

EXHIBIT

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Mark Tapscott
Journalist
Daily Caller News Foundation
1050 17th Street, NW
Suite 900
Washington, DC 20036
301-275-6645

August 23, 2016

FOIA Officer
Department of Treasury
Internal Revenue Service
Stop 211
2385 Chamblee Tucker Road
Chamblee, GA 30341
(770) 234-4374

FOIA REQUEST

Fee waiver requested

Dear FOIA Officer:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of all determination letters, Form 1023 applications and related memoranda, telephone messages, correspondence, including digital and U.S. mail, and any other official documents for the tax-exempt 501(c)(3) variously known as the "Bill, Hillary and Chelsea Clinton Foundation," the "William J. Clinton Presidential Foundation" and the "Clinton Foundation."

I would like to receive the information in Digital PDFs.

Please waive any applicable fees. Release of the information is in the public interest because it will contribute significantly to public understanding of government operations and activities. This requests concerns issues of intense public interest in ensuring that federal tax exemption policies and regulations were satisfied by one of the world's most well-known non-profit foundations.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of

otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

I would appreciate your communicating with me by email or telephone, rather than by mail. My email address is: mark.dailycallernewsfoundation.org. My cell telephone number is 301-275-6645.

Please provide expedited processing of this request, which concerns a matter of urgency. As a journalist, I am primarily engaged in disseminating information. The public has an urgent need for information about compliance with federal tax exemption policies and regulations because of the forthcoming presidential election.

Because of the election, there is great public and media interest in determining the accuracy of accusations that the Clinton Foundation has not complied with federal tax exemption laws and regulations since its inception in 1997. I certify that my statements concerning the need for expedited processing are true and correct to the best of my knowledge and belief.

I look forward to your determination regarding my request for expedited processing within 10 calendar days, as the statute requires.

Thank you for your assistance.

Sincerely,

Mark Tapscott

EXHIBIT

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PRIVACY, GOVERNMENTAL
LIAISON AND DISCLOSURE

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

September 14, 2016

Mark Tapscott, Executive Editor
Daily Caller
1050 17th St., NW, Suite 900
Washington, DC 20036

Dear Mr. Tapscott:

This is our final response to your Freedom of Information Act (FOIA) request dated August 23, 2016 that we received on August 30, 2016.

We have a routine agency procedure for requesting copies of the determination letters and applications of 501(c)(3) organizations. You can download, at irs.gov, Form 4506-A for this purpose. You will find instructions and mailing information available for download at irs.gov as well.

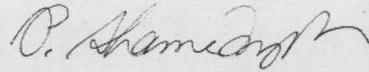
The balance of the scope of your request appears to extend to documents, to the extent that any exist, that consist of, or contain the return information of a third party. Please be advised that such records, to the extent that they exist, would be confidential and may not be disclosed unless specifically authorized by law. Specifically, Internal Revenue Code (IRC) § 6103 prohibits the release of returns and return information unless disclosure is authorized by Title 26. The Service's FOIA regulations specify that, in order to be processed, all requests that involve the disclosure of records that may be limited by statute or regulation, including requests for documents that are protected by IRC § 6103, must establish the right of the person making the request to the disclosure of the records in question. See 26 C.F.R. § 601.702(c)(4)(i)(E). Specifically, when a person is requesting records pertaining to other persons or businesses, "the requester shall furnish a properly executed power of attorney, Privacy Act consent, or tax information authorization, as appropriate." See 26 C.F.R. § 601.702(c)(5)(iii)(C). Without such authorization, the request is incomplete and cannot be processed. See 26 C.F.R. § 601.702(c)(4). Only fully compliant requests can be processed.

Because of the foregoing, we are closing your request with no further action.

If you have any questions, please call Tax Law Specialist A. Amparano, ID # 0220447, at (214) 413-5489, or write to: Internal Revenue Service, Disclosure Office 9, P.O. Box

621506, Stop 211, Atlanta, GA 30362-3006. Please refer to case number #F16244-0013.

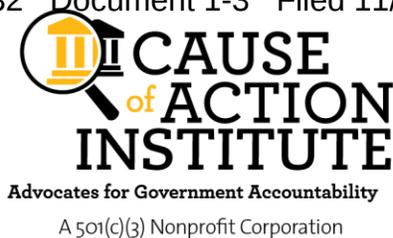
Sincerely,

A handwritten signature in black ink, appearing to read "P. Sharisse Tompkins". The signature is fluid and cursive.

P. Sharisse Tompkins
Disclosure Manager
Disclosure Office 9

EXHIBIT

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September 29, 2016

VIA CERTIFIED MAIL

IRS Appeals
Attn: FOIA Appeals
Internal Revenue Service
United States Department of the Treasury
M/Stop 55202
5045 E. Butler Avenue
Fresno, CA 93727-5136

Re: Freedom of Information Act Appeal, F16244-0013

FOIA Appeals:

This is a timely administrative appeal of an improper closure of Freedom of Information Act (“FOIA”) request number F16244-0013, submitted by Mark Tapscott of the Daily Caller News Foundation (“DCNF”). Cause of Action Institute (“CoA Institute”) is representing Mr. Tapscott and the DCNF in this matter, and all communications regarding this appeal should be directed to CoA Institute’s attention.¹

Background

On August 26, 2016, on behalf of the DCNF, Mr. Tapscott filed a FOIA request with the Internal Revenue Service (“IRS”) seeking access to “all determination letters, Form 1023 applications and related memoranda, telephone messages, correspondence, including digital and U.S. mail, and any other official documents for the tax-exempt 501(c)(3) variously known as the ‘Bill, Hillary and Chelsea Clinton Foundation,’ the ‘William J. Clinton Presidential Foundation’ and the ‘Clinton Foundation.’”²

On September 14, 2016, the IRS administratively closed the FOIA request on the grounds that it sought (1) Form 1023s and determination letters, both of which are available through “routine agency procedures,” and (2) additional information that may be protected by 26 U.S.C.

¹ CoA Institute is a nonprofit public interest law firm dedicated to ensuring that government decision-making is open, honest, and fair. *See* CAUSE OF ACTION INSTITUTE, *About*, www.causeofaction.org/about/.

² FOIA Request from Mark Tapscott, Daily Caller News Found., to Internal Revenue Serv., Dep’t of the Treasury (Aug. 23, 2016) (Ex. 1). Mr. Tapscott sought a public interest fee waiver and expedited processing. *Id.* at 1–2.

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§ 6103.³ The IRS assigned the request the tracking number F16244-0013.⁴ The IRS did not contact Mr. Tapscott or the DCNF before closing the request, nor did it provide them with an opportunity to clarify or perfect the request, as required by IRS rules and regulations. For the reasons set forth below, the closure was improper and the IRS must reopen and process FOIA request number F16244-0013.

Discussion

I. Form 1023 and Determination Letters

The DCNF agrees that a FOIA request is not necessary to access Form 1023s and determination letters. On behalf of the DCNF, CoA Institute has submitted a Form 4056-A to the IRS Cincinnati office requesting access to all Form 1023s and determination letters for the Clinton Foundation. The DCNF, however, does not agree that the Form 4056-A process covers other materials relating to applications for tax-exempt status and thus maintains that its FOIA request is valid as to those materials, as discussed below.

II. Remainder of the FOIA Request

In addition to Form 1023s and determination letters, the FOIA request sought “related memoranda, telephone messages, correspondence, including digital and U.S. mail, and any other official documents” related to the IRS review and determination of the Clinton Foundation tax-exempt status.⁵ The IRS refused to process that portion of the request because it “appear[ed] to extend to documents . . . [that] contain the return information of a third party.”⁶ The IRS claimed that its regulations require anyone seeking access to records through FOIA “that may be limited by statute or regulation, including requests for documents that are protected by IRC § 6103, [to] establish the right of the person making the request to the disclosure of the records in question.”⁷ It claimed that, in such cases, a FOIA requester must “furnish a properly executed power of attorney, Privacy Act consent, or tax information authorization, as appropriate.”⁸

The IRS response is flawed for two reasons. First, an agency may not refuse to conduct a search for records responsive to a FOIA request because the agency believes those records “may be” exempt from disclosure. Second, the records requested are not “return information” protected by Section 6103 of the Internal Revenue Code.

1. IRS Refusal to Conduct a Search

An agency must process a FOIA request for records that (1) “reasonably describes such records,” and (2) “is made in accordance with published rules stating the time, place, fees, . . .

³ Letter from P. Sharisse Tompkins, Disclosure Manager, Disclosure Office 9, Internal Revenue Serv., Dep’t of the Treasury, to Mark Tapscott, Daily Caller News Found. (Sept. 14, 2016) (Ex. 2).

⁴ *Id.* at 2.

⁵ Ex. 1.

⁶ Ex. 2 at 1.

⁷ *Id.*

⁸ *Id.* (quoting 26 C.F.R. § 601.702(c)(5)(iii)(C)).

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and procedures to be followed[.]”⁹ Once an agency has located records responsive to a request, it reviews the responsive records to determine whether any statutory exemptions apply.¹⁰

Although not explicitly stated in the closure letter, the IRS appears to be arguing that because the DCNF did not submit an authorization from the Clinton Foundation to view the records in question, the FOIA request was imperfect and not “made in accordance with published rules stating . . . [the] procedures to be followed.”¹¹ The IRS approach flips the FOIA process on its head, allowing it to assert that because a request “may” implicate exempt materials, it is not required to conduct a search, review the documents for exempt material, and subsequently defend its assertion of those exemptions in administrative and judicial review proceedings.

In *Gonzales & Gonzales Bonds & Insurance Agency Inc. v. Department of Homeland Security*, a federal court exposed the flaws in the IRS position.¹² The court in that case reviewed a Department of Homeland Security (“DHS”) FOIA regulation, which required that “if a party makes a FOIA request about another individual, ‘either a written authorization signed by that individual permitting disclosure of those records . . . or proof that that individual is deceased . . . must be submitted[.]’”¹³ Just as the IRS is claiming that its decision not to search for responsive records in this case is justified to protect the privacy rights of a third party, so the DHS argued that its policy was in place to “effectuat[e] the privacy exemptions in § 552(b)(6) and (7)(C)[.]”¹⁴ The DHS took the identical position as the IRS here by stating that “not only will [it] withhold all records if a requester does not or cannot comply with the provision, but [it] will not even determine what potential responsive materials exist.”¹⁵ The court rejected that position, finding that the DHS procedure “violates FOIA by allowing DHS to improperly withhold records, by releasing the agency from its obligation to demonstrate that FOIA’s exemptions apply, and by circumventing judicial review of its determinations.”¹⁶ The court concluded that the DHS policy was impermissible because it “renders it impossible for a requesting party to ascertain whether DHS has properly withheld the records, and nullifies the agency’s burden of demonstrating that it correctly invoked the exemptions.”¹⁷

The IRS claim that some documents responsive to the FOIA request may be protected by Section 6103 of the Internal Revenue Code accordingly is not a justification for avoiding its

⁹ 5 U.S.C. § 552(a)(3)(A).

¹⁰ See, e.g., *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, No. 15-5201, 2016 WL 4056405, at *8 (D.C. Cir. July 29, 2016) (“The statute thus sets forth the broad outlines of a process for agencies to follow when responding to FOIA requests: first, identify responsive records; second, identify those responsive records or portions of responsive records that are statutorily exempt from disclosure; and third, if necessary and feasible, redact exempt information from the responsive records.”).

¹¹ Ex. 2 at 1. The IRS did contend that the FOIA request failed to reasonably describe the records sought or that it otherwise failed to comply with the requirements of FOIA.

¹² 913 F. Supp. 2d 865, 876–77 (N.D. Cal. 2012), *appeal dismissed* (9th Cir. 13-15415 (Aug. 9, 2013)).

¹³ *Id.* at 868 (quoting DHS regulation, alternations in original).

¹⁴ *Id.* at 876.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

obligation to process a FOIA request and conduct a search for responsive records. The IRS approach denies the DCNF its rights to administrative and judicial review of the adequacy of the search the IRS must conduct and its review of responsive materials to determine whether the IRS has correctly applied statutory exemptions and segregated exempt from disclosable information.

In addition, the DCNF has a right to know whether records responsive to its FOIA request exist. The IRS is frustrating that right by refusing to conduct a search and disclosing the existence of responsive records, even if ultimately it may be justified in withholding most or all of the responsive records in question. Put differently, whether or to what extent there are IRS records relating to the application for or the updating of the Clinton Foundation tax-exempt status is not protected by Section 6103 or any other FOIA exemption.¹⁸ The IRS therefore may not avoid its FOIA obligation to conduct a search for responsive records in this case.

2. Section 6103 does not Apply to the Requested Records

Even if the IRS refusal to conduct a search for records protected from disclosure by Section 6103 were permissible – which, as explained above, it is not – any such refusal would not be justified in this case because Section 6103 does not protect the records responsive to the request. If the IRS had contacted the DCNF to seek a clarification of the request as required by IRS rules,¹⁹ it would have learned that the request is consistent with Section 6104 of the Internal Revenue Code in seeking “papers submitted in support of [an] application” for tax-exempt status, materials submitted in support of any updated application for tax-exempt status, and “any letter or other document issued by the [IRS] with respect to such application or notice.”²⁰

Such materials are not protected by Section 6103 and must be disclosed through FOIA because Section 6104 of the Internal Revenue Code requires such documents to be “open to public inspection.”²¹ As the U.S. Court of Appeals for the Sixth Circuit recently explained, “applications for tax-exempt status are very different from tax returns.”²² In addition, although Section 6103 protects disclosure of applications for tax-exempt status before that status has been granted, Section “6104 mandates precisely the opposite for applicants whose applications are granted.”²³ The Clinton Foundation is an approved 501(c)(3) tax-exempt organization and the FOIA request at issue here seeks access to the supporting materials and IRS documents relating to that organization’s application(s) for tax-exempt status. Those records fall within the disclosure requirements of Section 6104 and thus must be produced in response to the request.

¹⁸ See *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, 70 F. Supp. 3d 45, 51 (D.D.C. 2014) (denying the IRS the right to assert a *Glomar* response stating that it could not confirm or deny the existence of any records relating to investigations of unlawful disclosures of return information because “the mere existence of records of investigations into unlawful disclosures of return information is not, itself, return information” protected by Section 6103).

¹⁹ See *infra* note 244 and accompanying text.

²⁰ 26 U.S.C. § 6104(a)(1)(A).

²¹ *Id.*

²² *In re U.S.*, 817 F.3d 953, 962 (6th Cir. 2016).

²³ *Id.*

3. *Failure to Follow Procedures when Closing a Request*

The IRS response also deviates from IRS FOIA regulations and the Internal Revenue Manual, which states that “[c]ase workers must . . . notify the requester that the [imperfect] request does not meet certain requirements of the FOIA[,] that more information is needed . . . and [they] must advise the requester that he/she has 35 calendar days to perfect the request.”²⁴ The IRS did not contact the DCNF before closing the request, nor did it indicate that the DCNF had a 35-day period within which to perfect its request.

The improper closure of a valid FOIA request by ignoring both the substantive and procedural requirements of FOIA and IRS regulations is concerning because it frustrates public access to government information and evidences the breach of the agency’s legal obligations.²⁵ Greater care must be taken to ensure that closure only happens when necessary and appropriate. Here, for the reasons stated, we expect the IRS to reopen the DCNF FOIA request and process and produce the responsive records without further delay.

Conclusion

Thank you for your attention to this matter. If you have any questions about this appeal, you may contact me by email at james.valvo@causeofaction.org or by phone at (202) 417-3576.

Sincerely,



R. JAMES VALVO, III
COUNSEL & SENIOR POLICY ADVISOR

²⁴ Internal Revenue Manual 11.3.13.5.5(2); *see also* 26 C.F.R. § 601.702(c)(1)(i).

²⁵ *See, e.g.*, Letter from CoA Inst., *et al.*, to Miriam Nisbet, Dir., Office of Gov’t Info. Servs., Nat’l Archives & Records Admin. (Oct. 30, 2014), *available at* <http://bit.ly/29wzZ9P> (coalition letter urging reform of improper administrative closures); *see also* CoA Inst., *Cause of Action Signs Coalition Letter Asking for OGIS Investigation of Administrative Closures* (Oct. 30, 2014), <http://bit.ly/29kqrKf>.

EXHIBIT

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Internal Revenue Service

Appeals Office

P.O. Box 24018

Fresno, CA 93779-4018

Department of the Treasury

Person to Contact:

Theresa Carrillo

Employee ID Number: 1000157528

Tel: (559) 454-6337

Fax: (855) 223-7117

Date: **OCT 14 2016**

Refer Reply to:

AP:EX:FRC:TC

In Re:

Freedom of Information Act:

Mark Tapscott, Editor of the Daily Caller
Foundation

FOIA Case Number:

F16244-0013

R. JAMES VALVO, III
CAUSE OF ACTION INSTITUTE
1875 EYE ST. NW SUITE 800
WASHINGTON DC 20006

Dear Mr. R. James Valvo, III:

We are in receipt of your letter, dated September 29, 2016, which purports to administratively appeal under the Freedom of Information Act (FOIA), 5 U.S.C. Section 552, the September 14, 2016 response from the Disclosure Specialist.

The Requester, Mark Tapscott of the Daily Caller requested forms 1023 and determination letters of tax exempt organizations with all related documents including memos, telephone calls, messages correspondence and all other official documents relating to 3 Clinton Foundations.

The Disclosure Specialist stated that the forms and determination letters can be access through routine procedures and that the other documents related to the processing of the IRC 501 applications, if they exist, are third party information. Since the request did not contain proper authorization per IRC regulations, the documents may be exempt as third party records.

Your appeal letter states that you do not agree with the IRS determination that the related documents, if exist, are third party return documents. You state that the Disclosure Specialist should conduct a search for the documents and inform the requester of the existence of the requested documents. You state that the documents are not §6103 return information and that the release of such documents is provided under IRC §6104. You state that the response of the Disclosure Specialist did not afford your client appeal and judicial rights and should have advised the requester an opportunity to correct any deficiencies in the request.

I reviewed IRC §6103 and 6104 and found that the Disclosure Specialist response was appropriate. In regard to 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.

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.

I.R.C. § 6103(a) provides the withholding 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).

IRC §6104 authorizes the public inspection of applications for tax exemption or notice of status of tax exempt organizations described in section 501 or 527. If an organization described in section 501(c) or (d) is exempt from taxation under section 501(a) for any taxable year or a political organization is exempt from taxation under section 527 for any taxable year, the application filed by the organization with respect to which the Secretary made his determination that such organization was entitled to exemption under section 501(a) or notice of status filed by the organization under section 527(i), together with any papers submitted in support of such application or notice, and any letter or other document issued by the Internal Revenue Service with respect to such application or notice shall be open to public inspection at the national office of the Internal Revenue Service. In the case of any application or notice filed after the date of the enactment of this subparagraph, a copy of such application or notice and such letter or document shall be open to public inspection at the appropriate field office of the Internal Revenue Service (determined under regulations prescribed by the Secretary). Any inspection under this subparagraph may be made at such times, and in such manner, as the Secretary shall by regulations prescribe. After the application of any organization for exemption from taxation under section 501(a) has been opened to public inspection under this subparagraph, the Secretary shall, on the request of any person with respect to such organization, furnish a statement indicating the subsection and paragraph of section 501 which it has been determined describes such organization. This provision allows the IRS to release Forms 1023 application and the subsequent determination letter.

This office is charged with hearing administrative appeals from the denial of responsive documents under the Freedom of Information Act (FOIA). Since the Disclosure Specialist did not specifically deny nor exempt the documents under the FOIA, there is no jurisdiction for an administrative appeal under these circumstances

The FOIA, at 5 U.S.C. Section 552(a)(3)(A), and the Department of the Treasury Regulations that implement the FOIA, specify that certain information must be included in your letter in order to be treated as a proper FOIA request. The Disclosure Specialist informed the requester that the request did not contain all the necessary information specifically Form 2848 for the authorization of the release of the documents requested if they exist. We are closing our file in regard to this matter.

Sincerely,

A handwritten signature in black ink, appearing to be 'P. Perez', written in a cursive style.

P. Perez
Appeals Team Manager

EXHIBIT

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EXHIBIT

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Tracking Number: 9415511899563673444512



Product & Tracking Information

Postal Product: First-Class Mail®
 Features: Certified Mail™ Return Receipt

DATE & TIME	STATUS OF ITEM	LOCATION
October 3, 2016 , 8:34 am	Delivered, Individual Picked Up at Post Office	CINCINNATI, OH 45201
Your item was picked up at the post office at 8:34 am on October 3, 2016 in CINCINNATI, OH 45201.		
October 1, 2016 , 7:53 am	Available for Pickup	CINCINNATI, OH 45201
October 1, 2016 , 7:33 am	Arrived at Unit	CINCINNATI, OH 45201
October 1, 2016 , 4:26 am	Departed USPS Destination Facility	CINCINNATI, OH 45234
September 30, 2016 , 11:29 am	Arrived at USPS Destination Facility	CINCINNATI, OH 45234
September 28, 2016	Pre-Shipment Info Sent to USPS, USPS Awaiting Item	

Available Actions

[Return Receipt Electronic](#)

[Text Updates](#)

[Email Updates](#)

