IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS

ALEXANDRU AND SHERRY BITTNER,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:15-cv-01209-SS
	)	
INTERNAL REVENUE SERVICE,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The Internal Revenue Service ("the Service" or "IRS") moves for summary judgment in favor of the Internal Revenue Service and against Alexandru and Sherry Bittner in this Freedom of Information Act ("FOIA") case.

BACKGROUND

By letter dated September 8, 2015, Plaintiffs submitted a FOIA request through their power of attorney seeking access to the administrative file regarding the 2002-2004 and 2006-2011 income tax and report of foreign bank account and financial accounts examination of Alexandru and Sherry Bittner. (Compl., Doc. No. 1-1.) The scope of Plaintiffs' request was later limited to those documents contained in the administrative file for the 2002-2004 and 2006-2011 years, prepared by a revenue agent and an international examiner. (Declaration of Gail Minauro, "Minauro Decl." ¶5, Ex. A.) On December 22, 2015, before the Service began producing documents, Plaintiffs filed the complaint in the instant case. (Compl., Doc No. 1.)

ARGUMENT

FOIA actions are generally resolved through motions for summary judgment. See Miscavige v. Internal Revenue Serv., 2 F.3d 366, 369 (11th Cir. 1993); Lane v. Dep't of Interior,

523 F.3d 1128, 1134 (9th Cir. 2008); see also Schiller v. INS, 205 F. Supp. 2d 648, 653 (W.D. Tex. 2002) (noting that "Typically, discovery is not part of a FOIA case…."). In a FOIA case, an agency has the burden of establishing that it: 1) conducted a reasonable search for documents responsive to plaintiff's request; and 2) is not improperly withholding any responsive pages pursuant to the nine exemptions contained in the FOIA. Manna v. United States Dep't of Justice, 832 F. Supp. 866, 870, 874-75 (D.N.J. 1993), aff'd, 51 F.3d 1158 (3d Cir. 1995).

An agency may rely upon its reasonably detailed, nonconclusory declarations submitted in good faith, in order to prove the adequacy of its search. SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991); Rein v. U.S. Patent & Trademark Office, 553 F.3d 353, 363-64 (4th Cir. 2009). An agency's declaration must also "adequately describe the record, state what exemption the agency claims and explain why the agency believes the record falls within the exemption. Church of Scientology v. Internal Revenue Serv., 816 F. Supp. 1138, 1147 (W.D. Tex. 1993). "A description is sufficient if it enables a court to reach its own conclusion as to what is in the record." Id. The agency's declarations are entitled to a presumption of good faith. SafeCard Servs., 926 F.2d at 1200.

The Service located 5,319 pages of records in response to Plaintiffs' FOIA request. (Declaration of Christopher P. Valvardi, "Valvardi Decl.," ¶12.) Of these 5,319 pages, 3,845 pages were released to Plaintiffs in full, and 358 pages were released in part. (Id.); 116 pages are being withheld in full. (Id.) No genuine issue of material fact exists with respect to Plaintiffs' FOIA claim because the Service has submitted evidence through declarations that it: 1) conducted a reasonable search for documents responsive to Plaintiffs' FOIA request; and 2) released all responsive pages, or responsive portions of those pages, that are not exempt from disclosure. The four declarations accompanying the instant motion demonstrate that the Service

discharged its duty to conduct a reasonable search, and that the Service is not improperly withholding any responsive pages.

I. The Service Conducted a Reasonable Search for Records Responsive to Plaintiffs' FOIA Request.

Under the FOIA, an agency is obligated to perform a good faith search for documents responsive to a request for records. See Rein, 553 F.3d at 363-64; Oglesby v. United States Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990). "An agency may demonstrate that it conducted an adequate search by showing that it used methods which can be reasonably expected to produce the information requested." Batton v. Evers, 598 F.3d 169, 176 (5th Cir. 2010) (citation and quotation marks omitted); Kohake v. Dep't of Treasury, 630 F. App'x 583, 587 (6th Cir. 2015) (unreported). A court must decide only "whether the search was adequate." Batton, 598 F.3d at 176 (citations omitted). An agency may rely upon its reasonably detailed, nonconclusory declarations submitted in good faith, in order to prove the adequacy of its search. SafeCard Servs., 926 F.2d at 1200. Once an agency establishes that its search was reasonable, then the burden shifts to the plaintiff to rebut the agency's evidence by showing that the search was not reasonable or was not conducted in good faith. Ray v. U.S. Dep't of Justice, 908 F.2d 1549, 1558 (11th Cir. 1990), rev'd sub nom. U.S. Dep't of State v. Ray, 502 U.S. 164 (1991).

The declaration of Gail Minauro, a Senior Disclosure Specialist at the Service, describes the Service's search methodology in detail. Ms. Minauro was assigned to the FOIA case at issue on October 15, 2015, due to the previous disclosure specialist's work load. (Minauro Dec. ¶4.) Ms. Minauro explains that she reviewed the records that the previous disclosure specialist had

retrieved from the Service's Integrated Data Retrieval System ("IDRS"),[1] and continued her search for responsive documents by contacting Service employees who may have responsive documents. (Id. ¶4-14.) Ms. Minauro contacted Johnny Johnson, Manager for Large Business and International Division, who was the supervisor for Revenue Agent Anh Reach, one of the two individuals who were named in Plaintiffs' FOIA request. (Id. at ¶5.) After speaking with Ms. Reach, Ms. Minauro notified counsel for the Plaintiffs that the responsive documents were voluminous. (Id.) Plaintiffs' power of attorney limited the scope of the request to documents prepared by Ms. Reach and the international examiner. (Id., Minauro Ex. A.) As a result, Ms. Minauro contacted Joseph Reneau, the manager for the international examiner, Shena Bassett. (Id. at ¶7.) Ms. Minauro also contacted Daniel Price, Chief Counsel-IRS attorney, because she had been informed that Chief Counsel was involved in the case. (Id.)

Ms. Minauro received records from Ms. Bassett on January 8, 2016. (Minauro Decl. ¶9.) In February and March of 2016, Ms. Minauro received records from Ms. Reach. (Id. at ¶14.) Because she had been notified by Chief Counsel-IRS Attorney Steven Karon that Plaintiffs had filed the instant litigation, Ms. Minauro then sent a cd of all of the potentially responsive records to Mr. Karon. (Id.)

Christopher P. Valvardi, an attorney in Branch 7 of the Office of the Associate Chief Counsel describes, was assigned to this case on May 4, 2016. (Declaration of Christopher Valvardi, "Valvardi Decl." ¶11.) In his declaration, Mr. Valvardi explains that after he reviewed

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[1] This system is the Service's primary resource for researching current taxpayer information. It contains information pertaining to returns filed by taxpayers and information submitted with respect to taxpayers. Once a taxpayer's account has been retrieved on IDRS, the location of tax returns and other paper documents can be determined. (Declaration of Charles B. Christopher, ¶7, n.1.)

the documents provided to him by Mr. Karon, he noticed that some of the email files provided to him in portable document format ("PDF") contained encrypted documents that he could not open. (Id. at ¶11.) On June 20, 2016, Ms. Reach forwarded those emails to Mr. Valvardi so that he could open the attachments and convert them to a PDF format. (Id.) Based on his review of the case history notes provided to him by the Disclosure Office, his communications with the attorney previously assigned to the case, and his communications with the Revenue Agents assigned to examine Plaintiffs, Mr. Valvardi has determined that there are no other records responsive to Plaintiffs' request that could be located. (Valvardi Decl. ¶13.)

The Service made a good faith effort to search for the documents at issue in this case, and has demonstrated that it followed standard procedures, including a reasonable search methodology, in responding to Plaintiffs' request. Accordingly, the Court should find that the Service performed an adequate search to locate documents responsive to Plaintiffs' FOIA request.

II. 116 Pages of Documents were Properly Withheld in Full and 358 Pages were Properly Withheld In Part.

A. The Service has Released all Segregable Nonexempt Information Contained in Responsive Agency Records.

"[T]he burden is upon the agency to prove de novo in trial court that the information sought fits under one of the exemptions to the FOIA." Vaughn v. Rosen, 484 F.2d 820, 823 (D. C. Cir. 1973) (footnote omitted). The exemptions are to be narrowly construed, and the agency must notify the requester that it is withholding the document and give its reasons for withholding the document. Church of Scientology, 816 F. Supp. at 1146.

Mr. Valvardi is familiar with the segregation requirement of subsection (b) of the FOIA for any non-exempt information contained in responsive agency records. (Valvardi Decl. ¶13.)

He has read and analyzed all of the documents at issue in this case, and has attempted to release to Plaintiffs every reasonably segregable non-exempt portion of every responsive document (Id.)

The Service additionally notes that some pages have been withheld under multiple exemptions – in full or in part. The Service has provided cross-references where appropriate.

B. The Service Properly Withheld Pages in Full and in Part Pursuant to 5 U.S.C. §552(b)(3), Exemption 3, in Conjunction with 31 U.S.C. §5319.

Exemption 3, 5 U.S.C. §552(b)(3), of the FOIA provides that an agency need not disclose records that another statute exempts from disclosure:

> [The FOIA does not require the release of information] specifically exempted from disclosure by statute (other than section 552b of this title), if that statute--(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld….

If a court determines that a relevant statute exists and the withheld information is within the statute's coverage, the information cannot be released. Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 868 n.29 (D.C. Cir. 1981); Goland v. CIA, 607 F.2d 339, 350 n.65 (D.C. Cir. 1978) (sole issue is the existence of a relevant statute and the inclusion of information within the statute's coverage).

31 U.S.C. §5319 is a related statute covered by Exemption 3. Cuban v. SEC, 795 F. Supp.2d 43 (D.D.C. 2011); Bloomer v. Dep't of Homeland Sec., 870 F. Supp.2d 358 (D. Vt. 2012). 31 U.S.C. §5319 provides that "a report and records of reports are exempt from disclosure under section 552 of title 5, and may not be disclosed under any State, local, tribal, or territorial 'freedom of information', 'open government', or similar law." 31 U.S.C. §5319.

In paragraph 15 of his declaration, Mr. Valvardi explains that reports of certain foreign bank and financial accounts were gathered by the Service as a part of Plaintiffs' civil examination. (Valvardi Decl. ¶15.) These pages contain reports of certain foreign bank and

financial accounts protected under 31 U.S.C. §5319. (Id.) As such, the Service is asserting Exemption 3 in conjunction with 31 U.S.C. §5319 as legal justification for withholding this information.

C. The Service Properly Withheld Pages in Full and in Part Pursuant to 5 U.S. C. §552(b)(3), Exemption 3, in Conjunction with 26 U.S.C. §6103(a).

As described in detail above, Exemption 3, 5 U.S.C. §552(b)(3), of the FOIA provides that an agency need not disclose records that another statute exempts from disclosure. If a court determines that a relevant statute exists and the withheld information is within the statute's coverage, the information cannot be released.

Courts have uniformly held that Section 6103 of the Internal Revenue Code qualifies as an Exemption 3 statute under the FOIA. Chamberlain v. Kurtz, 589 F.2d 827, 840 (5th Cir. 1979); Rollins v. U.S. Dep't of Justice, No. CIV.A. H-90-3170, 1992 WL 12014526, at *4 (S.D. Tex. June 30, 1992), aff'd sub nom. Rollins v. U.S. Dep't of Justice, 8 F.3d 21 (5th Cir. 1993); see also Long v. United States, 742 F.2d 1173, 1178 (9th Cir. 1984) (citing 26 U.S.C. §6103). Section 6103 governs the prohibition against disclosure of a taxpayer's tax returns or other "return information." 26 U.S.C. §6103(a).[2]

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[2] Among other things, "return information" includes:

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, over assessments, or tax payments, whether the taxpayer's return was, or is being examined, or subject to other investigation or processing, **or any other data, received by, recorded by, prepared by, furnished to, or collected by** the Secretary with respect to a return or with respect to the determination of the existence, or possible existence of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition or offense . . .. 26 U.S.C. § 6103(b)(2)(A).

In paragraph 16 of his declaration, Mr. Valvardi describes pages that were withheld in full or in part, and describes the return information related to third-party taxpayers that these pages contain. For example, these pages contain references to unrelated third-party taxpayers whose names and associated information had been recently searched by revenue agents. (Valvardi Decl. ¶16.) These pages also contain a diagram of interparty relationships created by revenue agents that includes names of third parties and their social security numbers and/or taxpayer identification numbers. (Id.) As such, the Service is asserting Exemption 3 in conjunction with 26 U.S.C. §6103(a) as legal justification for withholding this information.

D. The Service Properly Withheld Pages in Full and in Part Pursuant to 5 U.S.C. §552(b)(5), Exemption 5 and the Attorney-Client Privilege.

Among other things, Exemption 5 encompasses the attorney-client privilege, the attorney-work product privilege, and the deliberative process privilege. Rein, 553 F.3d at 366. Exemption 5 protects from disclosure under the FOIA "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552(b)(5). As the language suggests, Exemption 5 incorporates those privileges which the government enjoys in pretrial discovery under relevant statutes and case law. See United States v. Weber Aircraft Corp., 465 U.S. 792, 799 (1984); see also NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148 (1975) ("Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency.").

One aspect of Exemption 5 is the attorney-client privilege. "The attorney-client privilege under Exemption 5 extends to confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." Rollins, 1992 WL

12014526, at *8 (citation and quotation marks omitted); Am. Mgmt. Servs., LLC v. Dep't of the Army, 842 F.Supp.2d 859, 872 (E.D.Va. 2012).

In paragraphs 17-19 of his declaration, Mr. Valvardi describes the pages were withheld in full or in part pursuant to the attorney-client privilege, and describes the privileged information they contain. For example, Mr. Valvardi explains that during the course of Plaintiffs' ongoing examination, and in anticipation of litigation, the examiners provided facts to Chief Counsel-IRS attorneys, who provided opinions and advice to the examiners based upon those facts. (Valvardi Dec. ¶17-19.) As such, the Service is asserting Exemption 5 and the attorney-client privilege as legal justification for withholding this information.

E. The Service Properly Withheld Pages in Full and in Part Pursuant to 5 U.S.C. §552(b)(5), Exemption 5 and the Deliberative Process Privilege.

The governmental deliberative process privilege is another one of the privileges encompassed by Exemption 5. Chamberlain, 589 F.2d at 841; See Sears, Roebuck & Co., 421 U.S. at 150; Tax Analysts v. Internal Revenue Serv., 294 F.3d 71, 76 (D.C. Cir. 2002). The privilege protects "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" Sears, Roebuck & Co., 421 U.S. at 150 (quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeis, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966)). "This privilege is necessary to protect the integrity of an agency's decisions by insuring the unhindered exchange of fact and opinion within the agency." Chamberlain, 589 F.2d at 841 (footnote omitted).

In determining whether the governmental deliberative process privilege protects a particular document, the Court considers whether the document was pre-decisional, and whether it was deliberative in nature. Mapother v. Department of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993). "[T]he key issue in applying this exception is whether disclosure of the materials would

expose an agency's decision making process in such a way as to discourage discussion within the agency and thereby undermine the agency's ability to perform its functions." Rugiero v. U.S. Dep't of Justice, 257 F.3d 534, 550 (6th Cir. 2001) (citation and quotation marks omitted).

In paragraphs 20-26 of his declaration, Mr. Valvardi describes pages that were withheld in full or in part pursuant to the deliberative process privilege, and describes the privileged information they contain. He explains that these pages contain information that reflects the thought processes of the agency, and that these pages were generated prior to any final determination by the agency on the matters under consideration – the Plaintiffs' ongoing civil examination. (Valvardi Decl. ¶20-26.)

When the Service conducts a civil examination, the Service compares tax returns submitted by the taxpayer with information provided by the taxpayer when the taxpayer is under examination, information received from related parties, and information received from third parties. (Valvardi Decl. ¶22.) The Service gathers information through, among other things, document requests, subpoenas, interviews, and requests for information from other government agencies. (Id.) This information is analyzed by revenue agents, who are frequently advised by attorneys at Service as to what enforcement action, if any, should be taken. (Id.) The Service has not made a final determination about whether or how to pursue further action against Plaintiffs, and it is properly withholding documents pursuant to the deliberative process privilege. (Id. at ¶20.)

For example, Mr. Valvardi explains that one of the documents withheld in full was a draft set of interview questions. (Valvardi Decl. ¶26.) Other pages withheld in full pursuant to the deliberative process privileges are the handwritten notes of revenue agents indicating possible entities and transactions of interest as related to determining Plaintiffs' tax liability; examination

workpapers summarizing information from documents collected by revenue agents; and spreadsheets created by revenue agents or counsel compiling information collected by revenue agents, and organized to indicate possible parties, transactions, and relationships of interest when considering Plaintiffs' liability. (Id.) As such, the Service is asserting Exemption 5 and the deliberative process privilege as legal justification for withholding this information.

F. The Service Properly Withheld Pages in Full and in Part Pursuant to 5 U.S.C. §552(b)(5), Exemption 5 and the Attorney Work-Product Privilege.

The attorney work-product privilege is another one of the privileges encompassed by Exemption 5. McQueen v. United States, 264 F. Supp. 2d 502, 517 (S.D. Tex. 2003). In Hickman v. Taylor, the Supreme Court held that a party could not obtain from the opposing party, without a showing of necessity, written statements obtained by the opposing party's attorney and the attorney's mental impressions formed in anticipation of litigation. Hickman v. Taylor, 329 U.S. 495, 509-13 (1947). The attorney work-product aspect of Exemption 5 protects documents prepared by a government attorney in reasonable anticipation of litigation. McQueen, 264 F. Supp. 2d at 517 ("So long as specific claims have been identified that make litigation probable, a suit need not be filed for the privilege to apply.") (citation omitted); see Sears, Roebuck & Co., 421 U.S. at 154; see also Delaney, Midgail & Young v. Internal Revenue Serv., 826 F.2d 124, 126 (D.C. Cir. 1987). It also protects material that is "largely or entirely factual." McQueen, 264 F. Supp. 2d at 517 (citation omitted).

In paragraph 27 of his declaration, Mr. Valvardi describes the pages that were withheld in full or in part pursuant to the attorney work-product privilege, and describes the privileged information they contain. For example, Mr. Valvardi explains that drafts of IDR, or information document requests, with edits by Chief Counsel – IRS are being withheld in full; as is legal advice provided by Chief Counsel – IRS regarding anticipated litigation. (Valvardi Decl. ¶27.)

As such, the Service is asserting Exemption 5 and the attorney work-product privilege as legal justification for withholding this information.

G. The Service Properly Withheld Pages in Full and in Part Pursuant to 5 U.S.C. §552(b)(6), Exemption 6.[3]

Agency records are protected from disclosure under Exemption 6, 5 U.S.C. §552(b)(6), if the records pass a two-part balancing test: 1) whether the information at issue is contained in a personnel, medical, or "similar" file covered by Exemption 6; and 2) if so, whether disclosure "would constitute a clearly unwarranted invasion of personal privacy" by balancing the individual's privacy interest compromised by disclosure, against any public interest in the requested information. Chamberlain, 589 F.2d at 841 (footnote omitted), see Multi Ag Media LLC v. USDA, 515 F.3d 1224, 1228 (D.C. Cir. 2008). The Supreme Court has held that the scope of the phrase "similar files" is broad. U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 600 (1982); its scope includes files "on an individual which can be identified as applying to that individual." Id. at 602; Dean v. FDIC, 389 F.Supp.2d 780, 792 (E.D.Ky.2005).

To determine whether disclosing information meets the unwarranted invasion of personal privacy criterion, courts balance the individual's privacy interest against the public's interest in the information. See U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 497 (1994). When courts consider these two competing interests, "the only relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would

[3] Exemption 6 of the FOIA and Exemption 7(C) of the FOIA are frequently claimed and determined together because they both protect against the invasion of personal privacy. See, e.g., Dean v. FDIC, 389 F. Supp. 2d 780, 792-793 (E.D. Ky. 2005). In applying the personal privacy exemptions under FOIA, the courts must balance the private and public interests involved. **Error! Main Document Only.**The standard for identifying the public interest to be weighed against the privacy interest is substantially similar under Exemption 7(C) and Exemption 6. U.S. Dep't of Def., 510 U.S. at 496 n. 6.

'shed light on an agency's performance of its statutory duties' or otherwise let citizens know what their government is up to." Jurewicz v. U.S. Dep't of Agriculture, 741 F.3d 1326, 1332 (D.C. Cir. 2014) (citations and quotation marks omitted).

A FOIA requester has the burden of demonstrating that a "substantial public interest" in disclosure outweighs the privacy interests involved. Becker v. Internal Revenue Serv., 34 F.3d 398, 404-05 (7th Cir. 1994); Carter v. Dep't of Commerce, 830 F.2d 388, 390 n. 8 (D.C. Cir. 1987); see also Salas v. Office of Inspector General, 577 F. Supp. 2d 105, 112 (D.D.C. 2008). Typically, courts consider the nature of the requested documents, and whether they shed light on the agency's performance of its statutory duties. The release of these pages will not shed light on the Service's performance of its official functions.

In paragraph 28 of his declaration, Mr. Valvardi describes the pages that were withheld in full or in part, and describes the information they contain. The disclosure of this information would cause an unwarranted invasion of personal privacy, particularly because the information contained in the files will associate individuals with a law enforcement action – Plaintiffs' ongoing examination – and could lead to harassment or embarrassment. For example, Mr. Valvardi explains that pages withheld in full contain search results provided by a subscription database service, including the names, addresses, social security numbers of third parties. (Valvardi Decl. ¶28.) Because there is no countervailing public interest in this information, and because disclosing the withheld pages would cause an unwarranted invasion of privacy pursuant to Exemption 6, the Service is properly withholding these pages in full or in part.

H. The Service Properly Withheld Pages in Full and in Part Pursuant to 5 U.S.C. §552(b)(7)(A), Exemption 7(A).

Exemption 7(A) authorizes the withholding of records or information compiled for law enforcement purposes to the extent that production of such records or information could

reasonably be expected to interfere with enforcement proceedings. 5 U.S.C. § 552(b)(7)(A). The threshold determination under Exemption 7 is whether the documents at issue are "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7)(A). Only "[o]nce the investigation has concluded and there is no reasonable possibility of future law enforcement proceedings related to the requested documents," do the documents lose Exemption 7(A) status. Church of Scientology, 816 F. Supp. at 1156-57.

The Service must demonstrate that "disclosure of [the] document would, in some particular, discernable way, disrupt, impede, or otherwise harm the enforcement proceeding." Church of Scientology, 816 F. Supp. at 1156; see also Keys v. Dep't of Justice, 830 F.2d 337, 340 (D.C. Cir. 1987). The Supreme Court has held that it is not necessary for an agency claiming this exemption to demonstrate on a line-by-line or a document-by-document basis how disclosure of certain documents would interfere with enforcement proceedings. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223-24 (1978). Instead, a court may make generic determinations that, with respect to certain kinds of enforcement proceedings, disclosure of certain types of investigatory records would generally interfere with enforcement proceedings. Id.; see also Spannaus v. U.S. Dep't of Justice, 813 F.2d 1285, 1288 (4th Cir. 1987).

Courts have consistently held that documents compiled in investigations or proceedings in the civil or criminal context are records or information compiled for law enforcement purposes. Williams v. Internal Revenue Serv., 479 F.2d 317 (3d Cir. 1973), cert. denied, sub nom., Donlon v. Internal Revenue Serv., 414 U.S. 1024 (1973) (audit files are compiled for law enforcement purposes). "A tax audit is certainly performed in aid of enforcement of our tax laws, civil and criminal, and there should be no distinction under [FOIA Exemption] (b)(7) between monitoring activities and prosecutorial activities, both of which serve law enforcement

purposes." B. & C. Tire Co. v. Internal Revenue Serv., 376 F. Supp. 708, 713 n.11 (N.D. Ala. 1974). Moreover, the Service is a law enforcement agency for purposes of Exemption 7. Church of Scientology v. Internal Revenue Serv., 995 F.2d 916, 919 (9th Cir. 1993); Lewis v. Internal Revenue Serv., 823 F.2d 375, 379 (9th Cir. 1987).

In NLRB v. Robbins Tire, the Supreme Court found that permitting a plaintiff earlier and greater access to documents or other information collected by the agency than it would normally be entitled, constitutes the type of interference Exemption 7(A) was enacted to prevent. 437 U.S. 214, 225-26. Finally, courts have found that this exemption protects against the disclosure of documents that would interfere with enforcement proceedings by revealing the identities of potential witnesses, the nature, scope, direction, and limits of the investigation, the transactions being investigated, information concerning third-party contacts, the evidence obtained to date, the reliance the agency places on the evidence, and the government's strategies and theories. See, e.g., Curran v. Dep't of Justice, 813 F.2d 473, 474 (1st Cir. 1987); Barney v. Internal Revenue Serv., 618 F.2d 1268, 1273 (8th Cir. 1980); Lewis, 823 F.2d at 379; Martenson v. Internal Revenue Serv., 1981 WL 1941, *3 (D. Minn. 1981).

Ms. Reach is an Internal Revenue Agent with the International Individual Compliance Office ("IIC"), Territory 2, in the Large Business and Internal Division of the Service. (Anh Reach Declaration, "Reach Decl." ¶1.) She conducts civil examinations of taxpayers after they are identified for audit. (Id.) As a part of her duties, she examines taxpayers who are required to file, and fail to file, information returns with respect to certain foreign corporations. (Id. at ¶2.) Ms. Reach was assigned to the case on September 19, 2013. (Id. at ¶5.) According to Ms. Reach, the case was temporarily suspended pending the resolution of a Taxpayer Assistance

Order from the Taxpayer Advocate Service. (Id. at ¶6.) However, the Service resumed its examination in this case on or about July 19, 2016 – the examination is ongoing. (Id.)

Ms. Reach describes the pages that were withheld in full or in part, and describes how and why disclosing them could interfere with her examination. (Reach Decl. ¶ 8.) Specifically, Ms. Reach explains that disclosing the identities of potential witnesses; the nature, scope, direction, and limits of the transactions being investigated; information concerning third-party contacts, the evidence obtained to date, the reliance the agency places on the evidence; and the government's strategies and theories, will compromise the Service's ongoing civil examination. (Id.) Because disclosing these pages will interfere with the Service's ongoing enforcement proceedings, pursuant to Exemption 7(A), the Service is properly withholding these pages in full or in part.

I. The Service Properly Withheld Pages in Full and in Part Pursuant to 5 U.S.C. §552(b)(7)(C), Exemption 7(C).

Exemption 7(C) is a specific provision of Exemption 7 that protects from disclosure records or information compiled for law enforcement purposes that, if released, could reasonably be expected to constitute an unwarranted invasion of the personal privacy of individual(s), who are not the Plaintiffs, who are named in the investigation files. See 5 U.S.C. § 552(b)(7)(C).

In applying the personal privacy exemptions under the FOIA, courts must balance the private and public interests involved. See Halloran v. Veterans Admin., 874 F.2d 315, 318 (5th Cir. 1989). The standard for identifying the public interest to be weighed against the privacy interest is similar under Exemption 7(C) and Exemption 6.[4] See id. Under the balancing test, a FOIA plaintiff is required to show that a substantial public interest in disclosure outweighs the

[4] See n. 3, supra.

privacy interests involved. Where the plaintiff has failed to demonstrate any superior public interest that would be served by disclosure, the competing interest of avoiding an unwarranted invasion of personal privacy takes precedence, and the information is exempt from disclosure.

An individual's interest in personal privacy is particularly strong when his or her name is mentioned in an agency's investigation files. See Fitzgibbon v. CIA, 911 F.2d 755, 767 (D.C. Cir. 1990) (quoting Branch v. FBI, 658 F.Supp. 204, 209 (D.D.C. 1987)) ("'the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.'"); National Archives and Records Admin. v. Favish, 541 U.S. 157, 165–66 (2004) ("Law enforcement documents obtained by Government investigators often contain information about persons interviewed as witnesses or initial suspects but whose link to the official inquiry may be the result of mere happenstance. There is special reason, therefore, to give protection to this intimate personal data, to which the public does not have a general right of access in the ordinary course.") (citation omitted).

In paragraph 29 of his declaration, Mr. Valvardi describes the pages that were withheld in full or in part pursuant to Exemption 7(C), and describes the information they contain. The disclosure of this information would cause an unwarranted invasion of personal privacy for the individuals named in the law enforcement files; these files identify the names, telephone numbers, partial or full Social Security numbers, taxpayer identification numbers, driver's license numbers, addresses, and other personal information belonging to third parties; the disclosure of this information could reasonably be expected to lead to the identification of third parties and an unwarranted invasion of their personal privacy. (Valvardi Decl. ¶29.) Because there is no countervailing public interest in this information, and because disclosing these pages

will cause an unwarranted invasion of privacy pursuant to Exemption 7(C), the Service is properly withholding these pages in full or in part.

J. The Service Properly Withheld Pages in Full and in Part Pursuant to 5 U.S.C. §552(b)(7)(E), Exemption 7(E), and FOIA Exemption 3 in Conjunction with 26 U.S.C. §6103(e)(7); and 5 U.S.C. §552(b)(3) in conjunction with 26 U.S.C. §6103(b)(2).

i. 5 U.S.C. §552(b)(7)(E), Exemption 7(E), and FOIA Exemption 3 in Conjunction with 26 U.S.C. §6103(e)(7)

The Service has broad authority to withhold records or information compiled for law enforcement purposes to the extent that disclosure would reveal techniques and procedures for law enforcement investigations or prosecutions. See 5 U.S.C. § 552(b)(7)(E); Church of Scientology, 816 F. Supp. at 1162. 26 U.S.C. §6103(e)(7) is a related statute that also provides for the withholding of return information if disclosure of the information would impair federal tax administration.

Charles B. Christopher is a Supervisory General Attorney currently serving as Branch Chief for Branch 7, Office of Chief Counsel. (Declaration of Charles B. Christopher, "Christopher Decl.," ¶1.) Mr. Christopher has held this position since 2008. (Id. at ¶1-2.) These duties require knowledge of the types of documents created and maintained by the various divisions and functions of the Service, and an understanding of the provisions of the FOIA which exempt certain types of documents from disclosure in response to a request. (Id. at ¶1.) Mr. Christopher personally reviewed the documents at issue in this case, and is familiar with the issues in this proceeding. (Id.at ¶2.)

Based on his personal knowledge and review of the documents, Mr. Christopher determined that the pages described in paragraphs 12 and 15 of his declaration contain

discriminant index function scores ("DIF" scores),[5] and other investigative techniques that should be withheld in part pursuant to Exemption 7(E) and FOIA Exemption 3 in Conjunction with 26 U.S.C. §6103(e)(7). (Christopher Decl. ¶12, 15.) Mr. Christopher explains how and why disclosing this information would allow Plaintiff insight into techniques and procedures for conducting investigations that are not generally known to the public. (Id. at ¶4-15.) The Service is properly withholding these pages in full or in part pursuant to Exemption 7(E) and Exemption 3 in conjunction with 26 U.S.C. §6103(e)(7).

ii. 5 U.S.C. §552(b)(3) in conjunction with 26 U.S.C. §6103(b)(2)

DIF scores are also exempt from disclosure under Exemption 3 in conjunction with 26 U.S.C. §6103(b)(2). See George v. IRS, No. C05-0955 MJJ, 2007 WL 1450309, *1 at *7 (N.D.Cal. May 14, 2007) (citing five cases upholding the Service's right to withhold DIF scores, audit guidelines, and tolerances); Naranjo v. I.R.S., No. CIV. 86-16, 1988 WL 126570, at *3 (E.D. Ky. Jan. 26, 1988) ("…DIF scores are also protected from disclosure under subsection (b)(7)(E) of the FOIA.").

26 U.S.C. §6103(b)(2) is a related statute that provides for the withholding of "standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws." 26 U.S.C. §6103(b)(2) prevents disclosure of DIF scores under the FOIA.

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[5] Returns that have a higher probability of significant tax change have higher DIF scores. The Service tends to examine higher-scored returns first in order to ensure the most efficient use of resources. (Christopher Decl. ¶4.)

In paragraphs 4-12 of his declaration,[6] Mr. Christopher notes the pages that contain DIF scores, and explains how and why disclosure of these standards will seriously impair assessment, collection, or enforcement under the internal revenue laws. As such, the Service has demonstrated that these pages were properly withheld in part pursuant to Exemption 3 in conjunction with 26 U.S.C. §6103(b)(2).

CONCLUSION

The Service released in full to Plaintiffs 3,845 pages, and it released in part 358 pages; (Valvardi Decl. ¶12.) 116 pages are being withheld in full. (Id.) No genuine issue of material fact exists with respect to Plaintiffs' FOIA claim because the Service: 1) conducted a reasonable search for documents responsive to the FOIA request at issue; and 2) released all responsive pages, or responsive portions of those pages, that are not exempt from disclosure. Judgment, therefore, should be entered in favor of the Service.

[6] These pages are also identified in paragraph 30 of Mr. Valvardi's declaration.

DATE: August 16, 2016

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