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Effectively Using FOIA in Your Tax Practice

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Disclaimer

These slides are designed as shorthand aids to an oral presentation. Neither the presentation nor the slides are legal advice.

About Dan Price



Dan is the managing member of the Law Offices of Daniel N. Price, PLLC. Dan's legal practice focuses on federal tax and Title 31 matters including civil and criminal defense of IRS audits and investigations. Dan assists taxpayers in navigating the process of coming into compliance, especially taxpayers with international reporting obligations who have for one reason or another failed to comply fully with U.S. law. Dan also fights for taxpayers in various federal courts handling a variety of tax issues from technical international issues to collection matters. He leverages his extensive experience as an attorney and manager for the Office of Chief Counsel of the IRS to provide advice and defend taxpayer rights.

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Learning Objectives

- What is the Freedom of Information Act (FOIA)?
- When to use FOIA
- How to make a FOIA
- How to appeal IRS decisions on FOIA requests

What is the Freedom of Information Act (FOIA)?

The United States Supreme Court has explained that “[t]he basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). This is not mere hyperbole by the nation’s highest court. Rather, FOIA “defines a structural necessity in a real democracy.” NARA v. Favish, 541 U.S. 157, 172 (2004).

Congress struck a balance between citizens' right to records and the need of the federal government.

- The Freedom of Information Act (FOIA) gives any person the right to access federal agency records or information. 5 U.S.C. § 552
- Congress wrote FOIA favoring disclosure with specific exemptions
 - See 5 U.S.C. § 552(b) for exemptions
 - We will discuss common exemptions later
- FOIA mandates certain records be routinely made available (e.g. through the IRS electronic reading room)
<https://www.irs.gov/privacy-disclosure/foia-library>

Information Available without using FOIA

- Account transcripts
- Copies of tax returns- use Form 4605 and pay the fee
- Copy of IRS examination file under “Direct Release” per I.R.M. 4.2.5.6
 - Must state no FOIA was made
- Copy of IRS examination file under the Taxpayer First Act
 - Taxpayer First Act requires the IRS to provide access to all nonprivileged portions of the exam file at least 10 days before an Appeals conference to individual taxpayers with gross income of \$400,000 or less or organizations with gross receipts of \$5 million or less

When to use FOIA

- Penalty abatement/refund cases to establish whether the IRS met § 6751(b)(1) for supervisory approval and other prerequisites
- To gain an understanding of what transpired before you became the representative
- No IRS employee is assigned the case
- Obstinate, difficult, or perhaps unorthodox IRS employees
- IRS policy information or stats not publicly available
- IRS training material not publicly available

Typical Information Sought through FOIA Requests

- Campus files- for some campus activities such as penalty assessments that are not fully computerized various records including case notes, penalty worksheets, grade of employee, etc. For some correspondence audits records similar to examination files.
- Examination files- case activity records, emails, research, list of third party contacts, penalty approval documents, coordination with Office of Fraud Enforcement, Chief Counsel, or subject matter experts, etc.
- Collection files- ICS case history, emails, coordination, notices of federal tax lien, levy notices, previously submitted installment agreements, list of third party contacts, previously submitted collection information statements Forms 433, etc.
- Appeals files- Appeals Officer's case memorandum, notes, emails, coordination, etc.

How to Make a FOIA Request

- Make the request in writing
- State the request is made under the FOIA
- Identify the records
- State you want copies of the records
- Include a Form 2848 to show you are authorized to make the request on behalf of the taxpayer
- Agree to pay fees associated with the request
- Ask for your preferred means of production: electronic production, paper, fax, etc.
- Identify your category as a requestor, which for your clients is generally “other”
- Sign the request
- See 26 CFR § 601.702(c)(4) for guidance on the form of the request

Practice tip: (i) When stating you will pay fees for the FOIA, include a limit with a request to contact you if the fees exceed the limit; (ii) include FOIA on your Form 2848 as a “belts and suspenders” provision to document your authority to make the request.

How to Identify and Describe the Records Sought

- It is the FOIA requestor's burden to reasonably describe the documents being sought. 5 U.S.C. § 552(a)(3)(A).
- Identify the taxpayer by name and TIN
- Provide context
 - Is it a penalty abatement case? Attach a copy of the penalty notice for context
 - Is it a collection case? Provide a copy of the Notice of Federal Tax Lien for context
- Consider providing narrative context for the request
- Use broad requests with specific examples
- See 26 CFR § 601.702(c)(5) for a discussion of a reasonable description of records

Practice tip: If you include a document to assist the IRS' search, add language that the document does not limit the scope of the requests.

Special Considerations Regarding Email

- August 7, 2023 Memo to all Disclosure employees on email records
- “Requests for email records should contain sufficient information to allow a reasonable search to be conducted. This could include details such as the sender/recipient names, a reasonable timeframe and a subject matter or reasonable/functional keywords”

Special Considerations Regarding Email (cont'd)

- Draft in a way to not overly restrict searches for email
- Include name, initials, “name control,” case number, docket number, etc. to cover all permutations linked to the individual

Practice tip: Include search terms and anticipate spelling deviations, abbreviations, and typos. For example, consider using the * wildcard and include possible spelling deviations.

Example: If your client is named John F. Sanderson with SSN of 123-45-6789 include Sander* as a possible search term which would cover alternate spellings such as Sandersen. Also, include SAND (the name control), JEF (initials), and 6789 (last 4 of SSN).

How to Submit a FOIA Request

- Address letter to:
Internal Revenue Service
Central Processing Unit
Stop 93A
Post Office Box 621506
Atlanta, GA 30362-3006
- If you have an online account, use the FOIA Portal to upload the request
- Choose requestor category “other” for most requests

Practice tip: Consolidate your letter making the FOIA request, any exhibits, and your Form 2848 into one PDF to upload to the FOIA portal.

- Fax to 877-891-6035 (see <https://www.irs.gov/privacy-disclosure/freedom-of-information-act-foia-guidelines>)

Practice tip: If you make your request on the portal, then the IRS may provide documents to you electronically through the portal. If you fax your request, you will likely get a response on a CD-ROM by mail.

General Timelines

- The IRS is required to determine within 20 days (excluding Saturdays, Sunday and legal public holidays) of receipt whether to process your FOIA request. See 26 CFR § 601.702(c)(9)(ii).
- The IRS must provide the reasons why the request is denied in whole or in part and include info about the right to administratively appeal the denial
- See 26 CFR § 601.702(c)(11)(i)(A)(1)-(4): Allows IRS to take 10 more days to collect records from field locations, review large numbers of records, and consult with other agencies

How does the IRS View the FOIA Process?

The IRS views FOIA as a five-step process:

1. Receipt of request- I.R.M. 11.3.13.2.1
2. Analysis of request- determining validity, identifying expedited processing or fee waiver requests, and other special features- I.R.M. 11.3.13.3
3. Search - searching IRS systems or offices for responsive records- I.R.M. 11.3.13.4
4. Review - reviewing records located in the search and applying exemptions or exclusions- I.R.M. 11.3.13.5
5. Response and closing - drafting responses to the requester and closing the case- I.R.M. 11.3.13.6

Perhaps the Most Important Step in IRS Process

- During the search phase, the Disclosure Specialist will draft a “search memo” and send the search memo to the IRS business units that likely have records.
- If the Disclosure Specialist does not understand the requests, then the search memo will reflect that.
- Write in a manner that will allow the Disclosure Specialist to understand what you are seeking so that she can write a search memo that yields results.

How do IRS Employees View FOIA Requests?

- Time consuming
- Burden to provide records to Disclosure
- March 16, 2023 memo to IRS employees explains obligations of IRS employees under FOIA

Real Timelines and Obstacles You Will Encounter

- Some “no records” responses may be processed in under a week
- Simple FOIA requests for campus records may take 30-60 days
- Requests for Exam and Collection files will take much longer especially where the Exam and Collection employees desire to slow-walk the process
- Disclosure personnel more often than not mail encrypted data and then slow-walk providing the password to the encrypted data
- Disclosure personnel more often than not provide encrypted CD-ROMs and provide incorrect passwords
- Expect letters from Disclosure to be backdated compared to the actual mailing dates (use the date of letters for any FOIA appeal)

What To Do When a FOIA Request Goes Into a Black Hole

- Call FOIA Liaison at 312-292-3297
- Leave a detailed message
- Rinse and repeat several times
- The FOIA Liaison will not call you back but you may be contacted by the Disclosure employee assigned the matter as a result of your repeated messages

Fees

1. Copying costs
2. Search fees
3. Review fees (for commercial requestors only)
 - There are provisions for fee waivers
 - Small requests (release of 100 copies or less pages and less than two hours of search) are without fees (except for commercial requestors)

Practice tip: To date, I have never been charged any fees for FOIA productions by the IRS, USCIS, or the Department of Justice (for Immigration Court records). Many of the IRS productions have exceeded 100 pages and one DOJ production exceeded 1500 pages.

Redactions, Withholding, and FOIA Exemptions

- Redaction- IRS will redact and indicate FOIA exemption for redaction on the page
 - Typical example: employee email addresses with exemption (b)(6) cited
- Withholding- IRS may withhold records in full
 - Typical example: Records of another taxpayer in the file for your client
- Common FOIA exemptions found at 5 U.S.C. 552(b) include: (1) classified/national security info, (2) internal personnel rules, (3) protected by other laws, (4) trade secrets and confidential commercial or financial info, (5) attorney- client, work product and deliberative process privileges, (6) personal privacy (i.e., third parties), (7) law enforcement (if criminal investigation is pending)

Games IRS May Play Using FOIA Exemptions

- Refusing to provide information about personnel involved in penalty approval process including withholding names and position information on the basis of (b)(6) personal privacy
- Classifying documents as “drafts” to avoid production under the deliberative process privilege
- Classifying documents as (b)(7) law enforcement even through prior versions of documents in other cases were not so classified or simply misclassifying documents as subject to (b)(7) hoping the requestor will not appeal or fight
- Classifying non-legal input from Chief Counsel attorneys as legal advice

Practice tip: Don’t take the IRS citation of a FOIA exemption at face value. If you suspect gamesmanship by the IRS, consider a “FOIA on a FOIA,” a subsequent FOIA request for all records relating to the IRS’ search for responsive records to your original FOIA.

Dealing with Redacted and Withheld Documents

- You can attempt to engage with the Disclosure employee to discuss the matter
- You can attempt to discuss with a manager in Disclosure
- Appeal the production

Appealing a FOIA Production or Determination

- 26 CFR § 601.702(c)(10) governs FOIA administrative appeals
- Time to appeal: 90 days from date of IRS letter
- Mail appeal mail to:
 - IRS Independent Office of Appeals
 - Attn: FOIA Appeals, M/S 55205
 - 3211 S. Northpointe Drive
 - Fresno, CA 93725

Practice tip: Send the FOIA appeal by certified mail

Appealing a FOIA Production or Determination (cont'd)

- Common bases to appeal
 - Inadequate search
 - Misapplication of exemptions
- In the appeal letter provide
 - Your original FOIA request
 - The IRS' response to your FOIA request
 - Any back and forth you had with Disclosure about the FOIA request
 - Explain the basis of the appeal
 - Make specific requests for Appeals to consider such as a complete and proper search for records or determine a FOIA exemption does not apply
 - Sign the letter

Appealing a FOIA Production or Determination (cont'd)

- **Practice Tips about the FOIA response stuffer**

- The FOIA response will include a stuffer with information on how to appeal. Note that the regulations still use the old name for Appeals rather than the Independent Office of Appeals.
- That stuffer will also provide information about mediation through the Office of Government Information Services (OGIS) within the National Archives and Records Administration. I requested mediation in one case where the IRS completely and clearly misapplied a FOIA exemption and where the Independent Office of Appeals rubber stamped the decision of Disclosure without affording a conference on the matter. From that test case, I found OGIS personnel thoroughly ignorant of the nuances of FOIA exemptions, willfully blind to clear case law on point, and generally dismally bureaucratic. In other words, choose OGIS mediation if you enjoy dealing with Orwellian bureaucracies and don't expect positive results from the "mediation."

What Is an Adequate Search?

- The FOIA defines the term "search" as "to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request. 5 U.S.C. § 552(a)(3)(D)
- The adequacy of an agency's search is judged by a test of "reasonableness," which varies from case to case including the scope of the request and records specifically mentioned in the request.
- Courts do not require a perfect search
- Some courts have found that when a requester has suggested search terms that are demonstrably reasonable and could aid in the search, the burden shifts back to the agency to explain its failure to use such terms to conduct its search

Appeal Every FOIA Production

- Why?
- Best practice because IRS is sloppy and IRS business units that provide documents to Disclosure have little incentive to fully comply
- Exhaust administrative remedies in order to possibly claim attorney fees if the matter proceeds to litigation

Is your appeal serious or just to exhaust the administrative process?

- If to exhaust the administrative process, make the appeal bare bones and briefly assert all possible bases for appeal. This is more likely to lead to the “rubber stamp” treatment
- If serious, really dig into the law, cite government publications supporting your position, and in bold text ask for a conference with Appeals to explain your position
 - If the search was inadequate, try to provide documentary evidence showing the search was inadequate. This may be impossible in many cases but in some cases it is possible. Example of email with Appeals Officer by prior rep not produced

Appeal Timelines

- IRS is required to make decision on appeal within 20 business days after the date of receipt of the appeal.
- IRS may extend deadline by an additional 10 days under unusual circumstances. See 26 CFR § 601-702(c)(11)(i).
- If you raise a serious issue in your FOIA appeal, expect a request for more time

FOIA Litigation

- FOIA litigation is becoming common during high stakes audits and in high dollar cases
- FOIA litigation is a byproduct of the IRS' lack of transparency during examinations, lack of customer service, and headline grabbing accounts of IRS lies and misconduct
- If IRS doesn't meet the FOIA timeline or administrative appeal is denied, requestor may file suit in U.S. District Court
- Completing administrative appeal is crucial to have "exhausted administrative remedies"
- Most FOIA litigation focuses on redacted and withheld documents, the exemptions asserted by IRS, and the adequacy of the IRS' search
- Burden is on the IRS to justify withholding of records and information
- IRS typically supports its position with affidavits but process inserts higher graded personnel into the mix and can lead to more documents being produced
- IRS and DOJ have been known to slow-walk FOIA cases

Attorney Fees in FOIA Litigation

- Step 1: Eligible for award?
 - Did the requester “substantially prevail” in the FOIA litigation?
 - Did the agency position change in a “not insubstantial” way as a result of the litigation?
- Step 2: Entitled to an award?
 - Factors: (1) the public benefit derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding had a reasonable basis in law
- Courts have broad discretion in determining entitlement

FOIA Resources

- Regulations at 26 CFR § 601.702
- I.R.M. 11.3.13 Freedom of Information Act
- March 16, 2023 Memo on obligations of IRS employees under FOIA
- August 7, 2023 Memo on email records
- Department of Justice FOIA Guide <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>

Practice Tip: Consider quoting from or even providing a copy of the relevant DOJ FOIA guide chapter with your FOIA Appeal

Sample

- Sample FOIA Complaint in IRS penalty matter- Exhibit C