 6103(e)(7).

FOIA exemption (b)(7)(C) 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.

Exemption (b)(7)(E) affords protection to all law enforcement information which "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. 552(b)(7)(E). See also *Becker v. IRS*, 34 F.3d at 405; *PHE, Inc. v. Dept. of Justice*, 983 F.2d 248, 251 (D.C. Cir. 1993) ("Release of FBI guidelines as to what sources of information are available to its agents might encourage violators to tamper with those sources of information and thus inhibit investigative efforts.").

It is well settled that a requester is not entitled to receive a Vaughn index during the administrative process as the courts do not require the submission of such an index prior to the time when a dispositive motion is filed. See, e.g., *Edmond v. U.S. Attorney*, 959 F. Supp. 1, 5 (D.D.C. 1997) (rejecting, as premature, request for Vaughn Index when agency had not processed plaintiff's request), *Tannehill v. Dept. of the Air Force*, No. 87-1335, slip op. at 1 (D.D.C. Aug. 20, 1987) (noting that standard practice is to await filing of agency's dispositive motion before deciding whether additional indexes will be necessary); *Miscavige*, 2 F.3d at 369 ("The plaintiff's early attempt in litigation of this kind to obtain a Vaughn Index... is inappropriate until the government has first had a chance to provide the court with the information necessary to make a decision on the applicable exemptions."). Therefore, any effort to compel an agency to prepare a Vaughn Index prior to the filing of the agency's dispositive motion is typically denied as premature.

We have reviewed the response of the Disclosure Specialist and have determined that it is appropriate under the circumstances. The Appeals office

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 the documents requested fall within the FOIA exemption(s) cited. Toward that end, we address the adequacy of the search and the appropriateness of the redactions and the exemptions cited. Our written notice is your determination that the redacted information was withheld properly through the FOIA exemptions cited. Our sole responsibility is to determine if the documents were properly withheld under 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  
Email: [ogis@nara.gov](mailto: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', with a checkmark at the end.

P. Perez  
Appeals Team Manager