

Attachment C

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Commissioner, Internal Revenue Service
IRS Appeals
6377A Riverside Avenue, Suite 110
Riverside, California 92506

FOIA APPEAL

Via Priority and Certified Mail Return Receipt Requested

Re: FREEDOM OF INFORMATION ACT APPEAL: FOIA Request F 19032-0300

Dear FOIA Administrative Appeals Officer:

I am C. Peter Sorenson an attorney licensed in the District of Columbia (DC Bar No. 438089) and on behalf of Mr. Chester W. Nosal and Natascha Nosal ("Nosal" or "the Nosals" or "requesters") they appeal the United States Department of the Treasury Internal Revenue Service's ("IRS") final determination response to the Nosals' referenced request for records pursuant to the Freedom of Information Act, 5 U.S.C. § 552, as amended ("FOIA"), assigned FOIA Request F 19032-0300 ("FOIA Request"). IRS improperly responded to the Nosals' FOIA Request, failed to conduct an adequate search for responsive records, failed to segregate records that should have been provided and improperly redacted records pursuant to FOIA Exemptions. For the reasons set forth below, IRS's withholding of responsive records violates FOIA.

You have 20 working days to respond to this appeal. You are advised that the Nosals intend to pursue legal action in the United States District Court for the District of Columbia if IRS does not search for and disclose all responsive records immediately, in accordance with FOIA's disclosure mandate and federal policies.

FACTUAL BACKGROUND ABOUT THE NOSALS' FOIA REQUEST

On January 17, 2017 an attorney for the Nosals submitted a FOIA Request on their behalf via U.S. mail to IRS (Attachment A). He requested a large number of records believed to be in the possession of the IRS and offered to pay copying costs up to \$2000 without further authorization. These records concern the whistle-blower claims made against the Nosals.

On February 25, 2019 the IRS wrote the Nosals' attorney and informed him that "[T]his is our final response to your Freedom of Information Act request..." No records were released. The IRS response letter is attached as Exhibit B.

The Nosals challenge both the search as being not adequate and that the withholdings violate the Freedom of Information Act.

THE FREEDOM OF INFORMATION ACT

The purpose of FOIA is to “open agency action to the light of public scrutiny.” Dep’t of the Air Force v. Rose 425 U.S. 352, 372 (1976). Former President Obama reinforced FOIA’s strong presumption of disclosure with regard to all FOIA decisions. See Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (directing agencies to administer FOIA under a presumption that, “[i]n the face of doubt, openness prevails”). Former Attorney General Eric Holder issued FOIA guidelines that reinforce a commitment to open government, encouraging federal agencies to both “make discretionary releases of information” and to “make partial disclosures” when an agency determines full disclosure is not possible. See Former Attorney General Eric Holder’s Memorandum for Heads of Executive Departments and Agencies (Mar. 19, 2009). In his memo, the Former Attorney General also announced a “foreseeable harm” standard for defending agency decisions to withhold information under FOIA. *Id.* Thus, the DOJ will defend an agency’s denial of a FOIA request “only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” See *id.* These authorities have not been changed by the current Administration and remain in effect.

FOIA “mandates a policy of broad disclosure of government documents” and carries a strict disclosure mandate that requires federal agencies to expeditiously disclose requested records to requesters. See 5 U.S.C. § 552, Church of Scientology v. Dep’t of the Army, 611 F.2d 738, 741 (9th Cir. 1980). Consequently, any inquiry under FOIA brings with it a “strong presumption in favor of disclosure.” U.S. Dep’t of State v. Ray 502 U.S. 164, 173 (1991). To that end, nothing in FOIA should be read to “authorize withholding of information or limit the availability of records to the public, except as specifically stated.” See 5 U.S.C. § 552 (c). Congress recognized that in certain limited instances, records may be exempt from FOIA’s broad disclosure mandate, and thus created nine categories of exemptions. *Id.* §552, (b). These exemptions, however, “must be narrowly construed in light of FOIA’s dominant objective of disclosure, not secrecy.” Maricopa Audubon Soc’y. v. U.S. Forest Serv., 108 F.3d 1082, 1085 (9th Cir. 1996). Accordingly, because FOIA carries a presumption in favor of disclosure, and indeed, because, “FOIA requesters face an information asymmetry given that the agency possesses the requested information and decides whether it should be withheld or disclosed,” COMPTTEL v. U.S. Federal Comm’n. Comm., 910 F. Supp. 2d 100, 111 (D.D.C. 2012) (internal citations omitted), agencies bear the burden of justifying the withholding of any records that are responsive to a FOIA request. 5 U.S.C. §552 (a) (4). An agency must provide “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.” See King v. Dept. of Justice, 830 F.2d 210, 219 (D.C. Cir. 1987) (agency must provide); see also Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 861 (D.C. Cir. 1980) (holding an agency’s disclosure of “who wrote the [document], to whom it was addressed, its date, and a brief description” was “patently inadequate” to establish exemption under FOIA). Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. See FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

DISCUSSION

I. IRS DID NOT CONDUCT AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS.

Based on the IRS's failure to provide records that are responsive to the Nosals' FOIA Request, IRS has failed to conduct an adequate search for responsive records.

To achieve FOIA's core purpose of disclosure, an agency must perform an adequate search for responsive records. Founding Church of Scientology v. NSA, 610 F.2d 824, 837 (D.C. Cir. 1979). Upon receiving a FOIA request, federal agencies are "required to perform more than a perfunctory search" to identify records that are responsive to the request. Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F.3d 504, 514 (D.C. Cir. 2011). An agency must demonstrate "a 'good faith effort to conduct a search using methods which can be reasonably expected to produce the information requested.'" DiBacco v. U.S. Army, 795 F.3d 178, 188 (D.C. Cir. 2014) (quoting Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 68 (D.C. Cir. 1990)) (internal alterations omitted); Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting Truitt v. U.S. Dep't of State, 897 F.2d 540, 542 (D.C. Cir. 1990)) (to meet this burden, the agency must "demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents'").

In addition, "agency affidavits must explain in reasonable detail the scope and method of the search conducted by the agency" for the agency to "satisfy its burden of establishing the adequacy of its search." Nat'l Sec. Counselors II, 960 F. Supp. 2d 101, 152 (internal quotations omitted); Ancient Coin Collectors Guild, 641 F.3d at 514 (internal quotation omitted) (agency may meet its burden by submitting "[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched"). A court will apply "a 'reasonableness' test" to assess whether an agency's search for responsive records was adequate. Campbell v. U.S. Dep't. of Justice, 164 F.3d 20, 27(D.C. Cir. 1998). This reasonableness test is "consistent with congressional intent tilting the scale in favor of disclosure." *Id.*

Here, the evidence suggests that the IRS failed to conduct an adequate search for responsive records. IRS merely said that they have records but are not going to release them.

The IRS did not establish that it made a good faith effort to conduct a search for the requested records, nor did it prove that it used methods that can be reasonably expected to produce the requested records. *See Oglesby* at 920 F.2d at 68. Furthermore, the IRS failed to provide the Nosals with an affidavit explaining in reasonable detail the scope and method of its search, and therefore did not satisfy its burden to prove the adequacy of its search. Nat'l Sec. Counselors II, 960 F. Supp. 2d at 152. Hence, it is simply not reasonable to conclude that the IRS conducted an adequate search that was reasonably calculated to find all records that are responsive to the Nosals' FOIA Request – including emails, attachments, memoranda, correspondence, meeting notes, draft documents, etc. Without a description of the search methods that were used in response to the Nosals' request, or any description that the IRS attempted a search at all, the IRS has failed to make it apparent to the requester that it conducted an adequate search for records. To remedy this, the IRS must conduct an adequate search for responsive records, release responsive records immediately, and provide adequate detail about the search methods that it utilized. Additionally, because the Nosals believe there may be further evidence of IRS's inadequate search, the requester reserves their right to pursue any such additional records once they receives additional records from the IRS and has an opportunity to review them. Thus, based on available information, the IRS failed to conduct a search that is reasonably expected to produce all of the requested responsive records.

II. IRS HAS FAILED TO CARRY ITS BURDEN THAT IT MAY LAWFULLY WITHHOLD RESPONSIVE RECORDS UNDER EXEMPTION 3.

While the IRS did not provide any records directly responsive to Mr. Nosal's FOIA Request, the records it apparently has were not released and heavily redacted under various FOIA exemptions, including FOIA Exemption 3. However, the IRS has not provided any "relatively detailed justification, specifically identifying the reasons" for withholding the records. See *King*, 830 F. 2d at 219.

Exemption 3 allows an agency to withhold information prohibited from disclosure by another federal statute provided that one of two disjunctive requirements are met: the statute either "(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." 5 U.S.C. § 552 (b)(3). Courts have held that a statute falls within the exemption's coverage if it satisfies either of its disjunctive requirements, although courts do not always specify under which subpart of Exemption 3 a statute qualifies. See *Long v. IRS*, 742 F. 2d 1173, 1178 (9th Cir. 1984); *Irons & Sears v. Dann*, 606 F. 2d 1215, 1220 (D.C. Cir. 1979); *Am. Jewish Cong. v. Kreps*, 574 F.2d 624, 628 (D.C. Cir. 1978); See also *Berger v. IRS*, 487 F. Supp. 2d 482, 496-97 (D.N.J. 2007) (finding that "[31 U.S.C.] § 5319 [(2006)] qualifies as an exempting statute under Exemption 3...but failing to specify whether statute qualifies under subpart (A) or (B)), *aff'd. on other grounds*," 288 F. App'x. 829 (3d Cir. 2008), cert. denied, No. 08-884, 2009 WL 1650205 (U.S. June 15, 2009).

The requesters are left to speculate about whether the IRS is relying upon any statute at all to redact records. If the IRS is relying on a statute, it is still ambiguous about whether the statute requires that all the matters be withheld from the public in such a manner as to leave no discretion on the issue, or if it establishes particular criteria for withholding or refers to particular types of matters to be withheld. 5 U.S.C. § 552 (b)(3). Thus, it is impossible for the Nosals to ascertain how the IRS is invoking Exemption 3 as a lawful rationale for withholding release of responsive records. As such, the IRS improperly invoked Exemption 3 and should release the records in full.

III. IRS HAS FAILED TO CARRY ITS BURDEN THAT IT MAY LAWFULLY WITHHOLD ALL REQUESTED RECORDS

WHERE SOME RECORDS MAY BE SEGREGATED, THEY MUST BE SEGREGATED

The IRS is not above FOIA. In *Payne Enterprises, Inc. v. U.S.*, 837 F. 2d 486 (DC Cir 1988), a contractor sought IRS records. The Court said, "Payne has an undeniable right to the bid *information* — whether or not it is compiled in the form of bid abstracts — and it is entitled to a judgment in support of its claim. On this point, we agree with the holding of the Ninth Circuit in *Long*: Congress did not intend for the IRS, or any other agency, to use the FOIA offensively to hinder the release of non-exempt documents. The appellants have fully complied with the administrative scheme. It was the IRS' abuse of this scheme that forced the appellants to bring several lawsuits to obtain release of the documents.... These unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent these abuses. 693 F.2d at 910. We therefore reverse and remand with instructions to afford Payne declaratory relief. *Payne* at 494.

In the event that portions of the responsive records can be segregated, they should be segregated. In an IRS case involving a tax attorney seeking to obtain records on his disciplinary case (to practice before the IRS), the Court emphasized segregability. The District Court agreed with the IRS that records did not need to be segregated. In

Waterman v. IRS, ___ F.2d ___ (Appeal Case No.18-5037, decided February 5, 2019, DC Cir 2019), the DC Circuit, in a PER CURIAM opinion, held that:

"A District court "clearly errs when it approves the government's withholding of information under the FOIA without making an *express* finding on segregability." PHE Inc. v. Dep't of Justice, 983 F.2d 248, 252 (D.C. Cir. 1993) (emphasis added). No such finding was made."

IV. CONCLUSION

As described above, the IRS violated FOIA by failing to provide the Nosals with the requested records. The IRS violated FOIA for refusing to release the responsive records that it did find. Accordingly, the IRS must conduct an adequate search for responsive records and produce all responsive records immediately. In so doing, the IRS must also provide an estimated date of completion of its release of the records. 5 U.S.C. § 552 (a)(7)(B).

I expect your timely resolution of this matter. Do not hesitate to contact me with any questions regarding this administrative appeal. Please contact me at 541-606-9173 or at petesorenson@gmail.com. All records and any related correspondence should be sent to my attention at this address: PO Box 10836, Eugene, OR 97440.

Very truly yours,



C. Peter Sorenson
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Attachments:

Attachment A (Request)

Attachment B (IRS Denial Letter)