

STATEMENT FOR THE RECORD

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

July 30, 2014

Hearing on IRS Abuses: Ensuring that Targeting Never Happens Again

2154 Rayburn House Office Building
Chairman Darrell E. Issa (R-CA)

Prashant K. Khetan
Senior Counsel

Thank you, Chairman Issa, for the opportunity to submit this statement for the record to the Committee on Oversight and Government Reform at the U.S. House of Representatives. My name is Prashant K. Khetan and I am a Senior Counsel at Cause of Action,¹ a non-profit, nonpartisan government accountability organization that uses investigative, legal, and communications tools to educate the public on how government transparency and accountability protect economic opportunity for American taxpayers.

Cause of Action is at the forefront of exposing the politicization and malfeasance that has occurred at the Internal Revenue Service (the “IRS”). From our legal efforts to prevent the IRS from finalizing widely-criticized proposed rules affecting 501(c)(4) social welfare organizations,² to our use of the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), to uncover the scope and severity of Lois Lerner’s targeting scheme,³ we are committed to supporting positive reform at what is now – as this Committee termed it in its most recent staff report – a “broken agency.”⁴

Relevant to this Hearing, Cause of Action has experience with the IRS and the Treasury Inspector General for Tax Administration (“TIGTA”) in connection with FOIA requests and litigation that is relevant to the issue of why reform of 26 U.S.C. § 6103 (“Section 6103”) should be a Congressional priority.⁵ Specifically, and as discussed below, the IRS and TIGTA have adopted inconsistent and overbroad interpretations of Section 6103 in order to preclude public and Congressional access to records that could demonstrate wrongdoing by Federal officials.

¹ CAUSE OF ACTION, available at www.causeofaction.org.

² *Cause of Action Sues IRS Over Proposed Regulations Affecting Nonprofits*, CAUSE OF ACTION, <http://causeofaction.org/cause-action-sues-irs-proposed-regulations-affecting-nonprofits/> (last visited Aug. 4, 2014).

³ *FOIA Request to IRS regarding IRS Targeting and Records Management*, CAUSE OF ACTION, <http://causeofaction.org/foia-request-irs-regarding-irs-targeting-records-management/> (last visited Aug. 4, 2014).

⁴ H. COMM. ON OVERSIGHT & GOV’T REFORM STAFF REPORT, MAKING SURE TARGETING NEVER HAPPENS: GETTING POLITICS OUT OF THE IRS AND OTHER SOLUTIONS i (July 29, 2014), available at <http://oversight.house.gov/wp-content/uploads/2014/07/2014-07-29-Getting-Politics-Out-of-the-IRS-and-Other-Solutions.pdf>.

⁵ *Cause of Action v. Internal Revenue Serv.*, No. 13-920 (D.D.C.); *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, No. 13-1225 (D.D.C.); see generally *Related Documents: IRS Targeting & Politicization*, CAUSE OF ACTION, <http://causeofaction.org/related-documents-irs-targeting-politicization/> (last visited Aug. 4, 2014).

Our work confirms recent testimony provided to this Committee – that the “IRS has turned Section 6103 on its head” in order to protect government wrong-doers.⁶

ENACTMENT OF SECTION 6103

Section 6103 protects confidential taxpayer returns and return information from unauthorized disclosure except in a limited number of statutorily prescribed circumstances. Congress enacted Section 6103 to instill public trust in the confidentiality of tax returns after many citizens expressed concern that the IRS was acting as a “lending library” of return information for other agencies.⁷ As the Joint Committee on Taxation more recently reported:

The IRS was at risk of becoming the Federal government’s central information clearing house. A question arose as to whether the virtually unfettered access to returns and return information unnecessarily intruded into the privacy of taxpayers. . . . Prior law [before the 1976 amendment of Section 6103] afforded the President broad discretion to determine who had access to returns and return information.⁸

In other words, Congress sought to prevent “highly publicized attempts to use the [IRS] for political purposes,” especially when such efforts involved the delivery of tax returns to the White House.⁹ Thus, in enacting Section 6103, Congress intended to curtail abusive intergovernmental disclosure practices; it did *not* intend to prevent government watchdogs – whether Congressional or public – from exposing potential malfeasance in the Federal government.¹⁰

THE IRS HAS ADOPTED INCONSISTENT AND OVERBROAD INTERPRETATIONS OF SECTION 6103

Simply put, the IRS has misused Section 6103. The IRS’s practice reflects that it will choose when and how Section 6103 applies based on the level of interest in keeping the subject matter of requested records hidden from scrutiny. Shockingly, the IRS has even stated that the decisions made by a FOIA manager do not bind the agency as a whole.

For example, Section 6103(g) permits the President to request in writing, and by his own signature, the tax return and return information of any individual taxpayer.¹¹ Concerned by the

⁶ “*IRS Abuses: Ensuring that Targeting Never Happens Again*”: Hearing before the H. Comm. on Oversight & Gov’t Reform, 113th Cong. (2014) (statement of Cleta Mitchell), available at <http://oversight.house.gov/wp-content/uploads/2014/07/Mitchell-Statement-IRS-Abuses-7-30.pdf>.

⁷ 122 Cong. Rec. 24,013 (1976) (remarks of Sen. Weicker).

⁸ Joint Committee on Taxation, Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions As Required by Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998, vol. 1, 127 (Jan. 28, 2000), available at <https://www.jct.gov/publications.html?func=startdown&id=2554>.

⁹ 122 Cong. Rec. 24,013 (1976) (remarks of Sen. Dole).

¹⁰ See *Tax Reform Research Group v. Internal Revenue Serv.*, 419 F. Supp. 415, 419-20 (D.D.C. 1976) (Section 6103 could not be used in conjunction with FOIA Exemption 3 to withhold records of requests by President Nixon’s special counsel for status reports on pending IRS investigations of taxpayers).

¹¹ 26 U.S.C. § 6103(g)(1) (“Upon written request by the President, signed by him personally, the [IRS] shall furnish to the President, or to such employee or employees of the White House as the President may designate . . . a return or return information with respect to any taxpayer named in such request.”).

prospect that the White House contravened the processes delineated by Section 6103(g), Cause of Action sent a FOIA request to the IRS in October 2012 to determine whether the President had, in fact, sought to access tax return information in an unauthorized manner (the “Section 6103(g) Request”).¹² Specifically, the Section 6103(g) Request sought records of Presidential requests for tax return information under Section 6103(g), as well as requests made outside the scope of Section 6103(g), and documents concerning any investigation by TIGTA into unauthorized disclosures of return information to the White House.

In its response to the Section 6103(g) Request,¹³ the IRS stated that the only responsive records it could locate were records of “tax checks,” which are requests by the Administration for return information provided on a voluntary basis by taxpayers pursuant to Section 6103(c).¹⁴ The IRS refused to release these records, however, claiming that “tax checks” were categorically “return information” and could be withheld regardless of the IRS’s ability to segregate and release non-personally-identifying information. This interpretation, however, is inconsistent both with the law¹⁵ and the IRS’s own practice, which at times has been to release “tax check” letters with personal information redacted – a common sense interpretation that balances the privacy interests of Section 6103 against the public interest in open government.

For example, Cause of Action previously submitted a FOIA request to the Department of Energy (“DOE”) seeking copies of all requests to the IRS under Section 6103(l)(3), which permits checks for tax delinquency of applicants for Federal loan programs (the “Section 6103(l) Request”).¹⁶ The Section 6103(l) Request was referred to the IRS, which produced 142 pages of “tax checks.”¹⁷ While the IRS redacted identifying information and the actual credit worthiness determinations, the segregable portions of the records were produced,¹⁸ contrary to the IRS’s position in connection with the Section 6103(g) Request that “tax checks” are categorically exempt “return information.”

In a pending lawsuit regarding the Section 6103(g) Request, Cause of Action confronted the IRS with its inconsistent interpretations of Section 6103. In response, earlier this week, the IRS re-confirmed the view that “tax checks” are entirely exempt.¹⁹ And in response to the clear

¹² Letter from Cause of Action to Ava Littlejohn, Public Liaison, Internal Revenue Serv. (Oct. 9, 2012), *available at* <http://causeofaction.org/assets/uploads/2013/05/2012-10-9-IRS-WH-FOIA-Request.pdf>.

¹³ Letter from Bertrand Tzeng, Disclosure Manager, Internal Revenue Serv. (Dec. 11, 2012), *available at* <http://causeofaction.org/assets/uploads/2013/06/Exhibits-for-TIGTA-Appeal.pdf> (labeled as Exhibit 3).

¹⁴ 26 U.S.C. § 6103(c) (“The Secretary may . . . disclos[e] the return of any taxpayer, or return information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a request for or consent to such disclosure, or to any other person at the taxpayer’s request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person.”).

¹⁵ See 5 U.S.C. § 552(b) (requiring an agency to produce any “reasonably segregable portion” of responsive records after deleting exempt portions); see also *Tax Analysts v. Internal Revenue Serv.*, 117 F.3d 607, 611 (D.C. Cir. 1997) (IRS has duty to “delete[] exempt matters, including [Section] 6103 return information,” before releasing records).

¹⁶ Letter from Cause of Action to Alexander Morris, FOIA Officer, Dep’t of Energy (June 12, 2012) (on file with Cause of Action).

¹⁷ Letter from Bertrand Tzeng, Disclosure Manager, Internal Revenue Serv., to Cause of Action (Jan. 22, 2013) (on file with Cause of Action).

¹⁸ E.g., Letter from Ava F. Littlejohn, Disclosure Manager, Internal Revenue Serv., to David G. Frantz, Dep’t of Energy (Jan 26, 2011) (attached hereto as Exhibit 1) (example of produced “tax check” with redactions).

¹⁹ See Def.’s Reply at 7-8, *Cause of Action v. Internal Revenue Serv.*, No. 13-920 (D.D.C. July 28, 2014).

inconsistency, the IRS took its position one step further. Even though the same FOIA Disclosure Manager was responsible for providing the IRS's final response in both matters, the IRS stated in court papers that:

The alleged act of an individual agency employee cannot overturn [a prior] holding as to what information the [IRS] is permitted to disclose under [S]ection 6103.²⁰

In addition to these inconsistencies, the IRS has used an overbroad interpretation of Section 6103. For example, the IRS misapplied Section 6103 in response to Cause of Action's request for records of communications between the IRS and third parties regarding the tax-exempt status of True the Vote ("TTV") (the "TTV Request"), which was approved after three years of scrutiny.²¹ Throughout the tax-exempt approval process, TTV was concerned that the Service Employees International Union ("SEIU") was urging the IRS either to deny TTV's application or to subject it to undue scrutiny. As a result, Cause of Action sought records reflecting communications between the IRS and SEIU concerning TTV.²² Even though no underlying tax returns or return information were requested, the IRS refused to produce any responsive documents, claiming that Section 6103 forbade the disclosure of any responsive records and, accordingly, that the TTV Request was closed.²³

In its response to the TTV Request, the IRS made no effort to explain how the documents requested by Cause of Action consisted entirely of information protected under Section 6103. If they did not, then the IRS's failure to segregate the non-exempt information from otherwise exempt records would violate FOIA. As Cause of Action noted in its administrative appeal of this blanket application of Section 6103:

[T]he IRS appears to take the position that *any* information about a third party contained in IRS files constitutes protected return information. As the Court of Appeals for the District of Columbia Circuit has held, however, not all information in IRS files is return information. "Congress would not have adopted such a detailed definition of return information in Section 6103 if it had simply intended the term to cover all information in IRS files."²⁴

²⁰ *Id.*

²¹ Cathy Burke, *DOJ, IRS Grant True the Vote Tax-Exempt Status*, NEWSMAX (Sept. 23, 2013), available at <http://www.newsmax.com/Newsfront/doj-irs-true-vote/2013/09/23/id/527285>.

²² Letter from Cause of Action to Bertrand Tzeng, Disclosure Manager, Internal Revenue Serv. (Oct. 2, 2013) (on file with Cause of Action).

²³ Letter from Bertrand Tzeng, Disclosure Manager, Internal Revenue Serv., to Cause of Action (Nov. 15, 2013) (on file with Cause of Action).

²⁴ Letter from Cause of Action, to Appeals Officer, Internal Revenue Serv. at 3 (Dec. 16, 2013) (on file with Cause of Action) (citations and brackets omitted).

TIGTA ALSO HAS ADOPTED INCORRECT INTERPRETATIONS OF SECTION 6103

As previously indicated, Cause of Action's Section 6103(g) Request also sought records regarding TIGTA investigations into the unauthorized disclosure of Section 6103 "return information" to individuals in the Executive Office of the President; the IRS referred this portion of the Request to TIGTA. In November 2012, TIGTA stated that it could neither confirm nor deny the existence of records related to the Request, what is commonly referred to as a "Glomar" response.²⁵ TIGTA argued that Section 6103 precluded the release of "return information," and that the mere fact of the existence or non-existence of an investigation into unauthorized disclosures would itself constitute return information within the meaning of Section 6103.²⁶

TIGTA's interpretation, however, sweeps too broadly. It effectively denies public access to meaningful information about whether TIGTA is investigating whether federal officials have violated Section 6103. Congress, however, never intended Section 6103 to be an all-purpose shield against public disclosure of agency records. To the contrary, whether TIGTA possesses records reflecting an investigation is not something that uniquely pertains to a particular taxpayer, but is instead a useful indicator of whether TIGTA is investigating the conduct of federal officials. Indeed, TIGTA's flawed interpretation directly contravenes this Committee's recent statement: "[T]here is no reason that TIGTA cannot provide basic investigatory information" to "potential victims and the public," while still ensuring that "confidential taxpayer information [is] protected."²⁷

As Cause of Action's litigation and FOIA work demonstrate, if the IRS and TIGTA prevail in their sweeping and inconsistent interpretations of Section 6103, then the public will be hampered in its efforts to determine whether Federal officials are violating the law. Accordingly, Cause of Action endorses many of the Recommendations contained in this Committee's July 29, 2014 Staff Report, and respectfully encourages the Committee to support revising Section 6103 to realize its intended purpose of preventing unauthorized "sharing" of taxpayer information within the Federal government and allow access to information concerning the activities of TIGTA.²⁸

²⁵ Letter from Diane K. Bowers, Dep't of the Treasury, to Cause of Action (Nov. 30, 2012) (on file with Cause of Action); see generally *Phillippi v. Cent. Intelligence Agency*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (affirming CIA's refusal to confirm or deny its ties to Howard Hughes's submarine retrieval ship, the *Glomar Explorer*).

²⁶ TIGTA also has taken inconsistent positions in connection with its application of Section 6103. In prior litigation where the Government faced potential liability for violating 26 U.S.C. § 7431(a)(1) and the prospect of paying monetary damages to a taxpayer, TIGTA argued for a more flexible interpretation of whether Section 6103 permitted it to release *some* "return information" outside of strict statutory exceptions. See Pl.'s Reply Br. at 9 and n.4, *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, No. 13-1225 (Mar. 13, 2014), available at <http://causeofaction.org/assets/uploads/2014/01/ECF-No.-33-Reply-Brief-ISO-Plaintiffs-Cross-Motion-for-Summary-Judgment-and-Opposition-to-Defendants.pdf>.

²⁷ See MAKING SURE TARGETING NEVER HAPPENS, *supra* note 4, at 7-8. The statement was made in the context of TIGTA notifying Koch Industries, Inc. that it could access TIGTA's report (via FOIA) of an investigation into White House advisor Austan Goolsbee's public comment that Koch Industries did not pay corporate income tax. See *id.* at 6-7; E-mail from Daniel K. Carney, Special Agent, Treasury Inspector Gen. for Tax Admin., to Mark Holden, Gen. Counsel, Koch Indus. (Aug. 10, 2011) (on file with Cause of Action).

²⁸ See MAKING SURE TARGETING NEVER HAPPENS, *supra* note 4, at 5-8.

Thank you for your consideration of our views and investigation. We would be pleased to provide the Committee with any further information the Committee needs or to answer any questions raised by this Statement.

Sincerely,

A handwritten signature in black ink, appearing to read 'PK Khetan', with a long horizontal stroke extending to the right.

PRASHANT K. KHETAN
SENIOR COUNSEL

EXHIBIT 1



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

SMALL BUSINESS/SELF-EMPLOYED DIVISION

JAN 26 2011

David G. Frantz
Department of Energy
1000 Independence Avenue S.W.
Washington, DC 20585

Dear Mr. Frantz:

I am responding to your request dated January 25, 2011 that we received on January 25, 2011.

You asked for information under the provisions of Internal Revenue Code (IRC) section 6103(l)(3) pertaining to [redacted]. The information provided below can be used solely for the purpose of determining the credit worthiness of the referenced individual as an applicant for a Federal loan.

(b)(3)/26 USC 6103

I reviewed the account for the referenced entity and found [redacted]

(b)(3)/26 USC 6103

Persons having access to this information should be made aware of the penalty provisions of Sections 7213 and 7431 of the Internal Revenue Code (IRC) regarding the unauthorized disclosure of such information and of Section 7213A of the IRC regarding the unauthorized access to federal tax information. Please destroy this document after its purpose has been served. We have enclosed Notice 129 for your reference.

If you have any questions please call Disclosure Assistant Robert Beloit, ID # 1001792539 at (513) 263-4199 or write to: Internal Revenue Service, Disclosure Office 5, 550 Main St. Room 7019, Cincinnati, OH 45202. Please refer to case number 05-2011-00828.

Sincerely,

Ava F. Littlejohn
Disclosure Manager
Disclosure Office 5

Limitation on Disclosure
The information provided in this document is for your use only and is not to be disseminated to other individuals or entities. This information is provided to you under the provisions of Internal Revenue Code section 6103(l)(3) and is not to be used for any other purpose. If you have any questions regarding this information, please contact the Internal Revenue Service at (513) 263-4199.