EXHIBIT 4

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October 5, 2020

Attention: FOIA Appeals
M/Stop 5502
5045 E. Butler Avenue
Fresno, CA 93727-5136

Re: Administrative Appeal from Denial of Freedom of Information Act Request
Case Number 2020-03237

Dear IRS Appeals:

This is an appeal under the Freedom of Information Act, 5 U.S.C. §552(a)(6) ("FOIA"), from a denial of information requested from the Internal Revenue Service ("IRS") on behalf of Stanley D. Crow (the "Taxpayer"). We submitted the Taxpayer's FOIA request to Disclosure Office 01 at Post Office Box 621506, Atlanta, Georgia by letter dated June 22, 2020. A copy of the Taxpayer's FOIA request is attached as Exhibit 1. The FOIA request was for the Taxpayer's Case Activity Record ("CAR") for the period from February 22, 2019, to the date of the request. The FOIA request reasonably describes the records requested to which this appeal pertains.

Disclosure Office 01 denied the Taxpayer's FOIA request in part by letter dated August 19, 2020. A copy of the FOIA response is attached as Exhibit 2. The partial denial of the Taxpayer's FOIA request is attributable to heavy redactions to the requested records. For example, the case activity record for the time period covered by the request included entries for 193 days. Of those 193 entries, 164 entries were completely redacted and another 18 were partially redacted. The basis for each redaction was described in conclusory terms only; aside from citing statutory exemptions from FOIA disclosure requirements, the IRS did not provide any specific information to support its redactions.

It is noteworthy that this high percentage of complete redactions contrasts sharply with a prior FOIA disclosure of the CAR as of February 22, 2019. In that disclosure, only 106 of 346 entries were completely redacted (85% versus 31%).

Pursuant to the FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, this administrative appeal is timely submitted within 90 days thereafter.

The Taxpayer requests that IRS Appeals grant its FOIA request in full, and provide copies of all records requested in the FOIA request. To the extent the IRS continues to withhold any records responsive to the FOIA request, the Taxpayer requests that the IRS provide for each record withheld a description of that record and the basis for withholding that record. The Taxpayer further requests that the IRS verify that an appropriate search was conducted and that all documents responsive to the FOIA request were either produced or else withheld pursuant to an appropriate exemption claim.

The specific grounds for the relief sought in this appeal are as follows:

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(1) The IRS's conclusory statements regarding its reasons for withholding information are patently insufficient.

For each redaction, the IRS identified only the statutory provision upon which it relied to make the redaction. It is well established that the government cannot support its reliance on an exemption by conclusory statements only. *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973); *Campbell v. Dep't of Health & Human Servs.,* 682 F.2d. 256, 259 (D.C. Cir. 1982). Allowing the government to rely on conclusory statements alone has the practical effect of shifting the burden of proof from the government to the person seeking disclosure and, therefore, contravenes the statute. *Vaughn*, 484 F.2d at 828. The burden is on the government agencies to establish their right to withhold information from the public and they must supply sufficient information to allow a reasoned determination that the agency was correct. *Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 859 (D.C. Cir. 1980).

After the *Vaughn* decision, courts frequently required government agencies to produce a "*Vaughn* index" setting forth an index of the documents withheld, the exemptions from disclosure claimed for each document, and the factual basis for the claimed exemption. *See, e.g., Coastal States,* 617 F.2d at 861. The agency preparing a *Vaughn* index 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 the document to which they apply." *Mead Data Central, Inc. v. U.S. Dep't of the Air Force,* 566 F.2d 242, 251 (D.C. Cir. 1977). The objective of requiring the agency to present a *Vaughn* index – to permit the requesting party to make its case effectively – is equally applicable to administrative proceedings within an agency. *Mead Data*, 566 F.2d at 251.

In *Coastal States*, the court rejected as "patently inadequate" a *Vaughn* index that listed "who wrote the memorandum, to whom it was addressed, its date, and a brief description of memorandum." 617 F.2d at 861. As the court noted in *Coastal* States, the index must sufficiently describe the characteristics of the withheld documents that the agency contends bring the document within the exemption claimed. In the present matter, the IRS has not provided any specific factual support for any of the redactions. In the absence of such factual support, there is no basis for sustaining the claimed exemption.

(2) The IRS has not demonstrated that it met its requirement to segregate information that is not exempt from disclosure.

An agency must take reasonable steps to segregate and release information that is not protected by an exception to disclosure. 5 U.S.C. § 552(a)(8)(A)(ii)(II). Information should be released unless it is inextricably intertwined with information that is exempt from disclosure. *Trans-Pac. Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1026-27 (D.C. Cir. 1999). The agency must explain why the non-protected material cannot be segregated from protected material. *Mead Data,* 566 F.2d at 261 ("[U]nless the segregability provision of the FOIA is to be nothing more than a precatory precept, agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts.")

It is extremely unlikely that numerous large blocks of information in the CAR would be so inextricably linked to protected information that the two could not be separated. For example, in one stretch of the CAR covering entries from April 23, 2019 to March 13, 2020, the CAR had entries on 116 days and covered 11 pages. For that block of entries, only 17 sentences were left unredacted. Most of them were short and related to minor procedural matters. It is likely that such large blocks of entries contains information exempt from disclosure and capable of being separated from protected information. Without additional descriptions of the withheld materials, however, it is impossible to assess whether some materials could be segregated.

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(3) The IRS's heavy reliance on 5 U.S.C. § 552(b)(7)(A) is implausible and it has not met its burden of explaining its reasons for the redactions.

Of the 193 daily entries in the CAR, the IRS cited 5 U.S.C. § 552(b)(7)(A) as a basis for fully or partially redacting approximately 141 entries. That section exempts from production "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information … could reasonably be expected to interfere with law enforcement proceedings …." It is surprising and contrary to experience that approximately 73% of the entries would be exempt from disclosure on the grounds that disclosure could reasonably be expected to interfere with enforcement proceedings ("(b)(7)(A) grounds"). For example, in the prior FOIA disclosure of the CAR as of February 22, 2019, approximately 15 of the 346 entries were redacted on (b)(7)(A) grounds (4% of entries). (Only 54 entries (16%) were redacted on the grounds that (b)(7)(A), (C), or (E) applied.) Because the redactions are supported by conclusory statements only, the Taxpayer has not been provided any specific information regarding why disclosure could interfere with enforcement proceedings and is not in a position to know whether any of the redactions were correctly made. *See* Point 1 *supra*. The unusually large percentage of redactions on (b)(7)(A) grounds raises doubt whether all the redactions are correct. Courts have held that the government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding. *See, e.g., Campbell v. Dept. of Health and Human Services,* 682 F.2d. 256, 259 (D.C. Cir 1982). Accordingly, the Taxpayer requests that the IRS be required to provide specific information regarding how disclosure of the entry could interfere with an enforcement proceeding and, to the extent the IRS does not support redactions with specific facts that are legally sufficient for (b)(7)(A) grounds, the redaction be removed.

(4) The IRS's heavy reliance on 5 U.S.C. § 552(b)(3) is implausible and it has not met its burden of explaining its reasons for the redactions.

The IRS cited 5 U.S.C. §552(b)(3) ("(b)(3) grounds") as a basis for fully or partially redacting approximately 113 entries (approximately 59% of the entries). The cover letter described these redactions as follows: "Disclosure of this information is also exempt under FOIA exemption (b)(3), supported by Internal Revenue Code section IRC section 6103(e)(7), because release would impair federal tax administration." Except as to four of these redactions, the IRS also supported the redactions on (b)(7)(A) grounds.

Like the numerous redactions made on (b)(7)(A) grounds, it is surprising and contrary to experience for such a high percentage of the entries in a CAR (in this case, almost 60%) to include content that is appropriately redacted on (b)(3) grounds. For example, in the prior FOIA disclosure of the CAR as of February 22, 2019, approximately 57 of the 346 entries were redacted on (b)(3) grounds (16%). Consequently, the high percentage of redactions on (b)(3) grounds raises doubts whether all of the redactions are correct. Moreover, the redactions are supported with conclusory statements and a court would require the IRS to provide more information before sustaining the IRS position. *See, e.g., Chamberlain v. Kurtz,* 589 F.2d 827, 835 (5th Cir. 1979) ("[the district court] decided the case on the basis of detailed descriptions of the documents, an elaborate index of the exemptions claimed with respect to each document, and the court's own *in camera* inspection of the documents"). Unless the IRS provides specific information regarding why the disclosure would impair federal tax administration, the redactions should be removed.

In addition, the limited space afforded each entry in the CAR suggests that, at least in some cases, the entry merely refers to the existence of other protected information but does not include the contents of such protected information. While courts have protected IRS-generated documents (intra-agency memoranda, agent reports and correspondence with state agencies and third parties) and third-party produced documents (tax returns, affidavits, transaction documents), that protection does not extend to nondisclosure

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of the existence of such documents. In fact, the agency must support its withholding of the requested information by describing what the documents are and why disclosure of the documents would impair tax administration. *See, e.g.*, *Currie v. I.R.S.,* 704 F.2d 523 (11th Cir. 1983) (affidavit of special agent states that materials include "memoranda of contacts with third parties . . . information received from third parties . . . records and information received from a state law enforcement agency . . . workpapers consisting of among other things notes and other documents analyzing evidence"). Thus, to the extent an entry in the CAR merely refers to the existence of a document or information but not the specific content, the document or information is not protected and the redaction should be removed.

(5) The IRS has not met its burden of explaining why the deliberative process privilege applies to any of the documents.

Under 5 U.S.C. § 552(b)(5), the deliberative process privilege is applicable to FOIA disclosures. The IRS cites the deliberative process privilege as a basis for withholding some or all of approximately 36 entries. To sustain a claim of deliberative process privilege, the IRS must show that the documents are "pre-decisional" and "deliberative, i.e., reflecting the 'give and take of the consultative process.'" *Coastal States,* 617 F.2d at 866. "[T]he government agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Coastal States,* 617 F.2d at 868. The identity of the parties to the deliberation is important. The exemption "covers recommendations, draft documents, proposals, suggestions and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id.* at 866. The question is whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency." *Id.* If the information involves a description of agency policy (*e.g.*, an issue or position, formal or informal, that has already been decided) rather than deliberation, the document is not protected. *Id.* The exemption is narrow in scope and there is a strong policy of the FOIA that the public is entitled to know what its government is doing and why. *Id.*

A reply is requested within 20 working days as prescribed under 5 U.S.C. § 552(a)(6)(A)(ii) and 26 C.F.R. § 601.702(c)(10)(iii). The determination on appeal should be sent to my attention at Cooley LLP, 55 Hudson Yards, New York, New York 10001-2157. It may be faxed to me at 212-479-6275 or emailed to me at cmassengill@cooley.com.

Should you have any questions, please contact me at 212-479-6585.

Sincerely,

Clint E. Massengill

Attachments