1981

Extracting Documents and Information from the Internal Revenue Service

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INTRODUCTION

"Publicity," said Justice Brandeis, "is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[1] Decades after this remark was made Congress sought to promote publicity and disclosure by passing legislation[2] attacking the self-protective and self-perpetuating policies of government agencies.[3] Agencies are no longer afforded the luxury of avoiding scrutiny simply by withholding pertinent information from private individuals.[4] As a governmental agency, the Internal Revenue Service (I.R.S.) is subject to the publicity

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[1] L. BRANDEIS, OTHER PEOPLE'S MONEY 62 (1980).

[2] The Freedom of Information Act (FOIA) was passed originally in 1966 and amended in 1974, 1976, and 1978. It is now codified at 5 U.S.C. § 552 (1976). Section 6110 of the Internal Revenue Code was passed as part of the Tax Reform Act of 1976. It is now codified at I.R.C. § 6110. The Privacy Act was passed in 1974 and is now codified at 5 U.S.C. 552a (1976).

[3] Consumers Union v. Veterans Admin., 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed*, 436 F. 2d 1363 (2d Cir. 1971). In this case, the district court of Southern New York made the following observations concerning the Freedom of Information Act:

> The purpose of the Act, seen in the statutory language and the legislative history, was to reverse the self-protective attitude of the agencies under which they had found that the public interest required, for example, that the names of unsuccessful contract bidders be kept from the public. The Act made disclosure the general rule and permitted only information specifically exempted to be withheld; it required the agency to carry the burden of sustaining its decision to withhold information in a de novo equity proceeding in a district court. Disclosure is thus the guiding star for this court in construing the Act.

Id. at 799-800.

[4] *Id. See generally* Scherer v. Kelley, 584 F. 2d 170 (7th Cir. 1978), *cert. denied*, 440 U.S. 964 (1979) (suppression of information to private party is not to be aided); Miller v. Webster, 483 F. Supp. 883 (N.D. Ill. 1979) (information unjustifiably withheld from public scrutiny must be released); Nationwide Mut. Ins. Co. v. Friedman, 451 F. Supp. 736 (D. Md. 1978) (promotion of broad public access to information is within control of government).

and disclosure legislation passed by Congress.[5] Individual access to documents and information held by the I.R.S. has been greatly facilitated by the passage of three major statutes: the Freedom of Information Act,[6] section 6110 of the Internal Revenue Code,[7] and the Privacy Act.[8]

The Freedom of Information Act (FOIA) is the statute through which the broadest range of materials may be gathered from the Internal Revenue Service.[9] FOIA aids the individual in extracting documents and information from the I.R.S. because it creates a right on the part of "any person"[10] to obtain any "records"[11] from government agencies. In addition, FOIA has

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[5] 5 U.S.C. § 551(1) (1976). For purposes of FOIA and the Privacy Act, the term "agency" is defined as follows:

> (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—
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> (A) the Congress;
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> (B) the courts of the United States;
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> (C) the governments of the territories or possessions of the United States;
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> (D) the government of the District of Columbia;
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> (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
>
> (F) courts martial and military commissions;
>
> (G) military authority exercised in the field in time of war or in occupied territory . . . .

Id.

[6] 5 U.S.C. § 552 (1976).

[7] I.R.C. § 6110.

[8] 5 U.S.C. § 552a (1976).

[9] *See* Taxation with Representation Fund v. I.R.S., 646 F.2d 666 (D.C. Cir. 1981) (I.R.S. general counsel memoranda and technical memoranda disclosable under FOIA); Hawkes v. I.R.S., 507 F.2d 481 (6th Cir. 1974) (I.R.S. manual and supplement disclosable under FOIA); Pies v. I.R.S., 484 F. Supp. 930 (D.D.C. 1979) (drafts of technical memorandum and proposed regulations disclosable under FOIA).

[10] 5 U.S.C. § 552(a)(3) (1976). Under this provision an individual has a legally enforceable right of access to I.R.S. documents even though he is not involved in litigation with the I.R.S. His right to I.R.S. documents is one of entitlement, not one of agency courtesy. *Id.*

[11] *Id.* Under this provision, agency obligations to disclose records are triggered by an individual's request meeting two criteria: "(A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed . . . ." *Id.*

liberal procedural rules[12] to expedite the processing of requests for information at the administrative level[13] and to provide for strict judicial review of agency refusals to disclose information.[14] In any review proceeding, FOIA shifts the burden of proof from the individual to the agency so that the agency must justify its action in withholding information.[15] The agency can meet its burden only by showing that the information sought comes within one of the nine exemptions specified in FOIA.[16] During the fifteen-year history of FOIA,[17] a substan-

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[12] 5 U.S.C. § 552(a)(6)(A)(i) (1976). Agencies must make initial determinations on requests within 10 days and a requesting party must be notified immediately of his right to appeal an adverse determination. *Id.* An administrative appeals officer must make determinations with respect to any appeal within 20 days and must notify the requesting party of his right to seek judicial review in the event of an adverse appellate determination. *Id.* at § 552(a)(6)(A)(ii). A 10-day extension is allowed when unusual circumstances exist to prevent an agency from meeting its time limit. *Id.* at § 552(a)(6)(B). Unusual circumstances exist whenever an agency must make a field examination or search a voluminous amount of separate records or consult with another agency in order to comply with the request. *Id.* at § 552(a)(6)(B)(i)-(iii). In any event, the requesting party must be notified in writing of the reasons for the extension and "the date on which a determination is expected to be dispatched." *Id.* at § 552(a)(6)(B).

[13] 5 U.S.C. § 552(a)(6)(C) (1976). "[I]f the agency fails to comply with the applicable time limit," then the requesting party will be deemed to have exhausted his administrative remedies under FOIA. Upon a showing of exceptional circumstances and due diligence, however, an agency can request "additional time to complete its review of the records." *Id.* The courts will generally exercise discretion to stay a suit in such an exceptional situation. *See* Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976) (exceptional circumstances found where agency deluged with many requests and existing resources were inadequate to deal with the volume). *But see* Hamlin v. Kelley, 433 F. Supp. 180 (N.D. Ill. 1977) (inadequate staff, insufficient funding, or great number of requests did not constitute exceptional circumstances).

[14] 5 U.S.C. § 552(a)(4)(B). If a request is denied, or if the I.R.S. does not respond to a request within 10 days or to an appeal within 20 days, a party may bring a civil action to compel disclosure. *Id.* § 552(a)(6)(A)-(B). In such a civil action, the United States district courts have "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the [requesting party]." *Id.* § 552(a)(4)(B).

[15] *Id.* When the requesting party alleges that the agency refused his request for identifiable records, then he has made out a case under FOIA. He does not have to overcome any presumption in favor of the agency's action. The burden shifts to the agency to justify its refusal of the party's request. *Id.*

[16] 5 U.S.C. § 552(b)(1)-(9) (1976). This section states that FOIA disclosure does not apply to matters that are:

> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
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> (2) related solely to the internal personnel rules and practices of an agency;
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> (3) specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a

tial body of judicial law has evolved interpreting those exemptions.[18] Much of the discussion below focuses on that judicial law and on the scope of the FOIA exemptions.

Besides FOIA, the I.R.S. is also subject to a disclosure provision specially applicable to it—section 6110 of the Internal Revenue Code.[19] Section 6110 governs the disclosure of "written determination[s]"[20] by the I.R.S., and its disclosure exemptions generally parallel the exemptions to FOIA.[21] Section 6110, however, has its own set of procedures and provisions for judicial review.[22] Moreover, many courts have held that section 6110 preempts FOIA[23] and provides the exclusive means for securing access to the documents covered by section 6110.[24]

Although the most significant means of gaining access to I.R.S. records is through either FOIA or section 6110, there is yet another statute, the Privacy Act,[25] which permits an in-

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manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes . . . ;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Id.

[17] *See* note 2 *supra.*

[18] *See, e.g.*, FTC v. Owens-Corning Fiberglas Corp., 626 F.2d 966 (D.C. Cir. 1980); Breuhaus v. I.R.S., 609 F.2d 80 (2d Cir. 1979); Wellman Indus., Inc. v. NLRB, 490 F.2d 427 (4th Cir.), *cert. denied*, 419 U.S. 834 (1974); Anheuser-Busch, Inc. v. I.R.S., 493 F. Supp. 549 (D.D.C. 1980); Exxon Corp. v. FTC, 476 F. Supp. 713 (D.D.C. 1979); Pacheco v. FBI, 470 F. Supp. 1091 (D.P.R. 1979).

[19] I.R.C. § 6110.

[20] I.R.C. § 6110(b)(1). This section defines a written determination as a "ruling, determination letter or technical advice memorandum." *Id.*

[21] I.R.C. § 6110(c)(1)-(7). *See* note 16 *supra.*

[22] I.R.C. § 6110(f)(1)-(3).

[23] *See* Grenier v. I.R.S., 449 F. Supp. 834 (D. Md. 1978) (Tax Reform Act of 1976 meant to supplant FOIA with respect to I.R.S. rulings and determinations); Conway v. I.R.S., 447 F. Supp. 1128 (D.D.C. 1978) (Tax Reform Act provides exclusive remedy for disclosure of I.R.S. documents).

[24] *Id.*

[25] 5 U.S.C. § 552a (1976).

dividual to secure personal "record[s]"[26] maintained by government agencies on his private life. Strictly speaking, the Privacy Act is not a disclosure statute; rather, it is a provision designed to prevent the improper use of personal records maintained by a government agency on various individuals.[27] The Privacy Act has its own set of procedures and judicial remedies,[28] which are generally similar to the procedures applicable under FOIA and which may be used in conjunction with FOIA procedures.[29]

FOIA, section 6110, and the Privacy Act are the major disclosure tools used by a private individual to extract information from the I.R.S. Yet an individual's request for information can be denied by the I.R.S. if it can show that the requested information is specifically exempted from disclosure by a statutory exemption provision.[30] Thus, a careful analysis of the

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[26] *Id.* § 552a(a)(4) (1976). This section defines the term "record" as follows:

> [A]ny item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph . . . .

Id.

[27] 5 U.S.C. § 552a(b)(2) (1976). This section states that a record about an individual may not be disclosed to a member of the public unless its disclosure is required by FOIA. *Id.* Prior to the enactment of the Privacy Act, an agency could disclose an individual's personal information to any requesting member of the public. Now an agency must be more careful about how it responds to FOIA requests for individually identifiable records; it must consider the privacy protection problems before disclosure. *See* Department of the Air Force v. Rose, 425 U.S. 352, 372-73 (1976) (a balancing of an individual's right of privacy against the basic purpose of the FOIA).

[28] 5 U.S.C. § 552a(d)(1)-(5) (1976). These sections provide the procedure by which an individual may gain access to his records in order to request an amendment of any record pertaining to him. The agency must acknowledge the individual's amendment request within 10 days after its receipt. An agency's refusal to amend must be communicated to the individual so that he can request a review of the refusal. Thereafter, an agency has 30 days in which to answer an individual's request for review. If the agency remains steadfast in its refusal to amend, then the individual has a right to judicial review. *Id.* An agency's noncompliance with the Privacy Act's procedural rules will result in civil remedies for the individual. *Id.* § 552a(g)(1)-(5). In a case in which the agency acted in a willful and intentional manner, the prevailing individual is entitled to actual damages, court costs, and attorney's fees. *Id.* § 552a(g)(4)(A)-(B).

[29] *See* Painter v. FBI, 615 F.2d 689 (5th Cir. 1980) (materials specifically exempted from disclosure by FOIA cannot be disclosed under the Privacy Act); Florida Medical Ass'n, Inc. v. Department of HEW, 479 F. Supp. 1291 (M.D. Fla. 1979) (information not falling within the scope of a FOIA exemption may be disclosable under Privacy Act rules); Plain Dealer Pub. Co. v. United States Dep't of Labor, 471 F. Supp. 1023 (D.D.C. 1979) (agency may disclose an individual's information without his consent if disclosure required under FOIA).

[30] *See* notes 16 & 21 & accompanying text *supra*.

exemptions of each statute is necessary to determine which statute would be the best route for securing records from the I.R.S. For this reason, the major focus of the discussion below is upon the judicial interpretation and analysis of disclosure exemptions under the three statutes. The legislative history, scope, and procedural requirements of each statute are also developed as a background from which to analyze the application of the three statutes to problems that arise in extracting information from the I.R.S.

FREEDOM OF INFORMATION ACT

A. LEGISLATIVE HISTORY

In 1946 section 3 of the Administrative Procedure Act[31] was introduced to create the statutory principle that members of the public have a "right" to obtain information possessed by the executive branch of the Government. Although section 3 advanced a progressive theory of disclosure, it strictly qualified the public's right to obtain information by permitting agencies to withhold from disclosure any information requiring secrecy for the protection of the public interest.[32] The broad disclosure exemption greatly undermined public access to government records under section 3. A reevaluation was necessary. In 1965 House and Senate committees held extensive hearings on the practices of federal agencies in withholding or disclosing information under section 3.[33] These hearings led to widespread congressional dissatisfaction with the practices of agencies in withholding information.[34]

The congressional dissatisfaction sparked efforts to establish a broad policy favoring the disclosure of information in the

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[31] Act of June 11, 1946, Pub. L. No. 404, ch. 324, § 3, 60 Stat. 238 (1946) (codified at 5 U.S.C. § 1002 (1964)).

[32] 5 U.S.C. § 1002 (1964).

[33] *See Hearings on S. 1160 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., 366 (1965); *Hearings on H.R. 5012 Before a Subcomm. of the House Comm. on Government Operations*, 89th Cong., 1st Sess., 14 (1965).

[34] EPA v. Mink, 410 U.S. 73, 79 (1973). According to the *Mink* court, "[s]ection 3 was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosing statute. The section was plagued with vague phrases . . . [and] provided no remedy for wrongful withholding of information." *Id.*

possession of federal agencies.[35] Adopted in 1966, FOIA[36] mandates disclosure of all agency "records"[37] that are not specifically excused from disclosure by one of nine designated exemptions.[38] Even when an exemption is applicable, withholding is discretionary with each agency, and the Act clearly indicates that it does not in any way broaden the agency's authority to withhold information.[39] FOIA also introduced new and expedited procedures for judicial review of agency decisions to withhold information.[40]

Prior to its enactment in 1966, FOIA was subject to interpretative problems growing out of conflicts in the Senate report[41] issued in 1965 and the House report[42] issued in 1966. The Senate report took a more liberal approach favoring

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[35] *Id.* at 80. FOIA is unquestionably broadly conceived. "It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Id.*

[36] Act of September 6, 1966, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified at 5 U.S.C. § 552 (1976)).

[37] 5 U.S.C. § 552(a)(1)-(3) (1976).

[38] *Id.* § 552(b)(1)-(9) (1976). *See* note 16 *supra.*

[39] *Id.* § 552(c) (1976). The preceding section "does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress." *Id.*

[40] 5 U.S.C. § 552(a)(4)(A)-(6). A FOIA action may be commenced in one of three places: (1) the district court where the requesting party resides, (2) the district court where the requesting party's principal place of business is located, or (3) the District of Columbia. *Id.* § 552(a)(4)(B). FOIA actions take precedence over other cases on a court's docket, except cases that the district court considers of greater importance. *Id.* § 552(a)(4)(D). The Government is required to answer a complaint within 30 days, notwithstanding any other provision of law or court rule. *Id.* § 552(a)(4)(C). In all FOIA suits, the district courts have de novo jurisdiction over the matter and the right to *in camera* inspection of the records in question. *Id.* § 552(a)(4)(B). The district court's prerogative of *in camera* inspection is particularly necessary when the requesting party does not have precise information concerning the nature of the documents held by the agency. In addition, the courts have developed special procedures to enable individuals to obtain records that are not precisely within their knowledge. Such special procedures were promulgated in Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). In this case the court ordered the government to provide the plaintiff (1) an itemized list of records being withheld, (2) a detailed explanation of the reason for withholding each record, and (3) an index correlating the justification for withholding the documents or portions of documents being withheld. *Id.* at 826-28.

[41] S. REP. No. 813, 89th Cong., 1st Sess. 8 (1965).

[42] H.R. REP. No. 1497, 89th Cong., 2d Sess. 10 (1966).

disclosure than did the House report.[43] In 1966 the Attorney General issued an interpretative memorandum[44] to all federal agencies concerning the application of FOIA. The memorandum generally adopted the more restrictive disclosure positions of the House report when significant differences existed between the two reports.[45] Judicial decisions, however, have generally followed the more liberal Senate report,[46] since it was "the only committee report that was before both houses of Congress."[47]

Despite its interpretative problems, FOIA provided access to government records well beyond that afforded by the predecessor section 3 of the Administrative Procedure Act. FOIA provisions give private individuals substantially greater leverage in dealing with government agencies.[48] Currently, an individual has a right of action in a United States district court if an agency refuses his request for identifiable records not exempted under other FOIA provisions.[49] Nevertheless, as originally enacted, FOIA was subject to certain procedural

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[43] *See* notes 41 & 42 *supra*. *See also* Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975). Quoting Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971), the *Vaughn* court determined that "[t]he policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly." *Id.* at 1142. *Vaughn* also held that the Senate report more nearly reflected the intent of Congress because it adopted a strong position favoring disclosure under FOIA. *Id. See also* Stokes v. Brennan, 476 F.2d 699 (5th Cir. 1973) (visual aids for training OSHA inspectors not administrative in nature, subject to disclosure); Hawkes v. I.R.S., 467 F.2d 787 (6th Cir. 1972) (language of Senate report favored over language of House report); Stern v. Richardson, 367 F. Supp. 1316 (D.D.C. 1973) (FBI counterintelligence documents did not fall within FOIA exemptions).

[44] Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967) [hereinafter cited as Attorney General's Memorandum].

[45] *Id.*

[46] *See* note 43 *supra*.

[47] Rose v. Department of the Air Force, 425 U.S. 352, 366 (1976), (quoting with approval Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973)). *See also* Vaughn v. Rosen, 523 F.2d 1136, 1142 (D.C. Cir. 1975). The Senate report was the only report before both houses because the House membership unanimously passed the Senate bill instead of attacking and amending it in a conference committee. "By unanimously passing the Senate Bill without amendment, the House denied both the Senate Committee and the entire Senate an opportunity to object (or concur) to the interpretation written into the House Report (or voiced in floor colloquy)." *Id.* at 1142-43. As a result, most judicial decisions reflect the view that the Senate report is a more accurate indication of the intent of Congress in interpreting FOIA. *See* note 43 *supra*.

[48] 5 U.S.C. § 552(a)(4)(B) (1976). *See* note 40 *supra*.

[49] *Id.*

problems[50] and certain difficulties arising out of its exemption provisions.[51] These conditions led Congress to adopt amendments in 1974[52] that substantially modified the procedures mandated by FOIA[53] and made important changes in the scope of certain FOIA exemptions.[54] The amendment provisions mandated a ten-day time limit for the administrative processing of FOIA requests by an agency[55] and a twenty-day time limit for an agency's response to an appeal lodged by an individual.[56] The 1974 amendments also narrowed two[57] of the nine express ex-

[50] Act of June 5, 1967, Pub. L. No. 90-23, § 1, 81 Stat. 54 (1967). Under this original version of FOIA, an agency could stall a FOIA court claim by being unreasonably dilatory in its response to FOIA requests. Since a FOIA action could not be brought before the refusal of a request, an agency could play a tactical waiting game in hopes that most individuals would abandon their requests. *Id.*

[51] 5 U.S.C. § 552(b)(1) (1967). Under this 1967 codification of FOIA, the (b)(1) exemption relating to foreign policy and national defense information was given a broad scope by the courts so that any agency could avoid its disclosure obligations by invoking the exemption. EPA v. Mink, 410 U.S. 73 (1973). In this case, the Court held that exemption (b)(1) did not authorize or permit a federal district court's *in camera* inspection of a document "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." *Id.* at 81. Denied *in camera* inspection, the district courts could not take the initiative to separate the exempt material from the nonexempt material. *Id.* Moreover, they were not permitted to review the soundness of the security classification. Thus, an improperly classified document could be exempted from disclosure when ordinarily it would be subject to disclosure. *Id.*

[52] Act of November 21, 1974, Pub. L. No. 93-502, §§ 1-3, 88 Stat. 1561-1564 (1974).

[53] 5 U.S.C. § 552(a)(6)(A)(i)-(ii) (1976). These 1974 amendments corrected the dilatory actions of agencies by providing the 10 day limit during which agencies must deal with FOIA requests. *Id.* § 552(a)(6)(A)(i). Upon appeal of the agency's decision by an individual, an agency has 20 days in which to decide the appeal. Failure to comply with those time limits will enable an individual to bring a FOIA court action. *Id.* § 552(a)(6)(A)(ii). *See* note 12 *supra.*

[54] 5 U.S.C. §§ 552(b)(1), (5) (1976). Amended exemption (b)(1) now provides for judicial review of the propriety of a document's classification under an Executive order. *Id.* at § 552(b)(1)(B).

[55] 5 U.S.C. § 552(a)(6)(A)(i) (1976). The 1974 amendments corrected the dilatory actions of agencies by providing a limited and specified period for agencies to consider FOIA requests. *See* notes 12 & 53 & accompanying text *supra.*

[56] 5 U.S.C. § 552(a)(6)(A)(ii) (1976).

[57] 5 U.S.C. §§ 552(b)(1), (5) (1976). For a discussion of exemption (b)(1) *see* notes 50 & 54 *supra.* In EPA v. Mink, 410 U.S. 73, 92-93 (1973), *in camera* inspection was denied for major documents given to the President by high-level government officials. Such denial was based on exemption (b)(5) of the codified 1967 FOIA; exemption (b)(5) applies to internal agency memoranda. The Court conceded that exemption (b)(5) could permit *in camera* inspection of low-level factual reports, but reports containing a blend of "factual presentations and policy recommendations" could not be subject to such inspection. *Id.* In addition, the Court allowed the agency the opportunity on remand "to demonstrate the propriety of withholding any documents, or portions thereof, by means short of submitting them for *in camera* inspection." *Id.* at 93-94. The 1974 amendments narrow exemption (b)(5) and provide for *in camera* inspection by the courts so that they can separate the factual nonexempt portions from the sensitive exempt portions.

emptions to FOIA. The amendments specifically overruled *Environmental Protection Agency v. Mink*,[58] in which the Supreme Court had held that a court could not review the substantive propriety of an agency's classification of documents.[59] Since an agency's classification of information could not be reviewed, the agency could escape mandatory disclosure of nonsensitive information by combining it with highly sensitive information.[60] To end this practice, the 1974 amendments authorized the judicial review of the propriety of document classifications by agencies.[61]

Viewed in retrospect, the 1974 amendments appear to have been, in part, a measured congressional response to the Watergate abuses of executive privilege and secrecy.[62] After Watergate, Congress espoused "open government"[63] policies that gained considerable support throughout the 1970's. FOIA, providing individual access to government records, and the Federal Sunshine Law,[64] providing public access to governmental meetings, became tools for implementing these principles.[65] Recognizing the need for open government, Congress passed a 1976 FOIA amendment,[66] thus narrowing the scope of a FOIA exemption that allowed the withholding of any information exempted by a collateral statute.[67] The amended provision

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[58] 410 U.S. 73 (1973). *See* notes 51 & 57 *supra*.

[59] *Id. See* notes 51 & 57 *supra*.

[60] *Id. See* notes 51 & 57 *supra*.

[61] 5 U.S.C. § 552(a)(6)(A)(i)-(ii) (1976). Under the 1974 amendments, the district courts are permitted to examine records *in camera* to determine whether they can be withheld under any of the nine FOIA exemptions. In fact, the matter to be determined is whether the requested records come within any of the nine exemptions. *Id.*

[62] Because of the 1974 amendments, the FOIA court can now determine de novo whether an invocation of executive privilege is justified. *See generally* United States v. Nixon, 418 U.S. 683 (1974).

[63] Act of September 13, 1976, Pub. L. No. 94-409, § 2, 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b (1976)). This statute became known as the Federal Sunshine Law. Section 2 of the law provided that "[i]t is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government." *Id.*

[64] *Id.* A primary concern of the Federal Sunshine Law movement was "to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities." *Id.*

[65] *Id.*

[66] *Id.* § 5(b), 90 Stat. 1247.

[67] 5 U.S.C. § 552(b)(3) (1976). Exemption (b)(3) was narrowed by the 1976 amendment. The principal objective of this amendment was to overrule the decision of the Supreme Court in Administrator, FAA v. Robertson, 422 U.S. 255 (1975), in which the Court had

disallows exemption of information under a collateral statute unless the information is specifically identified by that statute.[68]

The narrowing of FOIA exemptions grants members of the public greater access to information held by government agencies. Nevertheless, the broad language of FOIA does not guarantee the disclosure of all information requested by a private citizen.[69] Accordingly, a careful analysis of the scope and basic structure of FOIA is essential for the strategic determination of whether to seek information under a FOIA action.[70]

B. Scope and Structure

Structurally, FOIA has three basic sets of provisions: (1) the provisions defining materials that must be disclosed and the nature of the disclosure required;[71] (2) the provisions defining what is exempt from disclosure;[72] and (3) the provisions establishing the administrative and judicial procedures to be followed under FOIA.[73] The first set has three provisions that determine the scope of FOIA by describing the types of materials that must be disclosed.[74] At first glance the scope of

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held that the exemption for "statutorily exempt" material applied in the context of a statute that neither specifically identified the type of information to be withheld nor gave specific criteria for determining when to withhold information. *Id.* at 265-66. The amended exemption created an exception for information required by a collateral statute to be withheld only if the exempting statute "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3) (1976).

[68] 5 U.S.C. § 552(b)(3) (1976). *See* note 67 *supra*.

[69] *See* Chamberlain v. Kurtz, 589 F.2d 827 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979) (documents discussing tax liability of third-party taxpayers not disclosable to requesting party); Mason v. Callaway, 554 F.2d 129 (4th Cir.), *cert. denied*, 434 U.S. 877 (1977) (I.R.S. investigation documents for potential income tax evasion not disclosable to requesting party); Grabinski v. I.R.S., 478 F. Supp. 486 (E.D. Mo. 1979) (documents compiled for law enforcement purposes not disclosable to requesting party); Belisle v. Commissioner, 462 F. Supp. 460 (W.D. Okla. 1978) (documents concerning tax exempt status of corporation not disclosable to requesting party); Luzaich v. United States, 435 F. Supp. 31 (D. Minn. 1977) (identity of I.R.S. informant not disclosable to requesting party).

[70] *Cf.* Voelker v. I.R.S., 489 F. Supp. 40 (E.D. Mo. 1980) (FOIA action preferred over Privacy Act); Grenier v. I.R.S., 449 F. Supp. 834 (D. Md. 1978) (FOIA preempted by § 6110).

[71] 5 U.S.C. § 552(a)(1)-(3) (1976).

[72] *Id.* § 552(b)(1)-(9) (1976).

[73] *Id.* § 552(a)(4)-(6) (1976).

[74] *Id.* § 552(a)(1)-(3) (1976).

FOIA appears to be all-encompassing because the first two provisions specify in great detail the material that must be disclosed,[75] while the third provision operates as a catch-all by providing for the disclosure of any "record" not specified in the first two provisions.[76] This generic language is, however, deceiving. Although a tremendous amount of material falls within the purview of FOIA, the scope of the statute is limited, since the material is subject to varying degrees of disclosure.

Each of the three provisions defining the scope of FOIA deals with a specific type of information that is subject to a distinct type of disclosure. For example, the first provision requires that the material encompassed by its terms be published in the Federal Register.[77] This provision has five subcategories that generally require the disclosure of an agency's inner workings and its substantive statements of general policy.[78] The second provision governs material that must be indexed and made available by an agency for public inspection and copying.[79] Materials categorized under this provision include final case opinions, agency policy statements, and agency staff instructions.[80] The second provision narrows the scope of FOIA by re-

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[75] *Id.* § 552(a)(1)-(2) (1976).

[76] *Id.* § 552(a)(3) (1976).

[77] *Id.* § 552(a)(1)(A)-(E) (1976).

[78] *Id.* The five subcategories of the first provision are as follows:

> (A) descriptions of [the agency's] central and field organization and the established places at which, the employees . . . from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
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> (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
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> (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
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> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
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> (E) each amendment, revision, or repeal of the foregoing.

Id.

[79] 5 U.S.C. § 552(a)(2) (1976).

[80] *Id.* The following three categories of materials must be made available for public inspection:

> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and
>
> (C) administrative staff manuals and instructions to staff that affect a member of the public . . . .

Id. § 552(a)(2)(A)-(C) (1976).

quiring the publishing agency to delete any identifying details that would constitute "a clearly unwarranted invasion of personal privacy."[81] The third provision deals with material that is made available only on request. Individual access to I.R.S. records is greatly facilitated by this provision since it requires the disclosure of any agency record that has been properly requested.[82] In its catch-all capacity, the third provision reaches all agency records except those that are specifically exempted from disclosure by the exemption provisions of FOIA. An individual's access to an I.R.S. record is largely determined by the interpretations given to the FOIA exemptions. Consequently, the remainder of this FOIA discussion will concentrate on the applicability of the exemptions to I.R.S. records sought to be disclosed under FOIA.

C. Exemptions

Before launching a detailed analysis of particular exemptions, an overview of the general principles underlying all the exemptions is necessary. Such general principles are derived both from the direct language of FOIA and from case law. The first major principle is that the agency has the burden of proof in showing the applicability of an exemption.[83] As mentioned earlier, this concept is the cornerstone of the effort to implement the principles underlying FOIA; the agency, rather than the individual, must justify its position.[84] Second, if a document includes both exempt and nonexempt portions, the exempt portions must be segregated from the nonexempt portions so that the nonexempt portions may be disclosed.[85] Third, there is no

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[81] 5 U.S.C. § 552(a)(2). As a check on the agency, each deletion must be justified and explained fully in writing. *Id.* In addition, a document falling within this section "may be relied on, used, or cited as precedent by an agency against a party . . . only if—(i) it has been indexed . . . and made available . . . as provided by this paragraph; or (ii) the party has actual and timely notice of the terms thereof." *Id.* § 552(a)(2)(i)-(ii) (1976).

[82] 5 U.S.C. § 552(a)(3) (1976).

[83] 5 U.S.C. § 552(a)(4) (1976). *See* Kuehnert v. FBI, 620 F.2d 662 (8th Cir. 1980) (government bears burden of showing that undisclosed material falls under an exemption); Barney v. I.R.S., 618 F.2d 1268 (8th Cir. 1980) (I.R.S. sustained burden by writing to trial court that it did not have the information requested); Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977) (burden is met by a showing that disclosure would violate a statute).

[84] *See* note 15 & accompanying text *supra*.

[85] 5 U.S.C. § 552(b) (1976). This section provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." *Id.*

requirement of agency withholding even though an exemption may be applicable.[86] Fourth, it is irrelevant that a party seeking information has a special personal reason for seeking that information. FOIA confers rights on the public at large, and the special circumstances of a particular complainant are not relevant to his right to obtain disclosure of a document.[87] Finally, the courts have consistently held that the FOIA exemptions are to be narrowly construed.[88]

Exemption (1)

Although, as indicated, general judicial principles call for a narrow construction of exemptions, exemption (1), as originally enacted,[89] was not conducive to a narrow construction because the propriety or impropriety of its application to information was not judicially reviewable.[90] This problem of court review was remedied by the 1974 amendments.[91] Amended exemption (1) currently applies only to matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."[92] The executive order[93] authorizing non-

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[86] 5 U.S.C. § 552(c) (1976). *See* Chrysler Corp. v. Brown, 441 U.S. 281 (1979), in which the Court held that a party who submits documents to a federal agency is not allowed to enjoin that agency's disclosure of the documents by a private right of action under FOIA. *Id.* at 285. Such a "reverse FOIA" suit does not fall within the purview of FOIA. *Id.*

[87] *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975), in which the Court stated that a party's rights under FOIA are neither increased nor decreased because he has a greater special interest in the requested document than the general public. *Id.* at 143 n.10.

[88] *See, e.g.*, Kuehnert v. FBI, 620 F.2d 662 (8th Cir. 1980); Coastal States Gas Corp. v. DOE, 617 F.2d 854 (D.C. Cir. 1980); Founding Church of Scientology v. Bell, 603 F.2d 945 (D.C. Cir. 1979); Chamberlain v. Kurtz, 589 F.2d 827 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979); Consumers Union of United States, Inc. v. Heimann, 589 F.2d 531 (D.C. Cir. 1978); Cox v. United States Dep't of Justice, 576 F.2d 1302 (8th Cir. 1978); Columbia Packing Co. v. United States Dep't of Agriculture, 563 F.2d 495 (1st Cir. 1977); New England Medical Center Hosp. v. NLRB, 548 F.2d 377 (1st Cir. 1976); Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975).

[89] Act of June 5, 1967, Pub. L. No. 90-23, § 1, 81 Stat. 54 (1967). Prior to the 1974 amendments, 5 U.S.C. § 552(b)(1) (1967) exempted from FOIA disclosure matters "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy." *Id. See* notes 50-51 & accompanying text *supra*.

[90] *See* notes 50-51 & accompanying text *supra*.

[91] *Id.*

[92] 5 U.S.C. § 552(b)(1) (1976).

[93] Exec. Order No. 11,652, 3 C.F.R. 339 (1974), *reprinted in* 50 U.S.C. § 401, at 3678 (Supp. IV 1974).

disclosure under exemption (1) has three principal categories of exempted information: top secret, secret, and confidential information.[94] In assessing the three categories, the applicable standard of review is very important.[95] Another important question is whether the term "national defense or foreign policy"[96] imposes more substantial restrictions on disclosure than does the term "national security."[97]

Exemption (1) should play only a modest role in limiting access to I.R.S. information because a relatively limited range of I.R.S. information is classified pursuant to an executive order. The exemption may, however, play a role in a few significant areas. One such area involves communication with foreign officials concerning tax enforcement or the negotiation of tax conventions.[98] Another area concerns material pertaining to the "competent authority process" whereby proceedings are conducted under tax treaties on a government-to-government basis.[99] Unable to participate in these proceedings, the taxpayer has no right to the resulting "competent authority materials" that fall within the purview of exemption (1).[100] Another major

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[94] Exec. Order No. 11,652, § 1(c), 3 C.F.R. 339, 340 (1974), *reprinted in* 50 U.S.C. § 401, at 3679 (Supp. IV 1974), creates three principal categories: (1) Top Secret information, the disclosure of which would be "expected to cause exceptionally grave damage to the national security"; (2) Secret information, the disclosure of which would be "expected to cause grave damage to the national security"; and (3) Confidential information, the disclosure of which would be "expected to cause damage to the national security." *Id.*

[95] 5 U.S.C. § 552(b)(1)(A)-(B) (1976). It is evident that exemption (1) does not authorize or permit a court de novo to determine whether a document would harm the national defense or interfere with foreign policy. S. REP. No. 93-854, 93d Cong., 2d Sess. (1974). It does, however, permit a reviewing court to determine the propriety, under the executive order, of the agency's classification of the document. "[T]he standard for determining whether a document is properly classified and protected by exemption one is whether the proper classification procedures have been followed and if by its sufficient description the contested document logically falls into the category of the exemption indicated." Raven v. Panama Canal Co., 583 F.2d 169, 171 (5th Cir. 1978), *cert. denied*, 440 U.S. 980 (1979).

[96] 5 U.S.C. § 552(b)(1)(A) (1976).

[97] *See generally* Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), *cert. denied*, 441 U.S. 992 (1975).

[98] On occasion the I.R.S. has refused to comply with requests for information constituting communications to foreign officials concerning tax enforcement. *See* TAX NOTES, May 28, 1979, at 676; TAX NOTES, June 18, 1979, at 784.

[99] 5 U.S.C. § 552(b)(1). FOIA may be the important tool by which a taxpayer may determine the manner in which the authorities have treated his case unless such information is classified as "competent authority materials," which fall within the scope of exemption (1). Taxpayers should scrutinize closely the propriety of I.R.S. classification of competent authority materials.

[100] *Id.*

area protected by exemption (1) is the area of tax treaty negotiations. Any materials underlying the negotiations may be specifically classified via exemption (1) and thereby placed beyond the reach of taxpayers.[101] To combat an exemption (1) obstacle, the taxpayer must request that the reviewing court determine the propriety of the agency's executive order classification. Improperly classified materials are not exempt from disclosure.[102]

Exemption (2)

Exemption (2) applies to matters "related solely to the internal personnel rules and practices of an agency."[103] Exemption (2) was the subject of conflicting congressional interpretation in reports underlying the original enactment of FOIA. The Senate report interpreted the exemption narrowly,[104] while the House report interpreted it broadly.[105] Prior to the decision of the United States Supreme Court in *Department of the Air Force v. Rose*,[106] there was a split of authority concerning which of the two interpretations should be followed.[107] In *Rose* the Court followed the Senate's narrow interpretation of the exemption[108]

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[101] 5 U.S.C. § 552(b)(1) (1976). The materials underlying the treaties may constitute the "working law" of the I.R.S. *See* notes 155-58 & accompanying text *infra*.

[102] 5 U.S.C. § 552(b)(1) (1976).

[103] 5 U.S.C. § 552(b)(2) (1976). *See* note 16 *supra*.

[104] S. REP. No. 813, 89th Cong., 1st Sess., at 8 (1965). The Senate report stated that the exemption applied only to "rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like." *Id.*

[105] H.R. REP. No. 1497, 89th Cong., 2d Sess., at 10 (1966). The House report read the exemption broadly, stating that "[o]perating rules, guidelines, and manuals of procedure for Government investigators and examiners would be exempt from disclosure, but this exemption would not cover all 'matters of internal management' such as employee relations and working conditions and routine administrative procedures which are withheld under present law." *Id.* The Attorney General's Memorandum followed the House report in all respects. Attorney General's Memorandum, *supra* note 44.

[106] 425 U.S. 352 (1976). While researching an article about disciplinary systems at military academies, New York law review editors were denied access to the case summaries of the Air Force Academy's honor court hearings although the academy's practice was to post these hearings and distribute copies to the faculty and administration. *Id.* at 354-55. The Air Force Academy refused to release the summaries based on exemptions (2) and (6) of FOIA. *Id.* at 362-77. Cognizant of the need to protect an individual's privacy, the Supreme Court held that an *in camera* investigation should be conducted in the lower court to effect a workable compromise between an individual's right to privacy and the public's right to government information. *Id.* at 381.

[107] *Id.* at 362-66. *Compare* Hawkes v. I.R.S., 467 F.2d 787 (6th Cir. 1972) (narrow reading of exemption, following Senate report) *with* Tietze v. Richardson, 342 F. Supp. 610 (S.D. Tex. 1972) (broad reading of exemption, following the House report).

[108] 425 U.S. at 366-69.

but qualified its ruling by noting that "at least where the situation is not one where disclosure may risk circumvention of agency regulation, Exemption (2) is not applicable to matters subject to such a genuine and significant public interest."[109] The Court thus introduced into the application of exemption (2) a judicial balancing of the agency's interest (secrecy) against the public's interest (disclosure).[110]

The principal area of concern under exemption (2) has been the Internal Revenue Manual. The federal courts have consistently rejected the application of the exemption to the manual.[111] In *Hawkes v. I.R.S.*,[112] a taxpayer's conviction for criminal tax fraud was remanded to compel disclosure of those portions of the Internal Revenue Manual that qualified as "administrative" under 5 U.S.C. § 552(a)(2)(c).[113] Also, the *Hawkes* court embraced a narrow construction of exemption (2) by concluding that it related only to the "employee-employer type concerns upon which the Senate Report focused."[114]

Exemption (3)

Exemption (3) deals with matters required to be withheld by statute.[115] As originally enacted in 1966, exemption (3) gave agency officials wide discretion in determining whether or not to withhold documents.[116] Congress became dissatisfied with

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[109] *Id.* at 369.

[110] *Id.* at 373.

[111] *See, e.g.*, Hawkes v. I.R.S., 467 F.2d 787 (6th Cir. 1972); Long v. I.R.S., 349 F. Supp. 871 (W.D. Wash. 1972). *See also* Neufeld v. I.R.S., 646 F.2d 661 (D.C. Cir. 1981), which held that correspondence control forms accompanying third-party correspondence are not exempt under exemption (2). *Id.*

[112] 467 F.2d 787 (6th Cir. 1972).

[113] *Id.* at 795-96. According to the court, "The intent of the limit on [exemption 2] was to bar disclosure of information which . . . would *significantly impede* the enforcement process." *Id.* at 795. As long as the enforcement process is not adversely affected, "information which merely enables an individual to conform his actions to an agency's understanding of the law applied by that agency does not impede law enforcement and is not excluded from compulsory disclosure under [exemption 2]." *Id.*

[114] *Id.* at 797.

[115] 5 U.S.C. § 552(b)(3) (1976). *See* note 16 *supra.*

[116] *See* Robertson v. Administrator, FAA, 422 U.S. 255 (1976), in which the Supreme Court held that exemption (3) applied to a statute that required the FAA Administrator to withhold certain reports upon the objection of an affected private party if the Administrator found that disclosure would "adversely affect" the party and was "not required in the public interest." *Id. Compare* Stretch v. Weinberger, 495 F.2d 639 (3d Cir. 1974) (to fall within exemption 3, the exempting statute must prescribe some basis upon which the administrative determination to exempt is to be made) *with* Evans v. Department of Transp., 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 404 U.S.

the discretionary nature of the exemption and amended it to read as it does presently.[117] The current exemption applies to matters "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public . . . as to leave no discretion on this issue, or (B) establishes particular criteria for withholding . . . ."[118]

Section 6103 of the Internal Revenue Code[119] is the principal specific exemption statute in issue when requests are made for information from the I.R.S. Section 6103 has rules governing "returns,"[120] "return information,"[121] and "taxpayer return information."[122] It provides that "[r]eturns and return information shall be confidential"[123] and prohibits Government officers from disclosing return information except under the exception provisions of section 6103.[124] In general, these exception provisions govern disclosure of information to other agencies or other public officials.[125] The only pertinent exceptions potentially applicable to disclosure of return information to private parties are the following: section 6103(c), governing disclosure

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1020 (1972) (the identity of a letter writer was not disclosed because the information provided by him was exempted under a federal statute; the determination of exemption was within the discretionary power of the Board or Administrator named in the statute).

[117] 5 U.S.C. § 552(b)(3) (1976).

[118] *Id.*

[119] I.R.C. § 6103.

[120] I.R.C. § 6103(b)(1). Returns include tax and information returns; estimated tax declarations; and claims for refunds, including supporting schedules, attachments, or lists that supplement the returns, declarations, or refund claims. *Id.*

[121] I.R.C. § 6103(b)(2)(A)-(B). The term "return information" means:

> (A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing . . . , and
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> (B) any part of any written determination or any background file document relating to such written determination . . . but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

Id.

[122] I.R.C. § 6103(b)(3). "'[T]axpayer return information' [is] . . . information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates." *Id.*

[123] I.R.C. § 6103(a).

[124] I.R.C. § 6103(c)-(n).

[125] *Id.*

to a designee of the taxpayer;[126] section 6103(e), governing disclosure to the taxpayer or to persons having a material interest in the taxpayer;[127] and section 6103(h)(4), governing disclosure in proceedings to which the taxpayer is a party.[128]

In view of the varied exceptions to disclosure promulgated by section 6103, a considerable uncertainty exists as to the working relationship between exemption (3) of FOIA, providing for statutory nondisclosure, and section 6103, classifying return information as confidential, of the Internal Revenue Code.[129] The critical question is whether FOIA applies to return information that is disclosable to private parties under a section 6103 excep-

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[126] I.R.C. § 6103(c). Disclosure must be requested by the taxpayer and the designee must be identified in writing. The I.R.S. has discretion to withhold information when it determines that disclosure would "seriously impair Federal Tax administration." *Id.*

[127] I.R.C. § 6103(e)(1)(A)-(F). In the case of an individual, only the individual is treated as having a material interest except when a "split gift" is made or a joint return is filed, and a trustee is treated as having a material interest in a gift tax return to the extent necessary to determine a § 644 tax imposed on the trust. In the cases of partnerships, corporations, and trusts, certain persons beneficially interested are treated as having a material interest. *Id.* The "seriously impair" standard, applicable when individuals request information, also applies to this provision. *Id.* § 6103(e)(7). *See* note 126 & accompanying text *supra.*

[128] I.R.C. § 6103(h)(4). This section authorizes disclosure of return information in the course of a "Federal or State judicial or administrative proceeding pertaining to tax administration," in one of four circumstances:

> (A) the taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability, in respect of any tax imposed under this title;
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> (B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding;
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> (C) if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding; or
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> (D) to the extent required by order of a court pursuant to section 3500 of title 18, United States Code, or rule 16 of the Federal Rules of Criminal Procedure, such court being authorized in the issuance of such order to give due consideration to congressional policy favoring the confidentiality of returns and return information . . . .

Id. § 6103(h)(4)(A)-(D). Disclosure under § 6103(h)(4) is not limited by the "significant impairment of tax administration" standard applicable under § 6103(c) and (e). The limitational standard under § 6103(h)(4) is considerably stricter; disclosure is limited only when the Service determines that disclosure "would identify a confidential informant or seriously impair a civil or criminal tax investigation." *Id.* § 6103(h)(4).

[129] The confusion is compounded by the virtually contemporaneous enactment of § 6103 (Oct. 4, 1976) and the 1976 amendment to exemption (3) (Sept. 13, 1976). *See* Chamberlain v. Kurtz, 589 F.2d 827, 840 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979).

tion. Returns and return information are exempt from disclosure if none of the section 6103 exceptions are applicable; section 6103 is a statute that clearly meets the provisions of 5 U.S.C. § 552(b)(5)(B) by providing "specific criteria" for disclosure and a specific description of the kind of information protected from disclosure.[130] If the section 6103 exceptions are applicable, however, it is not clear that FOIA is reinstated and applied to the disclosure of returns and return information under the exceptions. Arguably, section 6103 still operates to dislodge FOIA, through exemption (3), so that the excepted return information may be provided only by means of non-FOIA procedures under the Administrative Procedure Act.[131] In *Zale Corp. v. I.R.S.*,[132] the District of Columbia district court held that section 6103(a) operated to override FOIA and that returns and return information subject to one of the section 6103 exceptions could be procured only by means of non-FOIA procedures.[133] No other court has dealt directly with the issue

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[130] *See* Chamberlain v. Kurtz, 589 F.2d 827 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979). In this case a taxpayer instituted a FOIA suit for the production and disclosure of I.R.S. materials compiled in a criminal and civil fraud investigation. The I.R.S. contended that § 6103 satisfied the requirements of exemption (3) and that § 6103 was applicable to all but five of the requested documents. *Id.* at 831-35. The court rejected taxpayer's argument that he should have automatic access to all tax liability information under § 6103(h)(4) upon the initiation of a judicial or administrative tax proceeding. Instead, the court held that § 6103(c) and § 6103(e)(6) were applicable to the information requested by the taxpayer. *Id.* at 838. The court concluded accordingly "that the provisions of section 6103 dealing with the disclosure of return information to a taxpayer with a material interest therein [satisfied] the requirements of Exemption 3." *Id.* at 840.

[131] *See* Zale Corp. v. I.R.S., 481 F. Supp. 486 (D.D.C. 1979). Zale Corporation brought a FOIA suit to compel disclosure of government documents relating to an ongoing tax investigation conducted by the I.R.S. Zale's four FOIA requests applied to over half a million pages of documents and computer cards. After 15 months of processing, the I.R.S. released 55,000 pages of documents and Zale abandoned most of its requests. It continued, however, to pursue its request for the I.R.S. Special Agents' Report, a critical document forming the basis of the I.R.S. investigative effort. The I.R.S. declined to disclose this document under exemptions (3) and (7) of FOIA. *Id.* at 487.

[132] 481 F. Supp. 486 (D.D.C. 1979). The court began by noting that "courts have an obligation to construe statutes harmoniously where it is reasonable to do so," an obligation "particularly compelling when a specific measure is enacted subsequent to a provision of general application." *Id.* at 488. In addition, the court held that "[a]bsent a clear indication to the contrary, the specific legislation will not be controlled or modified by the more general." *Id.*

[133] *Id.* at 489. With respect to the enactment of § 6103, the court held:

> Despite ample indication in the legislative history that Congress was aware of FOIA while it labored over the tax reform legislation, there is no evidence of an intention to allow that Act to negate, supersede, or otherwise frustrate the clear purpose and structure of § 6103. For a court to decide that the gener-

presented in *Zale*.[134]

Another problem area is the section 6103 provision that requires the deletion of identifying details.[135] According to FOIA, the I.R.S. has the burden of deleting identifying materials,[136] but it cannot charge a fee for deleting the material.[137] A question then arises as to whether the magnitude of the burden or cost of making deletions can in itself be sufficient grounds for refusing disclosure. In *Long v. I.R.S.*,[138] the Ninth Circuit rejected the I.R.S. argument that the expense and burden of deleting identifying details from certain data was sufficient

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alized strictures of FOIA take precedence over this subsequently enacted, particularized disclosure scheme would in effect render the tax reform provision an exercise in legislative futility. Absent an indication that Congress so intended, this Court will not imply such a prospective pre-emption by FOIA. *Id.* (footnote omitted).

[134] *See, e.g.*, Long v. I.R.S., 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980); Chamberlain v. Kurtz, 589 F.2d 827 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979).

[135] I.R.C. § 6103(b)(2). Generally, returns and return information are confidential and cannot be disclosed. *Id.* § 6103(a). Nevertheless, § 6103(b)(2) excludes from the definition of return information any "data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." *Id.* § 6103(b)(2). Thus, there is a distinction between return information that identifies a taxpayer and return information that does not identify a taxpayer. *Id.*

[136] 5 U.S.C. § 552(a)(2) (1976).

[137] 31 C.F.R. § 1.6(a)(1) (1981). Under this regulation, the I.R.S. is not permitted to charge fees for costs of making deletions required by law. This prohibition is important in light of the § 6103 rule requiring that tax return information not include data which cannot be associated with, or otherwise identify, a taxpayer. I.R.C. § 6103(b)(2). It is the I.R.S. policy to bear the cost of making deletions to avoid identifying a taxpayer, and this policy appears to be mandated by FOIA. 5 U.S.C. § 552(a)(4)(A). Under this provision, agencies are permitted to charge fees in accordance with "a uniform schedule of fees." Fees chargeable are limited to "standard charges for document search and duplication." Also, agencies are authorized to furnish documents without charge or at reduced charges when the agencies determine that "waiver or reduction of the fee is in the public interest," because the information "can be considered as primarily benefiting the general public." *Id.*

[138] 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980). In this case taxpayer brought an action for the disclosure of certain data tapes and check sheets that would require deletions at a cost of approximately $160,000. *Id.* The Ninth Circuit noted the general cost of complying with FOIA and held that "[d]espite the massive expenses that can be involved in even a single request, Congress has not limited access under this Act," and that "[w]hether such expenditures are good policy is not a question for us to decide," because "Congress has determined that access to government records is an important objective." Thus, the court concluded that "the costs of editing involved in this case are [not] so extreme that segregation of revealable material is unreasonable as a matter of law." *Id.* at 367.

justification for refusing to disclose those materials.[139]

Another potential area of conflict involves the interplay of the section 6103 exceptions. If a taxpayer is involved in a judicial or administrative proceeding and seeks return information about himself, then the section 6103(c) and (e) exceptions conflict with the section 6103(h)(4) exception.[140] The basic difference is the standard for withholding information: section 6103(c) authorizes disclosure when the Secretary of the Treasury determines that disclosure would not impair federal tax administration;[141] under section 6103(h)(4) the Secretary must determine whether disclosure would "identify a confidential informant or seriously impair a civil or criminal tax investigation."[142] In *Chamberlain v. Kurtz*,[143] the Fifth Circuit resolved the conflict by holding that section 6103(h)(4) applies only to disclosure by federal or state officials in a proceeding and does not permit disclosure to a taxpayer. The court further held that section 6103(h)(4) operates only to permit officials to use returns or return information as "evidence."[144] Impliedly, the court held that section 6103(h)(4) does not create discovery rights for any party who does not have a right to the materials in the first place.[145]

Exemption (4)

Exemption (4) has not been subject to the same degree of controversy as has exemption (3). Basically, exemption (4) applies to trade secrets and confidential commercial and financial information.[146] In practice, exemption (4) has only limited application

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[139] *Id.* Whether deletions made by the I.R.S. are sufficient to avoid indirect identification of the taxpayers is a question of fact to be determined by the court. *Id.* Although the I.R.S. argued that § 6103(b)(2) was intended to codify existing I.R.S. practice, the court rejected this argument and held that § 6103(b)(2) "demonstrates a purpose to permit the disclosure of compilations of useful data in circumstances which do not pose serious risks of a privacy breach." *Id.* at 368.

[140] I.R.C. § 6103(c), (e), (h)(4).

[141] I.R.C. § 6103(c).

[142] I.R.C. § 6103(h)(4).

[143] 589 F.2d 827 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979).

[144] *Id.* at 838.

[145] *Id.* The *Chamberlain* result is questionable. Section 6103(h)(4)(D) applies to the production of returns and return information pursuant to discovery in a criminal case and clearly permits it, pursuant to a judicial order, even in a case involving a defendant other than a taxpayer. *Id.* When the taxpayer is a party, the rules of § 6103(h)(4)(A), (B) or (C) will apply. A substantial argument can be made that Congress intended the more liberal standard on disclosure to apply in civil and criminal cases involving a taxpayer seeking to discover return information in the possession of the government. *Id.*

[146] 5 U.S.C. § 552(b)(4) (1976). *See* note 16 *supra*.

to requests for I.R.S. information, since most of the material that would be subject to the exemption is also taxpayer return information that has been covered already under exemption (3).[147] Occasional litigation under exemption (4) has resulted in decisions holding that the I.R.S. must assert more than a "bare claim of confidentiality"[148] to support an application of exemption (4).[149]

Exemption (5)

Exemption (5) applies to "inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation."[150] The federal courts have held that "the availability by law" standard is satisfied unless the documents would be privileged under the discovery rules of the Federal Rules of Civil Procedure.[151] In general, there are three categories of privilege recognized under exemption (5): the deliberative-process privilege,[152] the attorney work-product privilege,[153] and the attorney-client privilege.[154] In applying the

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[147] 5 U.S.C. § 552(b)(4) (1976).

[148] Tax Reform Research Group v. I.R.S., 74-1 U.S.T.C. ¶ 9374 (D.D.C. 1974). In this case the court held that the I.R.S. was required to disclose certain comments on proposed regulations submitted by a private party, notwithstanding that the I.R.S. had promised confidentiality with respect to the comments. The court found that the I.R.S. was asserting a "bare claim of confidentiality" with respect to the comments at issue; it held that such a "bare claim" did not support application of exemption (4) absent a showing that the documents in question contained the kind of information to which the exemption applies. *Id.*

[149] *Id.* The court invalidated the provisions of Procedural Rule § 601.601(b), which, prior to its amendment in 1973, provided that comments on proposed regulations would be held confidential if the commenting party so requested. It noted that Procedural Rule § 601.601(b), as amended, "reflect[ed] an appropriate resolution of the conflict between the desire of the I.R.S. to maintain confidentiality and the requirements of the Freedom of Information Act." *Id.*

[150] 5 U.S.C. § 552(b)(5) (1976). The language of this exemption has not been changed since the adoption of FOIA in 1966.

[151] FED. R. CIV. P. 26-37. *See, e.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975) (attorney work-product privilege); Common Cause v. I.R.S., 646 F.2d 656 (D.C. Cir. 1981) (deliberative-process privilege protects predecisional materials); Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971) (deliberative-process privilege).

[152] FED. R. CIV. P. 26. In NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975), the Supreme Court held that there exists a "'generally . . . recognized' privilege for 'confidential intra-agency advisory opinions' . . . [the] disclosure of which 'would be injurious to consultative functions of government.'" 421 U.S. at 149. *See also* Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958).

[153] FED. R. CIV. P. 26(b)(3). In *Sears* the attorney work-product privilege is defined as "memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy." 421 U.S. at 154. *See also* Hickman v. Taylor, 329 U.S. 495 (1947) (leading case discussing the attorney work-product immunity).

[154] FED. R. CIV. P. 26(b).

limited deliberative-process privilege, the courts in FOIA suits have established the criteria to guide decision-making. These criteria were recently reviewed in *Taxation with Representation Fund, Inc. v. I.R.S.*[155] This case also explored the application of exemption (5) in the context of I.R.S. materials. The I.R.S. materials involved in *Taxation with Representation Fund* are General Counsel's Memoranda (GCM's),[156] Technical Memoranda (TM's),[157] and Action on Decision Memoranda (AOD's).[158] Generally, all three documents are subject to FOIA disclosure, but the federal court held that predecisional GCM's, TM's, and AOD's were exempt from disclosure.[159] This principle of exemption for predecisional internal memoranda was further expanded in *Common Cause v. I.R.S.*,[160] which held that a rejected tax plan was not subject to disclosure because it did not constitute a "final decision" in the making of I.R.S. law or policy.[161]

Exemption (6)

Exemption (6) protects from disclosure "personnel and medical files and similar files the disclosure of which would con-

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[155] 646 F.2d 666 (D.C. Cir. 1981). In this case the court distinguished between "predecisional" and "post-decisional" materials. *Id.* at 677. A second criterion identified by the court is "the function and significance of the document in the agency's decision-making process." *Id.* at 678. The court distinguished between documents which are part of "ongoing . . . processes" and those that embody or detail the "working law" of the agency. *Id.* at 677-78.

[156] *Id.* at 669. General Counsel's Memoranda (GCM's) are prepared by attorneys in the Interpretive Division of the Office of Chief Counsel. They are legal memoranda prepared for the I.R.S. in response to an I.R.S. request for legal advice. They usually concern taxpayer revenue ruling requests or field requests for technical advice. *Id.* With respect to GCM's, the court found that the documents were "'adopted' as final statements of agency policy and function[ed] as the 'working law' of the agency." *Id.* at 683.

[157] *Id.* at 671. Technical Memoranda (TM's) are prepared by the Legislation and Regulations Division of the I.R.S. Office of Chief Counsel. TM's explain the reasoning behind various decisions made in the drafting and promulgation of regulations adopted as Treasury Decisions. *Id.* With respect to TM's, the court found that the documents had "been informally adopted by the agency as explanations of its policy, and are used by personnel within the agency as the 'working law' of the agency." *Id.* at 683.

[158] *Id.* at 672. Action on Decision Memoranda (AOD's) are prepared by the Chief Counsel's Tax Litigation Division, with the concurrence of the Assistant Commissioner (Technical), and these memoranda underlie decisions to "acquiesce" in or to "non-acquiesce" in decisions of the tax court or the lower federal courts. *Id.* at 672-73. With respect to AOD's, the court found that the documents constituted "explanations of the agency's 'final' legal position on an issue." *Id.* at 684.

[159] *Id.* at 681-82.

[160] 646 F.2d 656 (D.C. Cir. 1981).

[161] *Id.* at 660.

stitute a clearly unwarranted invasion of personal privacy."[162] Exemption (6) has limited application because most information falling within its scope is already protected from disclosure by exemption (3). The I.R.S., however, has invoked exemption (6) to protect the privacy of taxpayers required to register with the I.R.S.[163]

Exemption (7)

Exemption (7) applies to "investigatory records compiled for law enforcement purposes,"[164] but only to the extent that the production of those records would result in certain injuries to Government or private interests of a kind specifically identified by the statute.[165] Civil, administrative, and criminal investiga-

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[162] 5 U.S.C. § 552(b)(6) (1976). *See* note 16 *supra*. The language of exemption (6) has remained the same since the adoption of FOIA in 1966.

[163] Wine Hobby USA, Inc. v. United States, 502 F.2d 133 (3d Cir. 1974). A commercial seller of wine-making equipment brought FOIA action to compel the I.R.S. to release the names and addresses of persons required to register with the I.R.S. for the purpose of being permitted to produce wine for family use without payment of tax. The I.R.S. resisted disclosure of these names by invoking exemption (6). *Id.* at 134. In its opinion the court invoked a balancing test to "determine whether release of the names and addresses would constitute an invasion of personal privacy and, if so, balance the seriousness of that invasion with the purpose asserted for release." *Id.* at 136. Since Wine Hobby (the commercial seller) failed to assert a public interest purpose for disclosure, the court concluded that the disclosure of the names and addresses would be a "clearly unwarranted invasion" of personal privacy; such an invasion of privacy is prohibited by exemption (6) of FOIA. *Id.* at 137.

[164] 5 U.S.C. § 552(b)(7) (1976). *See* note 16 *supra*. *See also* Luzaich v. United States, 77-1 U.S.T.C. ¶ 9250 (D. Minn. 1977). Plaintiff, Mary Luzaich, discovered that an audit of her 1974 income tax return was prompted by a letter written by a third party. Luzaich initiated a FOIA action to compel disclosure of the letter so that she could learn the identity of the letter writer and the nature of the tip. The I.R.S. refused to disclose the letter based upon exemption (7) of FOIA. The court held that portions of the letter identifying the letter writer and other third parties could not be disclosed, but that much of the letter could be disclosed under FOIA after deletions of the exempt portions by the court. *Id.*

[165] 5 U.S.C. § 552(b)(7)(A)-(F) (1976). Investigatory records are exempt from disclosure to the extent that their production would:

> (A) interfere with enforcement proceedings,
> (B) deprive a person of a right to a fair trial or an impartial adjudication,
> (C) constitute an unwarranted invasion of personal privacy,
> (D) disclose the identity of a confidential source . . . ,
> (E) disclose investigative techniques and proceedings, or
> (F) endanger the life or physical safety of law enforcement personnel.

Id.

In adopting the requirement of specific showings of harm, Congress intended to disapprove certain restrictive decisions of the District of Columbia Circuit, which had held that the exemption applied to any investigatory file, even if the investigation was

tions are all covered by exemption (7).[166] As a general proposition, courts have taken a liberal approach regarding what constitutes an "investigation." For example, an investigation of an I.R.S. agent in connection with his alleged misconduct in an audit qualifies as an investigation within the meaning of exemption (7).[167]

Most of the litigation under this exemption focuses on investigative records that would interfere with enforcement proceedings if their production were required. The most important question under the "interference" rule is whether investigatory files can be disclosed under FOIA before they would be subject to disclosure under otherwise applicable discovery rules. In *NLRB v. Robbins Tire & Rubber Co.*,[168] the Supreme Court held that disclosure of witnesses' statements before they would have been disclosable under the discovery rules constituted in-

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closed, and the disclosure of the file would have had no tendency to disclose the Government's investigative efforts. *See* Center for Nat'l Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370 (D.C. Cir. 1974) (open and active civil rights files exempted from disclosure as investigatory files); Ditlow v. Brinegar, 494 F.2d 1073 (D.C. Cir.), *cert. denied*, 419 U.S. 974 (1974) (court could not determine whether the Government would be harmed by disclosure of files); Aspin v. Department of Defense, 491 F.2d 24 (D.C. Cir. 1973) (report on adequacy of U.S. Army's investigation of My Lai incident considered an "investigatory file"); Weisberg v. United States Dep't of Justice, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974) (materials compiled by FBI following President Kennedy's assassination fall under the "investigatory file" exemption).

[166] *See, e.g.*, Title Guarantee Co. v. NLRB, 534 F.2d 484 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976) (investigative statements obtained by NLRB are exempted from disclosure); B & C Tire Co. v. I.R.S., 376 F. Supp. 708 (N.D. Ala. 1974) (files compiled by I.R.S. agent in connection with audit are considered investigative files).

[167] *See* Albin v. I.R.S., 79-2 U.S.T.C. ¶ 9584 (D.D.C. 1979). The misconduct investigation of the agent was compiled in connection with the criminal investigation of the taxpayer. As a result, the misconduct investigation qualified as an investigation since it was conducted for law enforcement purposes. *Id.*

[168] 437 U.S. 214 (1978). The NLRB filed an unfair labor practice complaint against employer Robbins & Tire Rubber Company. The company responded by requesting copies of all written statements made by witnesses who were to be called by the Board at the unfair labor practice hearing. The NLRB denied this request based upon exemption (7)(A). *Id.* The Court reasoned that the prehearing disclosure of witnesses' statements would initiate precisely the kind of interference that exemption (7)(A) was designed to prevent. For example, the premature release of the statements would allow the employer to coerce or intimidate the witnesses so that they would change their testimony or refuse to testify. *Id.* at 239. Such a result would interfere with the NLRB's enforcement proceedings and would constitute a direct violation of exemption (7)(A). *Id.* at 242-43.

terference with an enforcement proceeding.[169] The Court's holding was limited to NLRB enforcement proceedings, but three justices stated in a concurring opinion that they believed disclosure prior to the time required by otherwise applicable discovery rules would constitute interference within the meaning of exemption (7)(A) in any enforcement proceeding.[170] Lower courts that have considered the question in connection with tax cases have found that FOIA disclosure prior to the time mandated by discovery rules would constitute "interference with enforcement proceedings" under exemption (7)(A).[171] There has also been considerable litigation involving exemption (7)(D) which bars investigatory records from disclosure when their production would disclose the identity of I.R.S. informants.[172] In several cases, the courts have been sensitive to the Service's claim for protection by refusing to disclose the identity of the informant.[173]

Exemptions (8) and (9)

Exemption (8) protects from disclosure those matters involving an agency's "regulation or supervision of financial institutions."[174] Exemption (9) deals with "geological and geophysical information" that must be protected from disclosure.[175] The greater number of I.R.S. records fall within the purview of prior exemptions, not within the purview of either exemption (8) or (9). As a result, the I.R.S. rarely invokes these exemptions as defenses in litigation.[176]

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[169] *Id.* at 241-42.

[170] *Id.* at 243.

[171] *See* Grabinski v. I.R.S., 79-2 U.S.T.C. ¶ 9681 (E.D. Mo. 1979) (taxpayer not entitled to disclosure of documents because such disclosure would interfere with enforcement proceedings); Kanter v. I.R.S., 433 F. Supp. 812 (N.D. Ill. 1977) (agency has burden of proof of showing that disclosure of materials would interfere with a law enforcement proceeding).

[172] 5 U.S.C. § 552(b)(7)(D) (1976).

[173] *See* Pope v. United States, 79-2 U.S.T.C. ¶ 9641 (5th Cir. 1979) (unsolicited information obtained from confidential informants barred from disclosure by exemption (7)(D)); Gregg v. I.R.S., 80-1 U.S.T.C. ¶ 9274 (D.D.C. 1980); Luzaich v. United States, 77-1 U.S.T.C. ¶ 9250 (D. Minn. 1977) (identity of letter writer protected from disclosure by exemption (7)(D)).

[174] 5 U.S.C. § 552(b)(8) (1976).

[175] 5 U.S.C. § 552(b)(9) (1976).

[176] 5 U.S.C. § 552(b)(8)-(9) (1976).

INTERNAL REVENUE CODE SECTION 6110

A. LEGISLATIVE HISTORY

Section 6110 was enacted as part of the Tax Reform Act of 1976.[177] Congressional members were concerned that the private ruling system had "developed into a body of secret law known only to a few members of the tax profession."[178] Such secrecy surrounding the system permitted some taxpayers or outside parties to exert undue or improper influence over the tax system.[179] Section 6110 aims to abolish such secrecy by requiring the disclosure of the private rulings issued by the I.R.S. Such rulings are viewed as constituting an important part of the "internal law" of the I.R.S.[180] Before the enactment of section 6110, the I.R.S. was reluctant to disclose private rulings because they dealt with the confidential information of private individuals. During this time, several court decisions compelled the disclosure of private rulings under FOIA.[181] With section 6110, Congress balanced the strong public need for disclosure against the individual need for privacy. Both needs were protected by special sets of disclosure requirements[182] applicable under section 6110.

The first set of disclosure requirements outlines procedures to restrain disclosure.[183] Upon the issuance of any written determination or upon the receipt of a request for a background file document, the Secretary must issue a "notice of intention to disclose such determination . . . to any person to whom the writ-

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[177] Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1667 (1976).

[178] S. REP. No. 94-938, 94th Cong., 2d Sess. 305-06 (1976).

[179] *Id.*

[180] I.R.C. § 6110(a), (b)(1)-(2). The general rule requires that two categories of information— "written determinations" and "background file documents"—be open to public inspection. *Id.* Section 6110 defines "written determination" to include "rulings," "determination letters," and "technical advice memoranda." *Id.* § 6110(b)(1). The terms "ruling," "determination letters," and "technical advice memoranda" are defined by regulation rather than by § 6110. *See* notes 196-98 *infra*. Section 6110 also distinguishes between "reference written determinations," which are those the Secretary deems to have significant reference value, and other determinations, which the statute defines as "general written determinations." *Id.* § 6110(b)(3)(A)-(B).

[181] *See, e.g.*, Freuhauf Corp. v. I.R.S., 522 F.2d 284 (6th Cir. 1975), *vacated and remanded for reconsideration in light of the Tax Reform Act of 1976*, 429 U.S. 1085 (1977); Tax Analysts & Advocates v. I.R.S., 505 F.2d 350 (D.C. Cir. 1974).

[182] I.R.C. § 6110(f)(3)-(4).

[183] I.R.C. § 6110(f)(3)(A)-(B).

ten determination pertains."[184] Thereafter, the person who has a direct interest in maintaining the confidentiality of the determination must protest the disclosure within twenty days.[185] If the I.R.S. and the protesting party cannot agree on what is to be disclosed, the protesting party may file a petition in Tax Court for a determination of what must be disclosed.[186] Such a petition must be filed within sixty days after the mailing of the notice of intention.[187] Within fifteen days of the petition's service, the Secretary is required to notify all other persons to whom the determination pertains to give them a right to intervene in the proceeding.[188]

Conversely, the second set of disclosure requirements addresses procedures to compel disclosure.[189] Under these guidelines any person may file a request for additional disclosure with respect to a written determination. The request must meet certain requirements.[190] Upon receipt of such a request, the I.R.S. will notify the person to whom the determination pertains, and if this person protests the disclosure within twenty days, then the I.R.S. will deny the information to the re-

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[184] I.R.C. § 6110(f)(1). This portion of § 6110 was further defined in Treas. Reg. § 301.6110-2(h)(i), T.D. 7524, 1978-1 C.B. 416:

> A "person to whom a written determination pertains" is the person by whom a ruling or determination letter is requested, but if requested by an authorized representative, the person on whose behalf the request is made. With respect to a technical advice memorandum a "person to whom a written determination pertains" is the taxpayer whose return is being examined or whose claim for refund or credit is being considered.

Id.

[185] Treas. Reg. § 601.201(e)(16). This regulation should be read in conjunction with Treas. Reg. § 301.6110-2(k), T.D. 7524, 1978-1 C.B. 416:

> A "person who has a direct interest in maintaining the confidentiality of a written determination" is any person whose name and address is listed in the request for such written determination .... A "person who has a direct interest in maintaining the confidentiality of a background file document" is any person whose name and address is in such background file document, or who has a direct interest in maintaining the confidentiality of the written determination to which such background file document relates.

Id.

[186] I.R.C. § 6110(f)(3)(A).

[187] *Id.*

[188] I.R.C. § 6110(f)(3)(B).

[189] I.R.C. § 6110(f)(4)(A).

[190] Treas. Reg. § 301.6110-5(d)(1), T.D. 7524, 1978-1 C.B. 416. The request must state: (1) the file number of the written determination or description of the background file document; (2) the deleted information that the requester believes should be open to inspection; and (3) the basis for the request. *Id.*

questing party.[191] Upon denial of his request, the requesting party may file a petition in either the Tax Court or the District of Columbia district court for an order requiring the disclosure.[192] Again, the I.R.S. is required to give notice to the interested parties, but it is not required to defend the disclosure suit.[193] In many respects the two sets of disclosure requirements are mirror images of each other; the first set protects the individual's right to privacy and the second set protects the public's right to disclosure of I.R.S. documents. The courts have held that these procedural requirements preempt the generally applicable standards under FOIA.[194]

B. Scope and Structure

Section 6110 requires the disclosure of "written determinations" and "background file documents."[195] "Rulings,"[196] "determination letters,"[197] and "technical advice memorandum"[198] are all specific types of written determinations. Each written determination has a corresponding background file document that includes an individual's request for that particular determination.[199] These are the only documents that fall within the scope of section 6110.[200] Written

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[191] Treas. Reg. § 301.6110-5(d)(1), T.D. 7524, 1978-1 C.B. 416.

[192] I.R.C. § 6110(f)(4)(A)-(B).

[193] *Id.* The burden of proof in a suit to compel disclosure is on a party opposing disclosure, and the suit is tried de novo, even if there has been a prior suit to restrain disclosure. Accordingly, even when there has been a prior successful suit to restrain disclosure under § 6110(f)(3), a suit to that effect will not be the "law of the case" in a subsequent suit to compel disclosure under § 6110(f)(4). *Id.* § 6110(f)(4)(A).

[194] *See* Grenier v. I.R.S., 449 F. Supp. 834 (D. Md. 1978); Conway v. I.R.S., 447 F. Supp. 1128 (D.D.C. 1978).

[195] I.R.C. § 6110(b)(1)-(2).

[196] Treas. Reg. § 301.6110-2(d), T.D. 7524, 1978-1 C.B. 416. A ruling is defined as "a written statement issued by the National Office to a taxpayer or to the taxpayer's authorized representative . . . that interprets and applies tax laws to a specific set of facts." *Id.* It "generally recites the relevant facts, sets forth the applicable provisions of law, and shows the application of the law to the facts." *Id.*

[197] Treas. Reg. § 301.6110-2(e), T.D. 7524, 1978-1 C.B. 416. A determination letter is defined as "a written statement issued by a district director in response to a written inquiry by an individual or an organization that applies principles and precedents previously announced by the National Office to the particular facts involved." *Id.*

[198] Treas. Reg. § 301.6110-2(f), T.D. 7524, 1978-1 C.B. 416. A technical advice memorandum is defined as "a written statement issued by the National Office to, and adopted by, a district director in connection with the examination of a taxpayer's return or consideration of a taxpayer's claim for refund or credit." *Id.*

[199] I.R.C. § 6110(b)(2).

[200] I.R.C. § 6110(b)(1)-(2).

determinations are available for public inspection,[201] but background file documents are available only upon request.[202] Also, a taxpayer must comply with certain procedures to obtain information that is available only upon request.[203]

C. Exemptions

There are seven exemptions under section 6110 that closely parallel the FOIA exemptions:

> (1) the names, addresses, and other identifying details of the person[s] to whom the written determination pertains . . . [must be deleted] . . .
> (2) information specifically authorized under criteria established by an Executive order . . . [must be deleted] . . .
> (3) information specifically exempted from disclosure by any statute . . . applicable to the Internal Revenue Service . . . [must be deleted] . . .
> (4) trade secrets and commercial or financial information . . . [must be deleted] . . .
> (5) information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . [must be deleted] . . .
> (6) information contained in . . . reports . . . for use of an agency responsible for . . . supervision of financial institutions . . . [must be deleted] . . .
> (7) geological and geophysical information . . . [must be deleted] . . . .[204]

Although there do not appear to be any reported decisions as yet, it is likely that the court precedent under FOIA will be applied to the section 6110 exemptions as well.

The Privacy Act

A. Legislative History

The Privacy Act was enacted in 1974.[205] The Act's legislative history "establishes beyond doubt that the range of discoverable material from a government agency under this statute is narrower than that bestowed on individuals under the Freedom of Information Act."[206] The Act is not a general disclosure statute; "[its] primary purpose . . . is to allow disclosure to an individual regarding information pertaining to

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[201] Treas. Reg. § 301.6110-1(a), T.D. 7524, 1978-1 C.B. 416.
[202] Treas. Reg. § 301.6110-1(b), T.D. 7524, 1978-1 C.B. 416.
[203] *See generally* Treas. Reg. § 301.6110-1(c)(4), T.D. 7524, 1978-1 C.B. 416.
[204] I.R.C. § 6110(c)(1)-(7).
[205] Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896.
[206] Voelker v. I.R.S., 489 F. Supp. 40, 41 (E.D. Mo. 1980).

him, while balancing the need to protect other individuals' right to privacy."[207]

B. Scope and Structure

The Privacy Act applies to "records"[208] that are maintained in a "system of records"[209] by an agency under the Act. Every agency maintaining a system of records is required to permit an individual to review and copy his records upon request.[210] The individual may bring a person of his own choosing to accompany him during the review.[211] In addition, any individual is permitted to request an amendment of a record pertaining to him, and the agency must make a determination of whether to permit the amendment.[212] If an agency refuses to amend, then it is required to note the amendment request and to state its reasons for refusing the request.[213] If access to a record is denied, the individual may bring a civil action in the district where he resides, where the records are located, or where he has his principal place of business.[214] The action may also be brought in the District of Columbia.[215] As with a FOIA suit, the district court determines the matter de novo and has a right to inspect the documents in camera.[216] The court is permitted to assess

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[207] *Id.*

[208] *See* note 26 *supra*. *See* American Fed'n of Gov't Employees v. NASA, 482 F. Supp. 281 (S.D. Tex. 1980) (daily time sheets were not considered a "record" within the meaning of this section); Houston v. United States Dep't of Treasury, 494 F. Supp. 24 (D.D.C. 1979) (Privacy Act section only protects personal records so that an I.R.S. agent's collection of information can be supplied to his supervisors without notice to the agent).

[209] 5 U.S.C. § 552a(a)(5) (1976). *See* Savarese v. United States Dep't of HEW, 479 F. Supp. 304 (N.D. Ga. 1979), *aff'd sub nom.* 620 F.2d 298 (5th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981) (to invoke coverage under this section there must have been a retrieval from the systems of records); Zeller v. United States, 467 F. Supp. 487 (E.D.N.Y. 1979) (this Act applies to information that pertains to an individual and can be retrieved from an agency's records system by some personal identifier of the individual).

[210] 5 U.S.C. § 552a(d) (1976). *See* Doe v. United States Civil Serv. Comm'n, 483 F. Supp. 539 (S.D.N.Y. 1980) (Privacy Act held to apply to violation of recordkeeping standards even though records were made prior to effective date of Act).

[211] 5 U.S.C. § 552a(d)(1) (1976).

[212] *Id.* § 552a(d)(2). *See* Zeller v. United States, 467 F. Supp. 487 (E.D.N.Y. 1979) (plaintiff not entitled to injunction amending press release, where statements therein were factually accurate and largely a matter of record).

[213] 5 U.S.C. § 552a(d)(2)(b)(ii)-(d)(4) (1976).

[214] 5 U.S.C. § 552a(g)(1) (1976).

[215] *Id.*

[216] 5 U.S.C. § 552a(g)(3)(A) (1976).

reasonable attorneys' fees against the United States in any case in which a litigant has "substantially prevailed."[217]

C. EXEMPTIONS

In contrast to FOIA, the Privacy Act does not contain exemptions which are operative of their own force; rather it specifies categories of "systems of records" that the agencies are permitted to make exempt by notice published in the Federal Register.[218] There are two "general exemptions"[219] and seven "specific exemptions."[220] Of these exemptions only the

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[217] 5 U.S.C. § 552a(g)(3)(B) (1976).

[218] 5 U.S.C. § 552a(j)-(k) (1976).

[219] 5 U.S.C. § 552a(j)(1)-(2) (1976).

[220] 5 U.S.C. § 552a(k)(1)-(7) (1976). The head of any agency may promulgate rules, in accordance with the requirements . . . of this title, to exempt any system of records within the agency . . . if the system of records is:

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however*, [t]hat if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law . . . such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government . . . ;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility or qualifications for Federal civilian [or military] employment . . . but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government . . . ;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government . . . .

Id.

(j)(2) general exemption[221] and the (k) specific exemption[222] are important. The I.R.S. has identified 146 files as constituting "systems of records" within the meaning of the Privacy Act. Of these, some eighty have been exempted from Privacy Act provisions under either subsection (j)(2) or (k)(2) of the Privacy Act.[223]

CONCLUSION

As elaborated above, taxpayer access to information in the hands of the I.R.S. is governed principally by three modern statutes—the Freedom of Information Act, section 6110 of the Internal Revenue Code, and the Privacy Act. The three statutes are structurally similar, especially since each is composed of provisions that define its scope by identifying the materials which are subject to its disclosure requirements. Each statute contains specific exemption provisions that limit the disclosure mandated by each and provisions that govern procedural requirements.

The Freedom of Information Act remains the most significant source of authority for securing information from the I.R.S. FOIA is still evolving and there are, as a result, unresolved questions concerning access to I.R.S. information under its provisions. Foremost among these are questions concerning the interaction of FOIA with section 6103 of the Internal Revenue Code, which governs the disclosure of tax returns and tax return information. Additionally, the scope of FOIA and the other two statutes is subject to evolving interpretations. Such interpretations determine an individual's access to classified

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[221] *Id.* § 552a(j)(2). This exemption pertains to systems of records "maintained by an agency . . . which performs as its principal function any activity pertaining to the enforcement of criminal laws." There are three classes of information exempted under this section:

> (A) information compiled for the purpose of identifying individual criminal offenders . . . and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status;
>
> (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or
>
> (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

Id.

[222] *Id.* § 552a(k)(2). *See* note 220 *supra.*

[223] *See* 43 Fed. Reg. 42,510 (1978).

tax documents, internal tax memoranda and tax investigation materials. The careful practitioner should be familiar with the rules of each statute as to scope of application and as to the various exemption provisions in order to design and evaluate strategies for securing information from the I.R.S. that may be valuable in his practice.[224]

[224] *See generally* Walter, *Changes in Strategic Positions Between the IRS and Tax Practitioners: Impact of the Disclosure of Information*, 58 TAXES 815 (1980); 27 WAYNE L. REV. 1315 (1981).