

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CAUSE OF ACTION)
 1919 Pennsylvania Avenue, NW, Suite 650)
 Washington, D.C. 20006,)
)
 Plaintiff,)
)
 v.)
)
 INTERNAL REVENUE SERVICE)
 1111 Constitution Avenue, NW)
 Washington, D.C. 20224,)
)
 Defendant.)
 _____)

Case No. 1:14-cv-00178-RBW

FIRST AMENDED COMPLAINT

This is an action under the Freedom of Information Act (FOIA) and the Administrative Procedure Act seeking disclosure of agency records improperly withheld and challenging the failure of the Internal Revenue Service (IRS) to allow Plaintiff the opportunity to meaningfully comment on the IRS’s proposed rules affecting Section 501(c)(4) social welfare organizations.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, 5 U.S.C. §§ 553(c), 701-706, and 5 U.S.C. § 552(a)(4)(B).
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 552(a)(4)(B).
3. This Court may grant Plaintiff injunctive relief pursuant to 28 U.S.C. § 2202, 5 U.S.C. §§ 705-06, and Fed. R. Civ. P. 65.

PARTIES

4. Cause of Action is a nonpartisan, non-profit organization that uses public advocacy and legal reform strategies to ensure greater transparency in government and protect taxpayer interests and economic freedom. In furtherance of its public interest mission, Cause of Action regularly requests access to the public records of federal government agencies, entities, and offices, and disseminates its findings to the public.

5. The IRS is a bureau of the U.S. Department of the Treasury and qualifies as an “agency” within the meaning of 5 U.S.C. § 701(b). The IRS has possession, custody, and control of records to which Cause of Action seeks access.

STATEMENT OF FACTS

The History of IRS Abuse

6. The IRS has repeatedly been used by the powerful to punish political opponents.

7. For example, Elmer Lincoln Irey, head of the criminal division of the Treasury Department’s tax enforcement branch from 1919 to 1946, admitted that he was ordered by Henry Morgenthau, Treasury Secretary to President Franklin Roosevelt, to file trumped-up criminal charges against former Treasury Secretary Andrew Mellon, even though Mellon was clearly innocent.

8. Beginning in the late 1950s, the civil rights leader Martin Luther King, Jr., several of his lawyers, and members of the Southern Christian Leadership Council, were repeatedly targets of IRS audits.

9. In the early 1960s, the Kennedy Administration established an “Ideological Organizations Audit Project” in the IRS to investigate the campaign contributions and tax-exempt status of dozens of groups deemed to be too “right wing.”

10. In the 1970s, President Nixon redirected the “Ideological Organizations Audit Project” against groups deemed to be too “left wing” and also used onerous IRS tax audits and federal grants and contracts to harm his political enemies. Article II of Nixon’s Articles of Impeachment provided:

He has, acting personally and through his subordinates and agents, endeavored to obtain from the Internal Revenue Service, in violation of the constitutional rights of citizens, confidential information contained in income tax returns for purposes not authorized by law, and to cause, in violation of the constitutional rights of citizens, income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner.

H.R. Rep. No. 93-1305, at 3 (1974).

11. During the 1990s, the IRS audited and harassed a number of individuals and organizations that the Clinton Administration viewed as hostile to its agenda.

12. According to a report by the Treasury Inspector General for Tax Administration (TIGTA), in early 2010 the IRS began using inappropriate criteria to select Tea Party and other conservative organizations applying for tax-exempt status for review “based upon their names or policy positions instead of indications of potential political campaign intervention.” TIGTA, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 14, 2013). Upon information and belief, this conduct was directed by high-ranking IRS officials to punish political opponents of the Obama Administration and hamstring opposition to its policies. At all times relevant, the IRS and the responsible officials knew such conduct was inappropriate and illegal.

The IRS’s Notice of Proposed Rulemaking

13. While the IRS acknowledged the impropriety of targeting conservative organizations for extra scrutiny, it has since taken further action to impose similar burdens on these same groups.

14. On November 29, 2013, the IRS issued a notice of proposed rulemaking (NPRM) revising the treatment of political activities by social welfare organizations under Section 501(c)(4) of the Internal Revenue Code. *See* Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535 (proposed Nov. 29, 2013) (to be codified at 26 C.F.R. pt. 1).

15. The proposed rules revise Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) to state that “[t]he promotion of social welfare does not include direct or indirect candidate-related political activity.” 78 Fed. Reg. 71,535, 71,537. The proposed rules define candidate-related political activity to include express advocacy communications, public communications close in time to an election, and election-related activities. *Id.* at 71,538-40.

16. The proposed rules would inflict a tremendous burden on non-profit organizations by classifying a significant amount of non-political activity as “candidate-related political activity,” including nonpartisan voter guides, speaker forums, pamphlets, and voter-registration drives. Since many conservative groups use these activities to educate the public on matters like the Constitution and government spending, they are at risk of losing their tax-exempt status if the IRS finalizes the proposed rules.

17. In addition to jeopardizing the tax-exempt status of many 501(c)(4) groups, the proposed rules impose voluminous recordkeeping requirements on small non-profits, particularly those that rely on volunteer support. *See* Ex. 1, at 5.

18. The IRS claims that the proposed rules are necessary to more easily define non-exempt political activities for 501(c)(4) organizations. However, this proposal is simply a back door attempt to stifle political opponents, to protect Administration policies, and to restrict and hamper grassroots education regarding the Constitution, limited-government, and economic

freedom. As Chairman of the House Ways and Means Committee, David Camp, observed: “The new regulation so closely mirrors the abused tea-party group applications, it leads me to question if this new proposed regulation is simply another form of targeting.” Kimberley A. Strassel, *IRS Targeting: Round 2*, Wall Street J. (Dec. 12, 2013),

<http://online.wsj.com/news/articles/SB10001424052702303932504579254521095034070>.

19. In a letter requesting IRS Commissioner Koskinen to withdraw the proposed rules, Representatives Darrell Issa and Jim Jordan describe how the proposed rules represent a continuation of the IRS’s efforts to curb conservative political speech. Ex. 2.

20. For instance, in Fall 2010, Lois Lerner, the former IRS Director of Exempt Organizations, told an audience that the IRS was under immense pressure to “fix the problem” of nonprofit political speech. Ex. 2, at 3. Lerner stated: “So everybody is screaming at us right now: ‘Fix it now before the election. Can’t you see how much these people are spending?’ I won’t know until I look at their 990s next year whether they have done more than their primary activity as political or not.” *Id.*

21. Lerner also proposed a “c4 project” within the IRS to scrutinize non-profits engaged in political speech. *Id.* This project involved measuring the degree of political activity by non-profits. *Id.*

22. E-mail communications suggest that Lerner hoped to use the project to publicize the IRS’s efforts to suppress non-profit political speech. Ex. 2, at 4.

23. The IRS’s efforts on this front apparently had been in development for several years. According to IRS attorney Dan Spellman, 501(c)(4) regulations had “been a very active topic for the last certainly 5 years.” Ex. 2, at 6. The IRS also understood it to be an important

topic, as one IRS employee noted that “[t]he mere fact that we are doing anything at all in this area will be huge.” Ex. 2, at 4.

24. Despite being an “active topic” of major importance, the IRS failed to notify the public of its discussions and intentions regarding the revision of 501(c)(4) regulations.

25. In fact, an e-mail from Ruth Madrigal of the Treasury Department’s Office of Tax Policy to several IRS officials demonstrates that the IRS intentionally developed the proposed rules behind closed doors. In her e-mail, Madrigal forwarded an article about a court decision impacting 501(c)(4) organizations and stated: “Don’t know who in your organization is keeping tabs on c4s, but since we mentioned potentially addressing them (off-plan) in 2013, I’ve got my radar up and this seemed interesting.” Ex. 3.

26. Madrigal testified that “off-plan” means “working on it, but not listing it on the plan. . . . [T]he term means the idea of spending some resources on working it, getting legal issues together, things like that, but not listing it on the published plan as an item we are working.” Ex. 2, at 11.

27. Consistent with Madrigal’s “off-plan” description, the IRS failed to include the proposed rules on the Administration’s Unified Agenda until Fall 2013—when it released the NPRM. *Id.*

28. The IRS also failed to acknowledge in the NPRM that leftist political partisans played a large role in initiating the rulemaking process. When testifying before the House Committee on Oversight and Government Reform, former Acting Commissioner Steven Miller admitted that outside parties influenced the IRS to revise the 501(c)(4) rules, even though the rules required no revision: “So I’m not sure there was a problem, right? I mean, I think we were—we had . . . [Senator Carl] Levin complaining bitterly to us about . . . our regulation. . . .

And . . . we were being asked to take a look at that. And so we were thinking about what things could be done.” Ex. 2, at 9.

29. Outside organizations also appear to have influenced the proposed rules. On July 27, 2011, two non-governmental organizations, Democracy 21 and the Campaign Legal Center, each connected to and funded by Obama Administration supporters, petitioned the IRS to issue rules preventing 501(c)(4) organizations from engaging in political speech. *See* Petition for Rulemaking from Democracy 21 & Campaign Legal Center to the Internal Revenue Serv. (July 27, 2011), *available at* http://www.democracy21.org/uploads/D21_and_CLC_Petition_to_IRS_7_27_2011.pdf.

30. On April 9, 2013, yet another non-governmental organization, this one also connected to and funded by Obama Administration supporters, filed another petition for IRS rules preventing 501(c)(4) organizations from engaging in political speech. *See* Petition for Rulemaking from Citizens for Responsibility & Ethics in Washington (CREW) to the Internal Revenue Serv. (Apr. 9, 2013), *available at* http://crew.3cdn.net/9e6dd1e2b163dbb240_i1m6b5q6u.pdf.

31. While the petitions purport to be about fair elections, it appears that their true intent was to protect the Administration from criticism. The April 9, 2013 petition stated: “The results of those elections [2010 and 2012] demonstrate even more compellingly the critical need for the IRS to revise its regulations” and ban 501(c)(4) organizations from engaging in political speech. *Id.* at 16.

32. After submitting their petition, Democracy 21 and the Campaign Legal Center, along with Public Citizen and Representative Chris Van Hollen, filed a lawsuit against the IRS in

August 2012 to compel the agency to initiate a rulemaking to amend IRS regulations governing 501(c)(4) organizations.

33. Shortly thereafter, the IRS issued a press release announcing its “Proposed Guidance for Tax-Exempt Social Welfare Organizations.” In the press release, the IRS stated: “In defining the new term, ‘candidate-related political activity,’ Treasury and the IRS drew upon existing definitions of political activity under federal and state campaign finance laws, other IRS provisions, *as well as suggestions made in unsolicited public comments.*” See Ex. 4.

34. Upon information and belief, the “unsolicited public comments” included communications and meetings with Administration partisans that support limiting or silencing political speech by citizens with “conservative,” “constitutional,” “right-wing” or “Tea Party” views.

35. On December 6, 2013—only one week after the IRS issued the NPRM—Democracy 21, *et al.* voluntarily dismissed their lawsuit.

Cause of Action’s FOIA Request

36. Members of the public, including Cause of Action, are concerned that the IRS rulemaking process has been tainted by politics.

37. Among other things, it is possible that there was consultation and perhaps even coordination between the Administration, its partisans, and the IRS itself.

38. Consequently, Cause of Action sent a FOIA request to the IRS on December 24, 2013, seeking access to four categories of records regarding the IRS’s proposed rules. See Ex. 5.

39. Item 1 seeks copies of the “unsolicited public comments” that the IRS “drew upon” in defining “candidate-related political activity” in the NPRM, as well as any agency correspondence with the commenters. Through this item, Cause of Action seeks to understand

what information the IRS relied upon in crafting the new rules, and what outside groups played a role in its actions.

40. Item 2 seeks correspondence between IRS employees within the Tax Exempt and Government Entities (TEGE) Division and those same IRS employees and the public regarding the revisions to the qualification requirements for tax-exempt status under section 501(c)(4). This request includes communications between the IRS and certain groups/individuals that may have influenced the IRS's decision-making through petitions for rulemaking and litigation.

41. Item 3 seeks records of correspondence to and from Amy F. Giuliano, Office of Associate Chief Counsel, TEGE, pertaining to the NPRM. As the principal author of the proposed regulations, records containing communications to and from Giuliano would reveal whom the IRS consulted during the rulemaking process.

42. Item 4 seeks records of communications between the IRS and any employee of the Office of Management and Budget and/or the Office of the White House Counsel regarding the proposed redefinition of "candidate-related political activity." This item would reveal whether the Administration pressured the IRS to issue the proposed guidance.

43. By letter dated January 30, 2014, the IRS informed Cause of Action that its FOIA request had been received on December 31, 2013 and assigned "case number F14002-0032." Ex. 6. The IRS further stated that it had invoked a ten-day extension of time in order to "search for, collect, and review responsive records from other locations," thereby extending the agency's statutory response deadline to February 13, 2014. *Id.* However, the IRS advised that it would be unable to complete the processing of the request even by February 13, 2014. Instead, the IRS estimated that its final response would not be forthcoming until May 16, 2014. *Id.*

44. Cause of Action intends to comment on the NPRM.

45. In order to comment meaningfully on the proposed rules, a right guaranteed by Congress to infuse a measure of public accountability into administrative practices, Cause of Action needs access to the requested records at least several days before the comment period ends on February 27, 2014.

46. By its own admission, the IRS will not produce documents until after the close of the comment period. Without access to the records, Cause of Action cannot fully evaluate the IRS's proposed rules and its right to effectively comment will be irreparably harmed.

FIRST CLAIM FOR RELIEF

Violation of FOIA: Failure to Comply with Statutory Deadlines

47. Cause of Action repeats paragraphs 1-46.

48. The IRS has improperly withheld agency records requested by Cause of Action by failing to make a determination on Cause of Action's request within the statutory time limit set forth in 5 U.S.C. § 552(a)(6)(A)(i).

49. Because the IRS has failed to comply with the response deadline set forth in 5 U.S.C. § 552(a)(6)(A)(i), Cause of Action has constructively exhausted its administrative remedies with respect to its request. 5 U.S.C. § 552(a)(6)(C).

50. Cause of Action is entitled to injunctive relief compelling the IRS to disclose all non-exempt records in its possession that are responsive to its request.

SECOND CLAIM FOR RELIEF

Violation of the Administrative Procedure Act: Failure to Allow Meaningful Comment

51. Cause of Action repeats paragraphs 1-50.

52. The Administrative Procedure Act requires agencies to give the public an opportunity to participate in the rulemaking process through submission of written comments. 5 U.S.C. § 553(c).

53. By failing to produce the requested records before the close of the comment period, the IRS has effectively denied Cause of Action's right to meaningfully comment. Cause of Action cannot fully judge the merits of the proposed rules without knowing what animated their form.

54. The IRS's refusal to disclose the relevant records before the close of the comment period constitutes final agency action that is arbitrary, capricious, and otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A).

55. Plaintiff has exhausted all administrative remedies.

RELIEF REQUESTED

WHEREFORE, Cause of Action respectfully requests that the Court:

- A. Order the IRS to promptly complete processing of Cause of Action's FOIA request and to promptly disclose all non-exempt records to Cause of Action;
- B. Order the IRS to delay issuing a final rule on the NPRM until the IRS produces responsive records;
- C. Order the IRS to re-open the comment period on the NPRM after the IRS produces all responsive records;
- D. Order expeditious proceedings in this action;
- E. Retain jurisdiction over this action to ensure that agency records are not improperly withheld;

F. Award Cause of Action such costs and attorney fees as it may be entitled to under law;

G. Grant such other relief as the Court may deem just and proper.

Dated: February 20, 2014

Respectfully submitted,

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