

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION,)
)
Plaintiff,)
) Case No.: 1:13-cv-920-ABJ
v.)
)
INTERNAL REVENUE SERVICE,)
)
Defendant.)
_____)

**PLAINTIFF’S RESPONSE TO INTERNAL REVENUE SERVICE’S
STATEMENT OF UNDISPUTED MATERIAL FACTS**

Pursuant to Local Rule 7(h)(1) of the Local Civil Rules of the United States District Court for the District of Columbia, Plaintiff Cause of Action responds, by and through undersigned counsel, to Defendant Internal Revenue Service’s Statement of Undisputed Material Facts as follows. Defendant’s numbered statements are reproduced below, each followed by Plaintiff’s response.

Statement 1: Plaintiff submitted to the Internal Revenue Service a Freedom of Information Act request, dated October 9, 2012 (the “October Request”). In that request, for the time period from January 1, 2009, to October 9, 2012, the plaintiff sought the following records:

- 1) All documents, including but not limited to emails, letters, and telephone logs or other telephone records, constituting communications to and/or from any employee of the IRS concerning any FOIA request or lawsuit that relates to I.R.C. § 6103(g);
- 2) All documents, including notes and emails, referring or relating to any communication described in request #1;
- 3) Any communications by or from anyone in the Executive Office of the President constituting requests for taxpayer or "return information" within the meaning of § 6103(a) that were not made pursuant to § 6103(g);
- 4) All documents, including notes and emails, referring or relating to any communication described in request #3;
- 5) All requests for disclosure by any agency pursuant to IRC §§§ 6103(i)(1), (i)(2), and (i)(3)(A);

6) All documents, including communications not limited to notes, emails, letters, memoranda and telephone logs or other telephone records, referring or relating to records described in request #5;

7) All documents, including but not limited to emails, letters, telephone logs, and reports pertaining to any investigation by the Treasury Inspector General for Tax Administration into the unauthorized disclosure of § 6103 "return information" to anyone in the Executive Office of the President; and

8) From the time period of March 27, 2012, to the present, all documents, including email communications, constituting or relating to a request by the President or anyone designated by the President in his Executive Office for tax records under § 6103(g)(l).

(Declaration of Denise Higley (Exhibit 1 to Def.'s Mot. Summ. Judgment ("Higley Decl.)) at ¶ 4; Declaration of Francis McCormick (Exhibit 2 to Def's Mot. Summ. Judgment ("McCormick Decl.))¹ at ¶ 5; see also Compl. (Docket Entry No. 1) Ex. 1.)

¹ Mr. McCormick is an attorney in the Office of Chief Counsel, Procedure & Administration, Branch 7, Internal Revenue Service and, since June 2013, he has been assigned to the above-captioned case. He has been employed in his current position since July 2008. (McCormick Decl. at ¶ 1.) As part of his official duties, he is responsible for coordinating with the Department of Justice the IRS's defense of the Freedom of Information Act (FOIA) lawsuit in which this declaration is being filed, and he has reviewed and is familiar with all of the documents at issue in this case. (*Id.* at ¶¶ 2-3.)

Plaintiff's Response: Disputed in part. Plaintiff does not dispute Defendant's characterization of Plaintiff's FOIA request, but respectfully refers the Court to the referenced document for a complete and accurate statement of its contents. With respect to footnote one, Plaintiff does not dispute that Mr. McCormick is an attorney employed by the IRS. Plaintiff lacks information sufficient to form a belief as to the accuracy of the remainder of Defendant's statement in footnote one and therefore disputes it.

Statement 2: After the Service received the request described in Paragraph 1, Denise Higley was assigned to prepare the Service's response. (Higley Decl. at ¶ 3.) Ms. Higley is a Tax Law Specialist assigned to the Internal Revenue Service's Headquarters Freedom of Information Act group. Her post of duty is in Ogden, Utah, with the Disclosure Office, which is a component of the Office of Privacy, Governmental Liaison and Disclosure. She has been

employed with the Service since April 26, 1977. She has been employed specifically with the Disclosure Office since February 1999. (*Id.* at ¶ 1.)

Plaintiff's Response: Disputed in part. Plaintiff does not dispute that Denise Higley is employed by the IRS as a Tax Law Specialist. Plaintiff lacks information sufficient to form a belief as to the accuracy of the remainder of Defendant's statement and therefore disputes it.

Statement 3: Ms. Higley's duties as a Tax Law Specialist include responding to requests made under the Freedom of Information Act ("FOIA"). These duties require knowledge and understanding of the Service, its procedures, and where records are maintained. She is also required to know the provisions of the FOIA and provisions which exempt certain records from disclosure in response to FOIA requests. She is familiar with the Service's procedures for logging and processing FOIA requests. (*Id.* at ¶ 2.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 4: Ms. Higley received the October Request on October 17, 2012. (*Id.* at ¶ 4.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 5: Upon receipt of the October Request, Ms. Higley initially determined that responsive records to items 1 and 2 of the request included, at a minimum, plaintiff's March 2012 FOIA request (the "March Request") for 26 U.S.C. § 6103(g) requests and records related thereto. (*Id.* at ¶ 5.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 6: In the March Request, for the time period of January 1, 2009, to March 27, 2012, the plaintiff sought the following records:

1) All documents, including e-mail communications, between the President or White House staff and the IRS, its staff, or other relevant employees concerning a request for tax records under §6103(g)(1).

2) All documents referring or relating to requests by the President or White House staff for copies of tax returns or tax return information made to the IRS or its employees and any subsequent response by the IRS or its employees;

a. For all documents responsive to this request, please produce all records referring or relating to the forwarding of Presidential requests to the Director of the Office of Governmental Liaison and Disclosure.

3) All documents referring or relating to reports filed by the President, or his agents, with the Joint Committee on Taxation at the U.S. Congress. Concerning such reports, produce all records referring or relating to whether the President's reports accurately disclosed:

a. The name and address of the taxpayer whose return information is to be disclosed;

b. The kind of return information which is to be disclosed;

c. The taxable period or periods covered by such return or return information; and

d. The specific reason why the inspection or disclosure is requested.

4) All documents referring or relating to determinations by the Joint Committee on Taxation that the disclosure of requests pursuant to IRC § 6103(g)(1) would be in the national interest.

(*Id.* at ¶ 5.)

Plaintiff's Response: Plaintiff does not dispute Defendant's characterization of Plaintiff's FOIA request, but respectfully refers the Court to the referenced document for a complete and accurate statement of its contents.

Statement 7: With respect to the October Request, Ms. Higley determined that item 7 should be referred to the Treasury Inspector General for Tax Administration ("TIGTA") because the IRS does not have jurisdiction over TIGTA's records. She then forwarded item 7 to the disclosure office at TIGTA and began the process of locating records responsive to items 1 through 6 and 8 of plaintiff's request. (*Id.* at ¶ 6.)

Plaintiff's Response: Disputed in part. Plaintiff does not dispute that item 7 of its request was forwarded by the IRS to TIGTA. Plaintiff lacks information sufficient to form a belief as to the accuracy of the remainder of Defendant's statement and therefore disputes it.

Statement 8: On November 4, 2013, this Court dismissed all claims related to items 7 and 8 of the October Request. (*See* Docket Entry No. 9.)

Plaintiff's Response: Undisputed.

Statement 9: Having recognized that items 1 and 2 of the October Request related, at a minimum, to plaintiff's March Request, Ms. Higley determined that records related to the March Request would be responsive to items 1 and 2 of the October Request. She thus obtained, from the Automated Freedom of Information Act electronic database (AFOIA), all records associated with the March 2012 FOIA request. (Higley Decl. at ¶ 7.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 10: AFOIA is the image-based document management system used by the Office of Privacy, Governmental Liaison and Disclosure to process FOIA requests. The Ogden Disclosure Office, where Ms. Higley works, has been using this system since January 2010. The Office of Appeals has been using the AFOIA system since October 2012. It functions as a database that includes FOIA requests, case notes regarding such requests, and responsive records. (*Id.* at ¶ 8.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 11: AFOIA is the successor to the E-DIMS database (Electronic Disclosure Information System), which was a management system utilized by the Internal Revenue Service until it was replaced by AFOIA during a roll-out phase beginning in January 2010 and ending in

October 2012. E-DIMS was a nation-wide management information system for inventory control, casework management, and standardized reporting for the IRS's national Disclosure function. In an effort to ensure timely and accurate data entry, each office with access to E-DIMS was asked to input all relevant data, including case history notes, when working on requests under 26 U.S.C. § 6103, FOIA, and the Privacy Act. AFOIA was developed to assist the Service in managing both the workload and data involved in complying with FOIA. It captures all requests made pursuant to section 6103, FOIA, and the Privacy Act. (*Id.* at ¶ 8 n.1.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 12: Upon conferring with Valerie Barta, a Senior Tax Law Specialist in the Headquarters Disclosure Office, Ms. Higley learned that plaintiff had filed a lawsuit relating to the March Request. She also learned that Deborah Lambert-Dean, an attorney in the Service's Office of Chief Counsel, was coordinating defense of that lawsuit with the Department of Justice. (*Id.* at ¶ 9.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 13: Ms. Higley contacted Ms. Lambert-Dean, to let her know of plaintiff's October Request. Ms. Lambert-Dean was conducting a search of the AFOIA database and its predecessor, the Electronic Disclosure Information Management System (E-DIMS), with respect to the plaintiff's FOIA lawsuit regarding its March Request. Ms. Lambert-Dean and Ms. Higley agreed that Ms. Lambert-Dean would expand her search to address the plaintiff's October Request. (*Id.* at ¶ 10.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 14: Ms. Lambert-Dean copied Ms. Higley on e-mail correspondence with Gary Prutsman, Associate Director of the Disclosure Office, and Diane Graves, an analyst in the IRS Office of Legislative Affairs, showing the results of a completed search of the FOIA records of the AFOIA and E-DIMS databases for each of the following terms, for the period beginning January 1, 2009: 6103g, White House, President of the United States, POTUS, Barack, Obama, George, and Bush. (*Id.* at ¶ 10.) This search looked for records containing each of these terms, and thus returned records containing any one of these terms. (*Id.* at ¶ 10 n.3.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 15: Both E-DIMS and AFOIA were searched in order to cover the requested time frame, January 1, 2009, to October 9, 2012. (*Id.* at ¶ 10 n.2.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 16: The search of E-DIMS did not result in any responsive records. (*Id.* at ¶ 11 n.4.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 17: The search of E-DIMS and AFOIA did not identify any responsive records other than those related to plaintiff's March Request. (*Id.* at ¶ 10.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 18: Upon Ms. Higley's review of the AFOIA records regarding plaintiff's March Request and independent inquiry of her colleagues, she determined that her colleagues in the Office of Privacy, Governmental Liaison and Disclosure (Mr. Prutsman, John H. Davis [Associate Director], Bertrand Tzeng [Disclosure Manager], David Nimmo

[Management/Program Analyst], Tina Haas [Program Analyst], Teddy Elmer [Management/Program Analyst], Ms. Barta, Rhonda O'Reilly [Senior Disclosure Analyst], and Janice Rudolph [Tax Law Analyst]) were involved with the March Request and may have records responsive to items 1 and 2 of plaintiff's request. She directed them to conduct a search for responsive records in their possession. (*Id.* at ¶ 11.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 19: Upon review of records resulting from the above-referenced searches, and upon consultation with Ms. Lambert-Dean, Ms. Higley determined that the IRS Media Relations Office and IRS Office of Appeals may have records responsive to items 1 and 2 of plaintiff's request. Ms. Higley sent to those offices copies of plaintiff's October Request and a memorandum directing them to search for responsive records. Ms. Higley also called Tom Mitchell, a manager in the Office of Appeals, requesting that he send to her a copy of the appeals letter regarding plaintiff's March Request. Based upon the response from the IRS Media Relations Office, she also sent to the IRS Office of Communications & Liaison a copy of plaintiff's October Request and a memorandum directing that office to search for responsive records. (*Id.* at ¶ 12.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 20: Upon review of records resulting from the above-referenced searches, and upon consultation with Mr. Prutsman, Ms. Higley determined that Deputy Commissioner Beth Tucker, and Rebecca Chiamida and Bernice Fisher, executives at the Office of Privacy, Governmental Liaison and Disclosure, may have records responsive to items 1 and 2 of

plaintiff's request. Ms. Higley forwarded to them a copy of plaintiff's October Request and asked them to send to her all responsive records in their possession. (*Id.* at ¶ 13.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 21: Ms. Higley received responses from all persons to whom she sent the search requests described above. (*Id.* at ¶ 14.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 22: Based on Ms. Higley's experience, and upon her consultation with the above-referenced people, and upon reviewing the results of the above-referenced searches, she determined that plaintiff's prior March Request (F12111-0031) was the only FOIA request that the IRS received related to 26 U.S.C. § 6103(g), from January 1, 2009, to October 9, 2012. (*Id.* at ¶ 15.)

Plaintiff's Response: Disputed in part. Plaintiff lacks information sufficient to form a belief as to the accuracy of the first clause of Defendant's statement and therefore disputes it. Plaintiff does not dispute that Ms. Higley made the determination referenced in the second clause of Defendant's statement, but Plaintiff does dispute the merits of that determination.

Statement 23: Ms. Higley then reviewed all records compiled pursuant to the above-described search efforts. She initially concluded that there were 796 pages of responsive records for items 1 and 2, but that was an error. Instead, there were 790 pages of responsive records. Pursuant to FOIA exemptions (b)(5) and (b)(6), she made redactions to 289 pages and identified 6 pages to be withheld in their entirety: to protect against disclosure of information covered by the deliberative process privilege, the attorney-client privilege, and the work product doctrine;

and to protect against disclosure of the personal telephone numbers of the individuals identified in the responsive records. (*Id.* at ¶ 16.)

Plaintiff's Response: Disputed in part. Plaintiff lacks information sufficient to form a belief as to the accuracy of the first three sentences of Defendant's statement and therefore disputes them. Plaintiff does not dispute that Ms. Higley made the redactions and withholdings referenced in the last sentence of Defendant's statement, but Plaintiff does dispute the merits of those actions.

Statement 24: With respect to Items 3 and 4 of the October Request, based on Ms. Higley's experience, and upon consultation with Mr. Prutsman and Ms. Lambert-Dean, she determined that correspondence between the IRS and the Executive Office of the President is most likely maintained by the Office of Legislative Affairs. (*Id.* at ¶ 17.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 25: Additionally, based on Ms. Higley's experience, and upon consultation with Mr. Prutsman and Ms. Lambert-Dean, she determined that the following offices could also possibly have responsive documents: the Services and Enforcement Office, Small Business/Self Employed, the IRS Media Relations Office, and the Office of the Commissioner. (*Id.* at ¶ 18.)

Statement 26: Ms. Higley received an email from the Small Business/ Self Employed function on October 19, 2012, stating that it would not have any documents responsive to the October Request. (*Id.* at ¶ 19.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 27: Ms. Higley issued search memoranda to the Office of Legislative Affairs and to the other offices listed above in paragraph 25, directing them to search for any records responsive to the plaintiff's October Request. (*Id.* at ¶ 20.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 28: Ms. Higley received responses from all of the offices to whom she sent search memoranda. None of the search memoranda resulted in finding any records responsive to the request. (*Id.* at ¶ 21.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 29: Upon conferring with Ms. Barta and with Ms. Lambert-Dean, Ms. Higley obtained the annual IRS reports to the Joint Committee on Taxation, for 2009 through 2011, regarding disclosures of return information within the Federal government. (*Id.* at ¶ 22.)

Plaintiff's Response: Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Statement 30: The reports to the Joint Committee on Taxation referenced above showed a number of requests for "tax checks" under 26 U.S.C. § 6103(c). "Tax checks" are requests for the return information of individuals under consideration for employment within the Executive Branch or appointment by the President. Disclosures regarding such "tax checks" are made pursuant to written consent, given under 26 U.S.C. § 6103(c) by the prospective employee or appointee. Upon consultation with Ms. Lambert-Dean, and with Ms. Higley's management, she determined that information with respect to any "tax check" request is inherently taxpayer specific. Ms. Higley determined that any records responsive to items 3 and 4 would be return information exempted from disclosure under FOIA exemption (b)(3) in conjunction with 26

U.S.C. § 6103(a). Therefore, she did not conduct a search for requests for "tax checks" that would be responsive to items 3 and 4. (*Id.* at ¶ 23; *see also id.* at ¶ 28.)

Plaintiff's Response: Disputed in part. Plaintiff lacks information sufficient to form a belief as to the accuracy of the first sentence of Defendant's statement and therefore disputes it. Plaintiff does not dispute the second and third sentences of Defendant's statement. Plaintiff lacks information sufficient to form a belief as to the accuracy of the fourth sentence of Defendant's statement and therefore disputes it. Plaintiff does not dispute that Ms. Higley made the determination referenced in the fifth sentence of Defendant's statement, but Plaintiff does dispute the merits of that determination. Plaintiff does not dispute that Ms. Higley did not conduct a search for "tax checks" as noted in the last sentence of Defendant's statement.

Statement 31: With respect to items 5 and 6 of the October Request, upon consultation with Ms. Lambert-Dean and review of the Internal Revenue Code, Ms. Higley determined that: (a) agencies do not submit requests to the IRS under sections 6103(i)(1) and (i)(3)(A); and (b) any records responsive to items 5 and 6 would be return information exempted from disclosure under FOIA exemption (b)(3) in conjunction with 26 U.S.C. § 6103(a). (*Id.* at ¶ 24.)

Plaintiff's Response: Disputed in part. Plaintiff does not dispute that Ms. Higley made the determinations referenced in Defendant's statement, but Plaintiff does dispute the merits of those determinations.

Statement 32: Ms. Higley, therefore, did not conduct any search regarding items 5 and 6 because any responsive records would be exempt from disclosure in their entirety as return information, under FOIA Exemption (b)(3) and 26 U.S.C. § 6103(a). Moreover, such a search would have consumed a significant amount of Government resources to locate records that, by definition, are return information. (*Id.* at ¶ 29.)

Plaintiff's Response: Disputed in part. Plaintiff does not dispute that Ms. Higley did not perform a search for items 5 and 6 of Plaintiff's request. Plaintiff disputes the remainder of Defendant's statement because either Plaintiff lacks sufficient information to form a belief as to its accuracy or because it consists of legal conclusions and not material facts.

Statement 33: By letter dated December 11, 2012, signed by the Acting Disclosure Manager of Headquarters Disclosure Program Operations and FOIA, Bertrand Tzeng, in his supervisory capacity, the Disclosure Office provided an interim response to plaintiff's October 9, 2012, FOIA request. The Disclosure Office advised that any records responsive to items 3 through 6 of the FOIA request would be return information that would be withheld from plaintiff pursuant to FOIA exemption (b)(3) in conjunction with 26 U.S.C. § 6103(a). (*Id.* at ¶ 26; *see also* McCormick Decl. at ¶ 7; Compl. Ex. 3.)

Plaintiff's Response: Undisputed, but Plaintiff respectfully refers the Court to the referenced letter for a complete and accurate statement of its contents.

Statement 34: By letter dated March 4, 2013, signed by Mr. Tzeng, the Disclosure Manager of Headquarters Disclosure Program Operations and FOIA, in his supervisory capacity, the Disclosure Office provided a final response to plaintiff's October 9, 2012, FOIA request. Through that letter, the Disclosure Office advised the plaintiff that the search regarding items 1 and 2 resulted in locating 796 pages of responsive records, 289 pages of which were being withheld in part and 6 pages of which were being withheld in full, pursuant to FOIA exemptions (b)(5) and (b)(6). Enclosed with this letter was a CD containing the responsive records and a notice advising plaintiff of its appeal rights. The Disclosure Office again advised that any records responsive to items 3 through 6 of the FOIA request would be return information that would be withheld from plaintiff pursuant to FOIA exemption (b)(3) in conjunction with 26 U.S.C. § 6103(a). (Higley Decl. at ¶ 27; *see also* McCormick Decl. at ¶ 8; Compl. Ex. 5.)

Plaintiff's Response: Undisputed, but Plaintiff respectfully refers the Court to letter referenced letter for a complete and accurate statement of its contents.

Statement 35: By letter dated April 8, 2013, plaintiff filed an administrative appeal. (McCormick Decl. at ¶ 9; *see also* Compl. Ex. 6.)

Plaintiff's Response: Undisputed, but Plaintiff respectfully refers the Court to the referenced letter for a complete and accurate statement of its content.

Statement 36: By letter dated May 6, 2013, the Office of Appeals responded to plaintiff's administrative appeal, stating that, after review, that office had determined that the response provided by the Disclosure Office to plaintiff's October 9, 2012, FOIA request was appropriate. (McCormick Decl. at ¶ 10; *see also* Compl. Ex. 8.)

Plaintiff's Response: Undisputed, but Plaintiff respectfully refers the Court to the referenced letter for a complete and accurate statement of its content.

Statement 37: During this litigation, Mr. McCormick contacted the Disclosure Office and requested copies of its administrative file and all records identified as responsive to plaintiff's FOIA request. He has since obtained from Michelle Eldridge (Supervisory Public Affairs Specialist, IRS Office of Media Relations) additional responsive records that will be produced to plaintiff concurrently with the IRS' motion for summary judgment. *See* IRS000791-793. At the same time, the Service will also produce to the plaintiff the 790 pages of records originally released to plaintiff with some redactions removed. (McCormick Decl. at ¶ 11.)

Plaintiff's Response: Disputed in part. Plaintiff lacks information sufficient to form a belief as to the accuracy of the first two sentences of Defendant's statement and therefore disputes those assertions. With respect to the last sentence of Defendant's statement, Plaintiff confirms that it received a supplemental release of records concurrently with Defendant's motion for summary judgment.

Statement 38: Records responsive to items 3 through 6 are being withheld in full pursuant to FOIA exemption (b)(3) in conjunction with 26 U.S.C. § 6103(a). (*Id.* at ¶ 13.)

Plaintiff's Response: Undisputed.

Statement 39: Exemption (b)(3) and § 6103(a) are asserted with respect to records that either consist of third party return information in their entirety or reference specific third party taxpayers. Exemption (b)(3) is being asserted in conjunction with § 6103(a) to withhold the return information of taxpayers that are the subject of requests referenced in items 3 through 6 of plaintiff's FOIA request. (*Id.*)

Plaintiff's Response: Disputed in part. Plaintiff does not dispute that Defendant invoked Exemption 3 in conjunction with 26 U.S.C. § 6103(a) in response to items 3-6 of Plaintiff's FOIA request. However, Plaintiff disputes the remainder of Defendant's statement, which consists of legal conclusions.

Statement 40: Regarding the documents produced in response to items 1 and 2 of the subject FOIA request, the Disclosure Office redacted the personal telephone numbers of various IRS employees on the following pages: IRS000077, 079, 092, 114, 338, 349, 388, 420, 422, 429, 430, 432, 436, 570, and 578. As this information is of a personal nature, the information meets the threshold requirement of subsection (b)(6). Further, there is no public interest in such information, and release of these personal telephone numbers would violate a viable privacy interest of the individual subject of the information. (*Id.* at ¶ 20.)

Plaintiff's Response: Disputed in part. Plaintiff does not dispute the first sentence of Defendant's statement. The remainder of Defendant's statement consists of legal conclusions, not material facts, and therefore is disputed.

Statement 41: Regarding items 3 and 4 of the subject FOIA request, the Service did not specifically search for any requests made to the IRS from the Executive Office of the President

for “tax checks,” which are requests for the return information, within the meaning of 26 U.S.C. § 6103(a), of individuals under consideration for employment within the Executive Branch or appointment by the President.

- a. Disclosures regarding such “tax checks” are made pursuant to 26 U.S.C. § 6103(c) written consents by the prospective employee. Information with respect to any “tax check” request is inherently taxpayer specific.
- b. The information with respect to a “tax check” is of a personal nature, and such information meets the threshold requirement of Exemption (b)(6).

(Id. at ¶ 21.)

Plaintiff’s Response: Disputed in part. With respect to the first sentence of Defendant’s statement, Plaintiff does not dispute that Defendant did not conduct a search for the requested “tax check” records. Whether such records constitute “return information” within the meaning of the Internal Revenue Code is a legal conclusion, not a material fact. Plaintiff does not dispute the first sentence of subsection (a) of Defendant’s statement. As for the second sentence of that subsection, Plaintiff disputes that all information with respect to a “tax check” request is “taxpayer specific.” Further, Plaintiff disputes the first clause of subsection (b) of Defendant’s statement, because a “tax check” contains non-identifying information that is not of “a personal nature.” The second clause of the same sentence is a legal conclusion, not a material fact.

Statement 42: The Service determined that any records responsive to items 5 and 6 of the October Request are exempt from disclosure under Exemption (b)(6). *(Id. at ¶ 22.)*

Plaintiff’s Response: Plaintiff does not dispute that Defendant made the referenced determination, but it disputes the merits of that determination.

Statement 43: The Service determined that any records responsive to items 5 and 6 are also exempt from disclosure pursuant to FOIA subsection (b)(7)(c). (*Id.* at ¶ 23.)

- a. In this case, any responsive records would be records generated and/or compiled for law enforcement purposes, a criminal investigation of the subject taxpayer.
- b. Sections 6103(i)(1) and (i)(2) expressly provide for disclosure only to Federal employees engaged in a criminal investigation. Section 6103(i)(3)(A) expressly provides for disclosure only to apprise Federal agencies charged with enforcing Federal criminal law of evidence of a violation of such law.
- c. There is little or no public interest in such information, and if it was released, that would violate a viable privacy interest of the individual subject of the information.

(*Id.* at ¶ 23.)

Plaintiff's Response: Disputed in part. Plaintiff does not dispute that Defendant made the determination referenced in the first sentence of Defendant's statement; however, Plaintiff disputes the merit of that determination. Subsections (a) and (b) of Defendant's statement are legal conclusions, not material facts, and therefore are disputed. Subsection (c) of Defendant's statement is a generalized, unsubstantiated assertion and therefore is disputed.

Statement 44: The Service determined that certain of the information in the responsive records for items 1 and 2 of the FOIA request is exempt from disclosure under the FOIA pursuant to exemption (b)(5). (*Id.* at ¶ 14.)

Plaintiff's Response: Plaintiff does not dispute that Defendant made the determination referenced in Defendant's statement; however, Plaintiff disputes the merit of that determination.

Statement 45: On October 2, 2012, plaintiff filed in this court a FOIA suit (Civil Action Case No. 1:12-cv-01633-RLW) against the Internal Revenue Service. That suit was regarding

plaintiff's March 2012 FOIA request, which sought, amongst other things, requests for return information under 26 U.S.C. § 6103(g). Also on October 2, 2012, plaintiff published on its website a press release announcing that suit. (*Id.* at ¶ 15.)

Plaintiff's Response: Disputed in part. The FOIA request upon which the instant litigation is based did not seek "requests for return information under 26 U.S.C. § 6103(g)." Plaintiff respectfully refers the Court to the referenced document for a complete and accurate statement of its contents. Plaintiff does not dispute the remainder of Defendant's statement.

Statement 46: On October 2 and 3, 2012, attorneys and other employees at the IRS, as well as attorneys in the Department of Justice Tax Division, had numerous communications regarding the Service's development of a media response to plaintiff's October 2 press release. (*Id.* at ¶ 16.)

a. The IRS Office of Media Relations finalized its response at 3:56 p.m. on October 3, 2012.

i. IRS000791 contains an October 3, 2012, e-mail message, dated 3:56 p.m., from Jonathan Davis (Chief of Staff, IRS Office of the Commissioner) to Beth Tucker (IRS Deputy Commissioner for Operations Support), Terry Lemons (Director, IRS Office of Communications), Frank Keith (Chief, IRS Communications & Liaison), Michelle Eldridge, Rebecca Chiaramida (Director, IRS Office of Privacy, Governmental Liaison and Disclosure), A.M. Gulas (Senior Counsel in the IRS Office of Chief Counsel (Procedure & Administration)), and Nikole Flax (Special Assistant to the Chief, IRS Office of Appeals).

ii. In the email at IRS000791, Chief of Staff Davis authorized release to the public of the following statement: "The IRS does not comment on pending litigation.

However, the IRS can confirm that no requests were made, and no tax returns or

return information have been disclosed under Internal Revenue Code 6103 (g) during the period in question. Federal law provides under Internal Revenue Code 6103 (g) a provision for the President of the United States to request and receive federal tax return information."

b. IRS000266-267, furthermore, contain an October 3, 2012, e-mail message, released in full, time-stamped 4:44 p.m., from Terry Lemons to Beth Tucker, Jonathan Davis, Frank Keith, Michelle Eldridge, Rebecca Chiaramida, Senior Counsel Gulas, and Dean Patterson (Public Affairs Specialist, IRS Office of Media Relations). That e-mail message provides that the Washington Examiner had updated its coverage to include the IRS media response.

(*Id.* at ¶ 16.)

Plaintiff's Response: Undisputed, but Plaintiff respectfully refers the Court to the referenced records for a complete and accurate statement of their contents.

Statement 47: Also, on October 3, 2012, Deborah Lambert-Dean, General Attorney (Tax) in the IRS Office of Chief Counsel² (Procedure & Administration), was assigned to coordinate with the Department of Justice the defense of the above-referenced October 2, 2012, FOIA suit. (*Id.* at ¶ 17.)

² The IRS Office of Chief Counsel is sometimes referred to herein as "Counsel" or "Chief Counsel."

Plaintiff's Response: Disputed in part. Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it. Plaintiff does not dispute footnote two of Defendant's statement.

Statement 48: The IRS is withholding—under the attorney-client privilege, the work product doctrine, and the deliberative process privilege—portions of e-mail correspondence containing advisory opinions and recommendations—by IRS Office of Chief Counsel attorneys

and by agency personnel—generated during the course of review and consideration of IRS positions associated with plaintiff’s March 2012 FOIA request; plaintiff’s subsequent lawsuit filed October 2, 2012; and plaintiff’s related press release on October 2, 2012. (*Id.* at ¶ 18.)

a. IRS00003, 009, 015-016, 026, 030, 033, 038-039, 384, 393, 398, 402, 406, 409, 416, and 421 contain October 4, 2012, e-mail messages among attorney Gulas and attorney Lambert-Dean, to assist attorney Lambert-Dean in the defense of the October 2, 2012, FOIA suit.

i. The redacted lines in the e-mail messages time-stamped 8:58:20 a.m. and 7:05:49/9:06 a.m.,³ describe the confidential, strategic advice (not involving legal analysis) that attorney Gulas had previously given to various IRS employees during the development of the IRS media response, Gulas' conversations on this subject during that period, and confidential communications that attorney Gulas had with attorneys at the Department of Justice, who were defending the October 2, 2012 lawsuit, regarding the development of the IRS media response with respect to litigation concerns. The withheld information is both deliberative and pre-decisional in nature. It is pre-decisional because the withheld information describes advice given before the IRS finalized its media response at 3:56 p.m. on October 3, 2012. The withheld information also involves discussions between Counsel and Justice attorneys regarding active FOIA litigation with the plaintiff. Disclosure of the withheld information would expose the decision making processes of the IRS and the Office of Chief Counsel in such a way as to discourage candid discussions and undermine their ability to perform their function of tax administration.

ii. The redacted lines in the e-mail messages time-stamped 9:17:51/11:18 a.m. and 9:16:07/11:16 a.m. contain the opinions and recommendations of attorneys Gulas and Lambert-Dean in development of the IRS Office of Chief Counsel

recommendations to the Department of Justice Tax Division regarding the October 2, 2012, FOIA suit. The withheld information is both deliberative and pre-decisional in nature. It is pre-decisional because it was created before any recommendations were made to the Department of Justice and before the Department of Justice took any action regarding the October 2, 2012, FOIA suit. This e-mail correspondence is dated only two days after Cause of Action filed suit, and only one day after attorney Lambert-Dean was assigned to coordinate with the Department of Justice the defense of the above-referenced October 2, 2012, FOIA suit. The withheld information also involves discussions amongst Counsel attorneys regarding active FOIA litigation with the plaintiff. Disclosure of the withheld information would expose the decision making processes of the Office of Chief Counsel in such a way as to discourage candid discussions and undermine its ability to perform its function of tax administration.

iii. The redacted lines in the e-mail message time-stamped 9:22:21 a.m. contain information regarding attorney Gulas' investigation regarding the March 2012 FOIA request, which attorney Gulas conducted after plaintiff filed its October 2012 FOIA suit. The withheld information involves discussions amongst Counsel attorneys regarding active FOIA litigation with the plaintiff. Disclosure of the withheld information would expose the decision making processes of the Office of Chief Counsel, and its work product, in such a way as to discourage candid discussions and undermine its ability to perform its function of tax administration.

iv. The redacted materials are exempt from disclosure under the deliberative process privilege, the attorney-client privilege, the attorney work-product privilege, and exemption (b)(5).

(*Id.* at ¶ 18(a).)

b. IRS000020-021 and 260-261 contain an October 3, 2012, e-mail message, time-stamped 10:28 a.m., from attorney Gulas to Dean Patterson providing confidential, strategic recommendations (not involving legal analysis) regarding the IRS response to the October 2, 2012, press release.

i. The redacted materials are exempt from disclosure under the deliberative process privilege, the attorney-client privilege, the attorney work-product privilege, and exemption (b)(5). The withheld information is both deliberative and pre-decisional in nature. It is pre-decisional because it was created before the IRS finalized its media response at 3:56 p.m. on October 3, 2012.

ii. The withheld information also involves discussions between a Counsel attorney and an IRS employee regarding a matter that was the subject of active FOIA litigation with the plaintiff. Disclosure of the withheld information would expose the decision making processes of the IRS and the Office of Chief Counsel in such a way as to discourage candid discussions and undermine their ability to perform their function of tax administration.

(*Id.* at ¶ 18(b).)

c. IRS000043, 047, 062, 073, 080, 254, 257, and 413 contain October 3, 2012, e-mail messages between attorney Gulas, Carmen Banerjee (Trial Attorney, Department of Justice Tax Division), David Hubbert (attorney and then-Chief of the Civil Trial Section-Eastern Region, Department of Justice Tax Division), and James Wilkinson (attorney and Assistant Chief of the Civil Trial Section-Eastern Region, Department of Justice Tax Division).

i. The redacted text discusses the development of the IRS response to the October 2, 2012, press release in light of the October 2, 2012, FOIA suit-before the IRS response was finalized-as well as discussions of litigation strategy. The emails

containing redactions are time-stamped 11:55 a.m., 12:40 p.m., 1:36 p.m., 2:03 p.m., and 2:49 p.m.

ii. The redacted materials are exempt from disclosure under the deliberative process privilege, the attorney-client privilege, the attorney work-product privilege, and exemption (b)(5). The redacted text would reveal confidential conversations between Counsel attorney Gulas and IRS employees, as well as between Counsel attorney Gulas and Department of Justice Tax Division attorneys. The withheld information is both deliberative and pre-decisional in nature. It is pre-decisional because it was created before the IRS finalized its media response at 3:56 p.m. on October 3, 2012, and while the IRS and Department of Justice Tax Division were in the early stages of discussing litigation strategy regarding plaintiff's October 2, 2012 FOIA suit.

iii. The withheld information also involves discussions between a Counsel attorney and attorneys at the Department of Justice regarding a matter that was the subject of active FOIA litigation with the plaintiff. Disclosure of the withheld information would expose the decision making processes of the IRS and the Office of Chief Counsel in such a way as to discourage candid discussions and undermine their ability to perform their function of tax administration.

(Id. at ¶ 18(c).)

d. IRS000046, 418, 552, 559, 568, and 576 contain an October 3, 2012, e-mail message from attorney Donald Squires (Senior Technician Reviewer, Office of Chief Counsel (Procedure & Administration)) to Frank Keith, Terry Lemons, Rebecca Chiaramida, Gary Prutsman (Associate Director, Disclosure Office), and attorney Richard Goldman (Branch Chief, IRS Office of Chief Counsel (Procedure & Administration)).

i. The redacted lines in this e-mail message contain a confidential description of

possible recommendations to the Department of Justice regarding litigation strategy with respect to the October 2, 2012, FOIA suit.

ii. The withheld information is both deliberative and pre-decisional in nature. It is pre-decisional because it was created before any recommendations were made to the Department of Justice and before the Department of Justice took any action regarding the October 2, 2012, FOIA suit. This e-mail correspondence is dated only one day after Cause of Action filed suit.

iii. The withheld information also involves discussions amongst Counsel attorneys regarding active FOIA litigation with the plaintiff. Disclosure of the withheld information would expose the decision making processes of the Office of Chief Counsel and the IRS in such a way as to discourage candid discussions and undermine their ability to perform their function of tax administration.

iv. The redacted materials are exempt from disclosure under the deliberative process privilege, the attorney-client privilege, the attorney work-product privilege, and exemption (b)(5).

(Id. at ¶ 18(d).)

e. IRS000053-061, 063, 067-072, 074, 075-076, 080-081, 238-250, 252, 253, 263-265, 472-473, 475-476, 478-504, and 508 contain October 3, 2012, e-mail messages between attorney Gulas, Beth Tucker, Terry Lemons, Michelle Eldridge, Jonathan Davis, Rebecca Chiaramida, Frank Keith, Dean Patterson, and Nikole Flax concerning the development of the IRS response to the October 2, 2012, press release in light of the October 2, 2012, FOIA suit. i. The redacted lines in the e-mail messages time-stamped 11:49:45 a.m./1:50 p.m., 1:58:11 p.m., and 11:59:04 a.m./1:59 p.m. contain a draft IRS media response for review and comment.

ii. The redacted lines in the e-mail messages time-stamped 12:50:05/1:50/2:50 p.m.,⁴

12:55:39/2:55 p.m., 12:58:51/2:59 p.m., 1:03:31/3:03 p.m., 1:05:42/3:05 p.m., 1:07:58/3:08 p.m., 1:13:43/3:14 p.m., and 1:17:11/3:17 p.m. convey: revisions and recommendations by various participants in the e-mail correspondence; and strategic, confidential communications (not involving legal analysis) between attorney Gulas and various IRS employees, regarding development of the draft IRS media response.

iii. The withheld information is both deliberative and pre-decisional in nature. It is pre-decisional because it was created before the IRS finalized its media response at 3:56 p.m. on October 3, 2012.

iv. The withheld information also involves discussions amongst IRS employees and a Counsel attorney regarding the subject matter of active FOIA litigation with the plaintiff. Disclosure of the withheld information would expose the decision making processes of the IRS and the Office of Chief Counsel in such a way as to discourage candid discussions and undermine their ability to perform their function of tax administration.

v. The redacted materials are exempt from disclosure under the deliberative process privilege, the attorney-client privilege, the attorney work-product privilege, and exemption (b)(5).

(*Id.* at ¶ 18(e).)

f. IRS000064, 082, 085, 088, 094, 098, 116, 120, 123, 146, 151, 158, 162, 172, 178, 185, 191, 197, 203, 209, 215, 222-223, 229, 234-235, 272, 275, 334, 345, 352, 358, 364, 369, 375, 381, 426, 442, 447, 464, 469, 505, 510, 515, 519, 525, 530, 535, 542, 548, 556, 564, 573, 580-581, and 584 contain an October 2, 2012, e-mail message from Michelle Eldridge to Valerie Barta (Senior Tax Law Specialist, IRS Disclosure Office), Marie Twarog (Tax Law Specialist, Disclosure Office), Rhonda O'Reilly (Tax Law Specialist, IRS Disclosure Office), Clare Calaby

(Management/Program Analyst, IRS Office of Governmental Liaison), Terry Lemons, Frank Keith, Dean Patterson, Jeannen Wetzler (Supervisory Management/Program Analyst, IRS Office of Communications and Training), and Rebecca Chiaramida concerning the development of the IRS response to the October 2, 2012 press release in light of the October 2, 2012, FOIA suit.

- i. The redacted lines in these e-mail messages convey confidential information from Michelle Eldridge regarding the IRS' possible strategy in responding to the October 2, 2012, press release, as well as opinions regarding the impact of that press release.
- ii. The withheld information is both deliberative and pre-decisional in nature. It is pre-decisional because it was created before the IRS finalized its media response at 3:56 p.m. on October 3, 2012. Disclosure of the withheld information would expose the decision making processes of the IRS in such a way as to discourage candid discussions and undermine its ability to perform its function of tax administration.
- iii. The redacted materials are exempt from disclosure under the deliberative process privilege and exemption (b)(5).

(*Id.* at ¶ 18(f).)

g. IRS000131-133, and 280-282, contain administrative materials concerning the development of the IRS calendar year 2009 reports to the Joint Committee on Taxation under 26 U.S.C. § 6103. The redacted materials contain a recommendation from a Deputy Commissioner to the Commissioner concerning the reports prior to their issuance, as well as draft correspondence for review and comment by the Commissioner.

- i. The withheld information is both deliberative and pre-decisional in nature. It is pre-decisional because it contains draft documents for consideration by the Commissioner, rather than final versions of those documents.
- ii. Disclosure of the withheld information would expose the decision making processes of the IRS in such

a way as to discourage candid discussions and undermine its ability to perform its function of tax administration.

iii. The redacted materials are exempt from disclosure under the deliberative process privilege and exemption (b)(5).

(Id. at ¶ 18(g).)

h. IRS000509 contains an October 2, 2012, e-mail message from John Davis to Rhonda O'Reilly.

i. The redacted lines in this e-mail message, time-stamped 8:31 p.m., convey a question by John Davis regarding the development of the IRS response to the October 2, 2012, press release.

ii. The withheld information is both deliberative and pre-decisional in nature. It is pre-decisional because it was created before the IRS finalized its media response at 3:56 p.m. on October 3, 2012.

iii. Disclosure of the withheld information would expose the decision making processes of the IRS in such a way as to discourage candid discussions and undermine its ability to perform its function of tax administration.

iv. The redacted materials are exempt from disclosure under the deliberative process privilege and exemption (b)(5).

(Id. at ¶ 18(h).)

i. IRS000175, 188, and 212-213 contain an October 3, 2012, e-mail message from Richard Goldman to Sarah Tate and Donald Squires concerning development of the IRS response to the October 2, 2012, FOIA suit.

i. The redacted lines contain questions from attorney Goldman to attorneys Tate and Squires concerning development of the IRS Office of Chief Counsel

recommendations to the Department of Justice Tax Division regarding the October 2, 2012 FOIA suit.

ii. The withheld information is both deliberative and pre-decisional in nature. It is pre-decisional because it was created before any recommendations were made to the Department of Justice and before the Department of Justice took any action regarding the October 2, 2012, FOIA suit. This e-mail correspondence is dated only one day after Cause of Action filed suit.

iii. The withheld information also involves discussions amongst Counsel attorneys regarding active FOIA litigation with the plaintiff. Disclosure of the withheld information would expose the decision making processes of the Office of Chief Counsel in such a way as to discourage candid discussions and undermine its ability to perform its function of tax administration.

iv. The redacted materials are exempt from disclosure under the deliberative process privilege, the attorney-client privilege, the attorney work-product privilege, and exemption (b)(5).

(Id. at ¶ 18(i).)

j. IRS000266 and 292 contain an October 3, 2012, e-mail message from Gary Prutsman to John Davis, Bertrand Tzeng (Manager, IRS Disclosure Office), and Mahlon Blagg concerning the development of the IRS response to the October 2, 2012, FOIA suit.

i. The redacted lines contain a statement of an opinion about the IRS litigating position in the October 2, 2012, FOIA suit in light of the IRS response to the October 2, 2012 press release.

ii. The withheld information is both deliberative and pre-decisional in nature. It is pre-decisional because it was created before any recommendations were made to the

Department of Justice and before the Department of Justice took any action regarding the October 2, 2012, FOIA suit. This e-mail correspondence is dated only one day after Cause of Action filed suit.

iii. Disclosure of the withheld information would expose the decision making processes of the IRS in such a way as to discourage candid discussions and undermine its ability to perform its function of tax administration.

iv. The redacted materials are exempt from disclosure under the deliberative process privilege and exemption (b)(5).

(Id. at ¶ 18(j).)

k. IRS000296-297, 313, 327, and 329 contain October 3, 2012, e-mail messages among Gary Prutsman, Bernice Fischer, Rebecca Chiaramida, Mahlon Blagg, and John Davis concerning the development of the IRS response to the October 2, 2012, FOIA suit.

i. The redacted lines in the e-mail messages time-stamped 10:08/11:08:06 a.m. and 11:23:30 a.m. contain statements and questions about issues regarding the IRS litigating position in the October 2, 2012, FOIA suit.

ii. The withheld information is both deliberative and pre-decisional in nature. It is pre-decisional because it was created before any recommendations were made to the Department of Justice and before the Department of Justice took any action regarding the October 2, 2012, FOIA suit. This e-mail correspondence is dated only one day after Cause of Action filed suit.

iii. Disclosure of the withheld information would expose the decision making processes of the IRS in such a way as to discourage candid discussions and undermine its ability to perform its function of tax administration.

iv. The redacted materials are exempt from disclosure under the deliberative process privilege and exemption (b)(5).

(Id. at ¶ 18(k).)

1. IRS000340 contains an October 3, 2012, e-mail message from Gary Prutsman to Rebecca Chiaramida, Bernice Fischer, and Mahlon Blagg concerning advice from the IRS Office of Chief Counsel regarding development of the IRS response to the October 2, 2012, press release.

i. The redacted lines in the e-mail message time-stamped 12:58 p.m. convey attorney Squires' confidential, strategic advice (not involving legal analysis) to Gary Prutsman regarding development of the IRS media response.

ii. The withheld information is both deliberative and pre-decisional in nature. It is pre-decisional because it was created before the IRS finalized its media response at 3:56 p.m. on October 3, 2012.

iii. The withheld information also involves discussions between a Counsel attorney and IRS employees regarding active FOIA litigation with the plaintiff. Disclosure of the withheld information would expose the decision making processes of the IRS and the Office of Chief Counsel in such a way as to discourage candid discussions and undermine their ability to perform their function of tax administration.

iv. The redacted materials are exempt from disclosure under the deliberative process privilege, the attorney-client privilege, the attorney work-product privilege, and exemption (b)(5).

(Id. at ¶ 18(l).)

m. IRS000419-420 contain an October 4, 2012, e-mail message from Deborah Lambert-Dean to Carmen Banerjee regarding the development of the IRS response to the October 2, 2012, FOIA suit.

i. The redacted lines in the e-mail message time-stamped 9:55:13 a.m. convey a question, comments, and opinions from attorney Lambert-Dean to attorney Banerjee about the March 2012 FOIA request in the context of developing the IRS litigating position in the October 2, 2012, FOIA suit.

ii. The withheld information is both deliberative and pre-decisional in nature. It is pre-decisional because it was created before any recommendations were made to the Department of Justice and before the Department of Justice took any action regarding the October 2, 2012, FOIA suit. This e-mail correspondence is dated only two days after Cause of Action filed suit, and only one day after attorney Lambert-Dean was assigned to coordinate with the Department of Justice the defense of the above-referenced October 2, 2012, FOIA suit.

iii. The withheld information also involves discussions amongst Counsel and Department of Justice attorneys regarding active FOIA litigation with the plaintiff. Disclosure of the withheld information would expose the decision making processes of the Office of Chief Counsel and the Department of Justice in such a way as to discourage candid discussions and undermine their ability to perform their functions regarding tax administration.

iv. The redacted materials are exempt from disclosure under the deliberative process privilege, the attorney-client privilege, the attorney work-product privilege, and exemption (b)(5).

(*Id.* at ¶ 18(m).)

n. IRS000453, 455, and 457-458 contain October 2, 2012, e-mail messages among Michelle Eldridge, Richard Goldman, Terry Lemons, Frank Keith, Deborah Butler (then-Associate Chief Counsel, IRS Office of Chief Counsel (Procedure & Administration)), Donald Squires, and Dean Patterson regarding the development of the IRS response to the October 2, 2012, press release.

i. The redacted lines in the e-mail messages time-stamped 2:00:47/2:01:19/4:01 p.m. and 2:59:47 p.m. convey confidential statements from Michelle Eldridge to attorney Goldman regarding the development of the IRS' response to the October 2, 2012, press release, as well as draft IRS statements and revisions.

ii. The withheld information is both deliberative and pre-decisional in nature. It is pre-decisional because it was created before the IRS finalized its media response at 3:56 p.m. on October 3, 2012.

iii. The withheld information also involves discussions between a Counsel attorney and IRS employees regarding the subject matter of active FOIA litigation with the plaintiff. Disclosure of the withheld information would expose the decision making processes of the IRS and the Office of Chief Counsel in such a way as to discourage candid discussions and undermine their ability to perform their function of tax administration.

iv. The redacted materials are exempt from disclosure under the deliberative process privilege, the attorney-client privilege, the attorney work-product privilege, and exemption (b)(5).

(*Id.* at ¶ 18(n).)

o. IRS000460 contains an October 2, 2012, e-mail message from Michelle Eldridge to Terry Lemons and Frank Keith concerning the development of the IRS response to the October 2, 2012, press release in light of the October 2, 2012, FOIA suit.

i. The redacted lines in the e-mail message, time-stamped 1:12:04 p.m., contain a draft IRS media response for review and comment.

ii. The withheld information is both deliberative and pre-decisional in nature. It is pre-decisional because it was created before the IRS finalized its media response at 3:56 p.m. on October 3, 2012.

iii. Disclosure of the withheld information would expose the decision making processes of the IRS in such a way as to discourage candid discussions and undermine its ability to perform its function of tax administration.

iv. The redacted materials are exempt from disclosure under the deliberative process privilege and exemption (b)(5). (*Id.* at ¶ 18(o).)

p. IRS000467-468, 477, and 513 contain October 3, 2012, e-mail messages between Michelle Eldridge and Terry Lemons regarding the development of the IRS response to the October 2, 2012, press release.

i. The redacted lines in the e-mail messages time-stamped 11:45:05 a.m. and 11:40:30 a.m./1:40 p.m. contain draft IRS statements and revisions.

ii. The withheld information is both deliberative and pre-decisional in nature. It is pre-decisional because it was created before the IRS finalized its media response at 3:56 p.m. on October 3, 2012.

iii. Disclosure of the withheld information would expose the decision making processes of the IRS in such a way as to discourage candid discussions and undermine its ability to perform its function of tax administration.

iv. The redacted materials are exempt from disclosure under the deliberative process privilege and exemption (b)(5).

(Id. at ¶ 18(p).)

q. IRS000474 contains an October 3, 2012, e-mail message, time-stamped 11:30 a.m., from Frank Keith to Terry Lemons, Michelle Eldridge, and Jonathan Davis referencing correspondence with the IRS Office of Chief Counsel regarding development of the IRS response to the October 2, 2012, press release.

i. The redacted lines convey confidential, strategic advice (not involving legal analysis) from attorney Gulas to Frank Keith concerning the IRS response to the press release.

ii. The withheld information is both deliberative and pre-decisional in nature. It is pre-decisional because it was created before the IRS finalized its media response at 3:56 p.m. on October 3, 2012.

iii. The withheld information also involves discussions between a Counsel attorney and IRS employees regarding the subject matter of active FOIA litigation with the plaintiff. Disclosure of the withheld information would expose the decision making processes of the IRS and the Office of Chief Counsel in such a way as to discourage candid discussions and undermine their ability to perform their function of tax administration.

iv. The redacted materials are exempt from disclosure under the deliberative process privilege, the attorney-client privilege, the attorney work-product privilege, and exemption (b)(5).

(Id. at ¶ 18(q).)

r. IRS000552, 559, and 568 contain an October 3, 2012, e-mail message from Gary Prutsman to Bernice Fischer, Mahlon Blagg, John Davis, Bertrand Tzeng, and Rebecca Chiaramida referencing correspondence with the IRS Office of Chief Counsel regarding development of the IRS response to the October 2, 2012, press release.

- i. The redacted lines in the e-mail message time-stamped 12:56/12:56:15/12:56:16 p.m. convey confidential, strategic advice (not involving legal analysis) from attorney Squires to Gary Prutsman concerning the IRS response to the press release.
- ii. The withheld information is both deliberative and pre-decisional in nature. It is pre-decisional because it was created before the IRS finalized its media response at 3:56 p.m. on October 3, 2012.
- iii. The withheld information also involves discussions between a Counsel attorney and IRS employees regarding the subject matter of active FOIA litigation with the plaintiff. Disclosure of the withheld information would expose the decision making processes of the IRS and the Office of Chief Counsel in such a way as to discourage candid discussions and undermine their ability to perform their function of tax administration.
- iv. The redacted materials are exempt from disclosure under the deliberative process privilege, the attorney-client privilege, the attorney work-product privilege, and exemption (b)(5).

(*Id.* at ¶ 18(r).)

³ Due to differences in time zones and other differences between users' computers, some identical e-mail messages have more than one time stamp. For example, the e-mail messages in this page range that are time-stamped 7:05:49 a.m. and 9:06 a.m. are identical. Where relevant, these differences will be noted as they are here, *e.g.*, "7:05:49/9:06 a.m."

⁴ Due to the issue described in footnote 2, there are two e-mail messages in this page range with the time stamp 1:50 p.m. The first such e-mail is time-stamped 11:49:45 a.m. and 1:50 p.m.; the redaction in this first e-mail is an initial draft of the IRS statement from Michelle Eldridge. The second such e-mail is time-stamped 12:50:05 p.m., 1:50 p.m., and 2:50 p.m.; the redaction in the second e-mail is a subsequent draft of the statement from Michelle Eldridge.

Plaintiff's Response: Disputed in part. Plaintiff does not dispute Defendant's statement to the extent that it identifies the authors, recipients, dates, and time stamps of emails that were released to Plaintiff. With respect to the portions of Defendant's statement that describe information that Defendant withheld in whole or in part, Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it. Plaintiff also disputes the portions of Defendant's statement that allege that the disclosure of withheld information would cause various harms to Defendant. To the extent that Defendant characterizes withheld information as "pre-decisional" and "deliberative," or "exempt from disclosure" under the deliberative process, attorney-client, and/or attorney-client privileges and/or Exemption 5, such assertions are legal conclusions, not material facts, and therefore are disputed.

Statement 49: The redacted text at the top of the following pages is not responsive to plaintiff's October 9, 2012 FOIA request because the redacted information was created after the end of the time frame for the request, which was October 9, 2012: IRS000050, 077, 078, 126, 143, 144, 146, 149, 151, 154, 156, 157, 161, 165, 167, 168, 169, 175, 181, 188, 194, 201, 206, 212, 219, 226, 232, 331, 337, 339, 343, 348, 350, 355, 361, 505, 509, 514, 518, 522, 528, 533, 538, 545, 551, 553, 560, 791, and 793. (*Id.* at ¶ 24.)

Plaintiff's Response: Because Defendant redacted the dates from the referenced records, Plaintiff lacks information sufficient to form a belief as to the accuracy of Defendant's statement and therefore disputes it.

Dated: June 9, 2014

s/ Daniel Z. Epstein
Daniel Z. Epstein
D.C. Bar 1009132
CAUSE OF ACTION
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
Telephone: (202) 499-4232
daniel.epstein@causeofaction.org

/s/ Reed D. Rubinstein
Reed D. Rubinstein
Senior Vice President of Litigation
D.C. Bar No. 400153
CAUSE OF ACTION
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
Telephone: (202) 499-4232
Reed.Rubinstein@causeofaction.org

Counsel for Cause of Action