

Internal Revenue Service
 Appeals Office M/S 55203
 5045 E Butler Ave
 Fresno, CA 93727-5136

Date: **MAY 06 2013**

KAREN GROEN OLEA
 (CAUSE OF ACTION)
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 WASHINGTON, DC 20006

Department of the Treasury

Person to Contact:

Diane Ambriz
 Employee ID Number: 1000157666
 Tel: (559) 253-4840
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Refer Reply to:

AP:CO:FRC:DMA

In Re:

Freedom of Information Act

Disclosure Case Number(s):

F13286-0081

Tax Period(s) Ended:

1/1/2009 to 10/9/2012

Dear Karen Groen Olea:

This letter is in response to your appeals request dated April 8, 2013 for Freedom of Information Act (FOIA) information. According to your letter you are appealing the response of March 4, 2013 from the Disclosure Office of your original request for information dated October 9, 2012.

You requested 8 items from the time period of January 1, 2009 to October 9, 2012. You requested:

- 1) All documents, including e-mails, letters, and telephone logs or other telephone records, constituting communications to and from any employee of the IRS concerning any FOIA request or lawsuit that relates to IRC section 6103(g).
- 2) All documents, including notes and emails, referring or relating to any communications 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 IRC section 6103(a) that is made in pursuant to IRC §610.
- 4) All documents, including notes and emails, referring or relating to any communications described in request #3.
- 5) All requests for disclosure by any agency pursuant to IRC sections 6103(i)(1),(i)(2), and (i)(3)(4).
- 6) All documents, including communications not limited to notes and emails, letters, memoranda and telephone logs or other telephone records, referring or relating to any communications described in request #5.
- 7) All documents, including but not limited to notes and emails, letters, telephone logs, and reports pertaining to any investigation by TIGTA 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 any one designated by the President in his Executive Office for tax records under §6103(g)(1).

The Disclosure Office located 796 pages in response to a portion of your request and enclosed 790 pages in a CD. Disclosure withheld 289 pages in part and 6 pages in full under FOIA exemptions (b)(5) and (b)(6). Disclosure also withheld pages in part that were outside the scope of your request.

The Disclosure Office explained FOIA exemptions (b)(5) and (b)(6). Disclosure properly explained IRC §6103(g).

FOIA exemption (b)(5) exempts from disclosure inter-agency or intra-agency memorandum or letters which would not be available by law to a party other than an agency in litigation with the agency. The three primary privileges covered by this exemption were explained as follows:

1. The deliberative process privilege protects documents that reflect the pre-decisional opinions and deliberations that play a direct part in the process of making recommendations on legal or policy matters.
2. The attorney work product privilege protects documents prepared by an attorney or other Service employee during litigation or in reasonable contemplation of litigation and
3. The attorney-client privilege protects confidential communications between an attorney and a client relating to a legal matter for which the client has sought professional advice.

FOIA exemption (b)(6) exempts from disclosure files that if released would clearly be an unwarranted invasion of personal privacy, which is based on the determination to withhold on a balancing of interests between the protection of an individual's right to privacy and the public's right to access government information.

The Supreme Court ruled that Congress intended the "similar files" provision to be construed broadly, so that all information which applies to a particular individual qualifies for consideration under exemption (b)(6).

Disclosure responded to your request in items 3 and 4, requesting any communications by or from anyone, in the Executive Office of the President constituting requests for taxpayer or return information within the meaning of IRC §6103(a) that is made in pursuant to IRC §6103 and all documents including notes emails, letters, referring or relating to any communications by or from anyone in the Executive Office of the President.

Disclosure explained for the time frame you requested, all requests made to the IRS from White House Personnel were for tax checks. The requests were made when an individual is a prospective Presidential appointee, under consideration for employment within the Executive Branch. All tax checks are conducted by the IRS at the request of the White House and all such disclosures to the White House of taxpayer specific information with respect to such tax checks are made pursuant to the written consent of the prospective employee who signs a waiver authorizing the disclosure of their return information under IRC section 6103(c). Information with respect to any of the request is taxpayer specific and subject to the confidentiality provisions of IRC §6103 and was withheld under FOIA exemption (b)(3) in conjunction with IRC § 6103(a).

Disclosure responded to items 5 and 6 of your requests regarding all request, documents, emails, letter, etc. for disclosure by any agency pursuant to IRC sections 6103(i)(1), (i)(2) and (i)(3)(a).

Disclosure explained IRC section 6103(i) concerning disclosures made in the context of Federal non-tax criminal investigations and prosecutions. Disclosure explained IRC 6103 (i)(1) that such disclosures are made pursuant to an ex parte order issued to the IRS by a Federal district court judge or magistrate at the request of enumerated personnel from the Department of Justice.

Disclosure stated under IRC 6103 (i)(2), that disclosures are made pursuant to an appropriate request from enumerated Executive Branch personnel and under IRC section 6103(i)(3), the IRS may make disclosures at their own initiative when necessary to enforce a federal non-tax criminal law, when there is danger or imminent death or physical injury or for purposes of thwarting terrorist activities.

All three categories are taxpayer specific such that all information pertaining to disclosures under IRC 6103(i)(1), (i)(2) and (i)(3)(a) are protected by the confidentiality provisions of IRC section 6103 and was therefore withheld under FOIA exemption (b)(3) asserted in conjunction with IRC section 6103(a).

Disclosure responded to your request in item 7 requesting all documents pertaining to any investigation by TIGTA into the unauthorized disclosure of IRC section 6103 return information to anyone in the Executive Office of the President. Disclosure stated they transferred this request to TIGTA because they have jurisdiction over those records.

Disclosure responded to your request in item 8 requesting all documents, emails, 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)(1). Disclosure stated the IRS has no record of requests from the White House or President of the U.S. pursuant to IRS 6103(g)(1).

Your appeal dated April 8, 2013 states that IRS improperly withheld six documents in full that were responsive to requested items 1 and 2, claiming FOIA exemptions (b)(5) and (b)(6). You stated the 289 redacted documents were also done improperly. You stated IRS's response did not specify how many of the six withheld-in-full documents were withheld under Exemptions 5 and 6. You stated the IRS improperly relied on FOIA exemptions 5 and 6 as a basis for its withholding and redactions, and its refusal to produce the requested records in full violates FOIA.

You state IRS failed to meet applied Exemption 5 because it did not provide sufficient specificity to permit CoA to understand its rationale for withholding the responsive information.

Your appeal states that IRS improperly applied Exemption 6 and you seek information related to unauthorized and statutorily authorized requests by the President and executive agencies for taxpayer information. You stated in asserting this exemption, the IRS has improperly weighed the interests between disclosure and individuals person privacy.

You stated IRS failed to undertake an adequate search reasonably calculated to uncover all relevant documents or failed to disclose that it withheld responsive documents both of which are impermissible under the law to the requested information related to IRC section 6103(g).

You stated the IRS improperly limited the scope of its search to your item 3 request requesting all communications by or from the Executive Office of the President. You state the IRS did not indicate that it searched for unauthorized request by the White House for taxpayer or return information.

You stated the IRS improperly claimed Exemption (b)(3) because IRS improperly relied on the exemption to withhold records responsive to requested items 3 and 6, claiming that all responsive documents are taxpayer specific and therefore subject to the confidentiality provisions of IRC section 6103. You stated what exemption (b)(3) allows and stated not all tax-related information is protected from disclosure under section 6103(a) and the specific information sought by FOIA must fall within the scope of the statutory exemption.

You stated IRS has claimed that IRC section 6103(a) exempts 1) all documents relating to White House requests for taxpayer or return information and 2) all documents relating to Executive Branch requests for taxpayer or return information pursuant to IRC section 6103(i)(1), (i)(2) and (i)(3). You state a communication requesting return information does not itself constitute return information and the purpose of section 6103(a) is to protect tax information. Yet a request by the White House or the Executive Branch does not include the nature or source of any tax related information, it is not for processing of the return or for tax investigation and it is not data with respect to a return or liability. An authorized tax check by the White House is made for the sole purpose of considering the employment of a prospective Presidential appointee and any request by the Executive Branch under section 6103(i) is made in the context of non-tax criminal investigations and prosecutions. You stated Cause of Action had no interest in any underlying return information the IRS provided to the President or the Executive Branch and since it is the IRS, not the President that is charged with the administration and enforcement of the tax laws, any requests that the White House or Executive Branch made could not possibly related to the determination of the existence, or possible existence, of liability of any person under this title or to whether the taxpayer return was, is being or will be examined. You state IRS improperly categorically denied these portions of your FOIA requests under FOIA exemption (b)(3) since CoA does not seek return information protected by the confidentiality provisions of IRC section 6103 and that IRS must provide the withheld documents as they are clearly responsive to requested items 3 and 6.

You stated IRS failed to release reasonably segregable portions of the records responsive to requested items 1-6. You stated that FOIA requires that all non-exempt information be disclosed, and that all agencies conduct a segregability review of responsive records to determine any portions of the records may be disc losable. You state agencies cannot justify withholding an entire document simply by showing that it contains some exempted material and you state IRS failed to provide adequate justification for failing to segregate the non-exempt materials from the exempt materials.

We have reviewed the response of the Disclosure Specialist, the Disclosure database, as well as the documents withheld and have determined that the response was appropriate. The Appeals office responsibility concerning the appeal of FOIA cases is limited to a de novo review to ensure the documents withheld or redacted for the specific requester and documents requested fall within the FOIA exemption(s) cited. We address the adequacy of the search and the appropriateness of the redactions and the exemptions cited. Our sole responsibility is to determine if the documents were properly withheld under the FOIA.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and the Office of Disclosure as a non-exclusive alternative to litigation. The Office of Appeals is not a part of this mediation process. Using OGIS services does not affect your right to pursue litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you disagree with the Appeals determination and wish to pursue mediation, you may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001
Email: ogis@nara.gov
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-free: 1-877-684-6448

The FOIA requires us to advise you of the judicial remedies granted in the Act. You may file a complaint in the United States District Court for the District in which you reside, or have your principal place of business, or in which the agency records are located, or in the District of Columbia.

Sincerely,



T. Mitchell
Appeals Team Manager