

# Disclosure Litigation **BULLETIN**

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This bulletin is for informational purposes; it is not a directive.

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## UNAX AWARENESS

The Taxpayer Browsing Protection Act, which was signed into law in August 1997, established criminal penalties for the willful unauthorized inspection of tax information. The Service is conducting agency-wide awareness briefings, including written materials, a video, and group meetings, to better focus attention on understanding and preventing the unauthorized access and inspection of tax information (UNAX). The Office of Chief Counsel will be supporting the Service's UNAX program by participating in this awareness effort.

The longstanding statutory rules governing when and under what circumstances Counsel and Service employees may access or inspect tax information have not changed. In this regard, access to or inspection of tax information by Counsel and Service employees is authorized under I.R.C. § 6103(h)(1) to the extent such access or inspection is required in carrying out official tax administration duties. The purpose of the UNAX program is to ensure that employees understand their responsibilities to protect taxpayer privacy, utilize the statutory rules governing access or inspection, and are aware of the penalties for violating those rules.

## PUBLIC RECORD AND PRESS RELEASES

By memorandum dated October 15, 1997, the Assistant Attorney General, Tax Division, provided guidance to United States Attorneys' Offices concerning the use of press releases publicizing indictments, convictions, and sentences in criminal tax and other Service investigated cases. This guidance was

issued in light of a recent circuit court opinion, Johnson v. Sawyer, 120 F.3d 1307 (5th Cir. 1997), and several earlier opinions, that caused some uncertainty about the information that may be released to the public about tax cases.

The memorandum concludes that press releases should not be written with information from Service files, but rather, must be based on and contain only, public court record information. Not only should a press release contain only that information the immediate source of which is the public court record of the judicial proceeding, the press release should, moreover, attribute such information to the public court record. The memorandum makes clear that Assistant United States Attorneys and Public Information Officers issuing press releases or responding to press inquiries should secure the source document from the public court record, and make clear that the immediate source of the information provided is the public court record, with the source identified. The memorandum recommends that caution be exercised in preparing press releases so that the confidentiality rules of I.R.C. § 6103 are not, nor appear to be, violated. A copy of the Tax Division memorandum was sent by e-mail to all Assistant Regional Counsel (Criminal Tax) and (General Litigation).

#### REVISED TITLE 26 AND TITLE 31 REGULATIONS

On October 2, 1996, President Clinton signed the "Electronic Freedom of Information Act Amendments of 1996," P.L. No. 194-231, 110 Stat. 2422, which specifically brings electronic records within the scope of the FOIA. Although the statute made no substantive changes to the FOIA exemptions, it contained a myriad of new procedural provisions regarding the FOIA.

To implement the new statute, the Department of the Treasury is revising its FOIA regulations, 31 C.F.R. §§ 1.1 et seq. These regulations contain appendices providing "housekeeping provisions" particular to each constituent bureau, including the Service which has completely revised its appendix (Appendix B). Service personnel had substantial input in the drafting of Treasury's proposed regulations which are expected to be issued for public comment in December 1997.

The Service's FOIA regulations are at 26 C.F.R. § 601.701 et seq. These regulations are currently undergoing revision to incorporate statutory changes, to be consistent with Treasury's regulations, and to set forth certain procedures previously described in IRM 1272, Disclosure of Official Information Handbook. As soon as Treasury publishes its regulations, the Service will place its proposed regulations in clearance, with publication expected by mid-1998.

FREEDOM OF INFORMATION ACT EXEMPTION  
FOR CONTRACTOR PROPOSALS

Last year on September 23, 1996, Congress passed Pub. L. No. 104-201, Sec. 821, 110 Stat. 2422 (National Defense Authorization Act) which contains provisions prohibiting agencies from releasing certain contractor proposals under the FOIA. Specifically, this new statute serves as a 5 U.S.C. § 552(b)(3) statute under the FOIA and is designed to alleviate the administrative burden experienced by both civilian agencies (including the Service) and defense agencies in the processing of FOIA requests for contract proposals. A subsection (b)(3) statute is one that incorporates disclosure prohibitions that are contained in certain other federal statutes.

The new provisions consist of two parallel measures -- one which directly amends the statute governing armed services acquisitions (to be codified at 10 U.S.C. § 2305(g)) and another identical provision which amends the statute governing certain civilian agency acquisitions (to be codified at 41 U.S.C. § 253b(m)).

The new (b)(3) statute prohibits agencies from releasing any proposal "submitted by a contractor in response to the requirements of a solicitation for a competitive proposal" unless the proposal "is set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal." In effect, this prohibition is twofold. First, it provides blanket protection for a proposal submitted by an unsuccessful offeror because, by definition, it would not be "set forth or incorporated by reference in a contract entered into between the agency" and that contractor. Second, it provides protection for a proposal submitted by a successful offeror provided that such a proposal is not actually "set forth or incorporated in" the awarded contract. Thus, the key determinant of exempt status is whether the particular proposal is actually set forth in or incorporated into the contract.

The legislative history indicates that Congress was concerned with the time and effort required by agencies to review a proposal "line-by-line." Because such a review often resulted in withholding material, Congress relieved agencies from conducting a review at all. In relying on FOIA subsection (b)(3) in conjunction with the new statute, no disclosure analysis of a contract proposal under subsection (b)(4), exempting trade secrets and other confidential proprietary information, need be made.

## FOIA REQUESTERS TREATED ALIKE

In its 1989 landmark FOIA decision, United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), the Supreme Court articulated several principles applicable to determinations made under FOIA privacy exemptions (b)(6) and (b)(7)(C). One of these principles is that the identity of a requester, i.e., who the requester is, the requester's particular knowledge of, or familiarity with the requested records, or the requester's reasons or need for the requested records, is not to be taken into account in determining what information is releasable under the FOIA. Of course, neither subsection (b)(6) nor subsection (b)(7)(C) are to be invoked when the privacy interest to be protected is the requesters own. Otherwise, the Court stated that "the identity of the requesting party has no bearing on the merits of his or her FOIA request." Reporters Committee at 771.

In other words, all FOIA requesters should be treated alike in making FOIA determinations. The treatment given to a FOIA requester for information about another person should be the same as any member of the general public, disclosing no more or no less information than would be released to anyone. Accordingly, a requester's particular knowledge of the records subject to a FOIA request and/or the case or circumstances underlying the records is not to be taken into consideration.

For example, a Service supervisor who submits a FOIA request seeking access to records in his own EEO complaint or grievance file, or access to records in an EEO complaint file lodged against him by one of his employees, gains no greater access to information about third parties contained in those files than any other member of the public, even though the employee-requester may already have personal and particular knowledge of that very same information and even though that employee may have a right of access to that information in a different, non-FOIA, context (e.g., under title VII EEO procedures, under agency or union grievance procedures, etc.) Along these same lines, employees who utilize the FOIA to attempt to obtain access to tax information contained in their personnel files are not authorized to receive that tax information under the FOIA; rather, the tax information should be redacted from appraisals, correspondence between the agency and employee during the grievance process, and similar records, citing FOIA exemption (b)(3), in conjunction with I.R.C. § 6103(a). At the same time, these employees should be advised that, to the extent they are seeking access to tax information for use in an administrative or judicial proceeding affecting their personnel rights (such as grievances or EEO complaints), they could submit a request citing to I.R.C. § 6103(1)(4). See IRM 1272, at (20)62.

DISCLOSURE LITIGATION PERSONNEL CHANGES

Disclosure Litigation is pleased to announce the selection of Dave Fish as Senior Technician Reviewer. Dave is assigned to Branch 4 which is responsible for most of the Division's I.R.C. § 6103 advisory opinions. Also, Gerry Ryan has been reassigned from Special Assistant to Senior Technician Reviewer in Branch 3.

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Your suggestions for topics to be included in future Bulletins are invited.