

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN B. LONG,)
488 Newhouse II,)
Syracuse University,)
Syracuse, NY 13244-2100,)
)
and)
)
DAVID BURNHAM,)
1718 Connecticut Avenue, N.W., Suite 200,)
Washington, DC 20009,) No. 05-0756
)
Plaintiffs,)
v.)
)
INTERNAL REVENUE SERVICE,)
1111 Constitution Avenue, N.W.,)
Washington, DC 20224,)
)
Defendant.)
_____)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. Plaintiffs Susan B. Long and David Burnham bring this action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to compel the Internal Revenue Service (IRS) to disclose Part 2 of the Internal Revenue Manual and certain other IRS records that describe information systems used by the IRS to compile statistical information about IRS activities and that explain numerical measures used as diagnostic tools to analyze operations and assess agency performance. The resulting statistical measures are used as the basis for public pronouncements by agency officials and to justify staffing and budget requests in agency submissions to the Office of Management and Budget and to Congress. According to the Internal Revenue Manual (at Part 1, Chapter 5, Section 1, providing details on its “New Approach to Measuring

Organizational Performance”), this statistical measurement process lies at the core of IRS operations and “has been developed as part of the effort to modernize the IRS and to reflect the Service’s priorities, as articulated in the IRS’s mission and strategic goals.” Although the requested materials do not properly fall within any exemption from disclosure under FOIA, the IRS has claimed authority to withhold them simply by designating them as for “internal use” or “official use only,” in flat defiance of the statute’s command that materials not falling within specifically defined exemptions must be made available upon request. In addition, the IRS has claimed authority to withhold Part 2 of the Internal Revenue Manual on the basis of “security reasons” because of the Manual’s alleged “importance to homeland security,” although it is not classified and falls far outside the scope of statutorily protected “critical infrastructure information.”

2. The plaintiffs also bring this action under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, to obtain declaratory and injunctive relief against the IRS’s policy of denying the release of “internal use” or “official use” documents without regard to whether they are properly subject to an exemption from release under FOIA. The IRS has gone so far as to assert that when it withholds release of records pursuant to this policy, it is not “denying” release under FOIA. Notwithstanding this assertion, the agency’s policy of not releasing “internal use” and “official use” documents irrespective of whether they are exempt under FOIA violates FOIA and therefore is contrary to law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) & (C).

Jurisdiction

3. This Court has jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

Parties

4. Plaintiff Susan B. Long is an Associate Professor of Management Information and Decision Sciences at the Martin J. Whitman School of Management at Syracuse University. Professor Long is also Co-Director of the Transactional Records Access Clearinghouse (TRAC), a data gathering, data research and data distribution organization associated with Syracuse University. TRAC was established in 1989 and has offices both at Syracuse University and in Washington, D.C. The purpose of TRAC is to provide the American people — and institutions of oversight such as Congress, news organizations, public interest groups, businesses, scholars, and lawyers — with comprehensive information about federal staffing, spending, and the enforcement activities of the federal government.

5. Plaintiff David Burnham is Co-Director of TRAC, a long-time journalist, and an Associate Research Professor in the S.I. Newhouse School of Public Communications at Syracuse University.

6. Defendant, the Internal Revenue Service, is an agency of the United States. The IRS has possession and control of the records at issue in this action.

The Requests

7. To make information about the federal government's enforcement and regulatory efforts more accessible to the public, Professors Long and Burnham and TRAC make systematic and informed use of FOIA to obtain access to government data compilations. In particular, Professors Long and Burnham and TRAC have for many years provided the public with detailed statistical information and reports concerning the IRS's performance of its tax collection, examination and auditing, enforcement, and litigation functions. They make such information available through TRAC's website, <http://trac.syr.edu> and <http://tracfed.syr.edu>. To make the

information it provides more timely, complete, and accurate, TRAC is engaged in ongoing efforts to obtain statistical information from the IRS's own databases. Although such information is subject to FOIA (and despite a consent decree in prior FOIA litigation in the United States District Court for the Western District of Washington requiring the IRS to make statistical information about its activities available to Professor Long on a regular, ongoing basis), Professors Long and Burnham and TRAC have recently met resistance from the IRS to their FOIA requests for data on IRS activities. Among other things, the IRS has asserted that data of the type they have requested would have to be specially compiled because the information does not otherwise exist, and that existing IRS databases and reports are not responsive to their requests. Accordingly, Professors Long and Burnham and TRAC have found it necessary to make FOIA requests aimed at ascertaining the nature of the IRS's information systems, including its databases and the programs that it uses to generate reports and tabulate statistics based on those databases.

8. On November 8, 2004, plaintiffs Long and Burnham, and TRAC, submitted a FOIA request to the IRS for a copy of Part 2 of the Internal Revenue Manual (IRM). Part 2 of the IRM concerns IRS "Information Technology." Although Part 2 of the IRM was formerly available on the IRS website at <http://www.irs.gov/irm>, it was removed from the website at some time before the plaintiffs submitted their request. The IRS designated the request for Part 2 of the IRM as Request No. 2005-00421.

9. Also on November 8, 2004, plaintiffs Long and Burnham, and TRAC, submitted a FOIA request to the IRS for copies of all completed IRS Forms 12240. IRS Form 12240 is entitled "Information Systems Description Form." IRS offices complete Form 12240 to describe

the nature, purpose, contents, output, and retention of their electronic information systems and files. The IRS designated the request for completed Forms 12240 as Request No. 2005-0423.

10. On November 9, 2004, plaintiffs Long and Burnham, and TRAC, submitted a FOIA request to the IRS for a copy of IRS Document 7544, the “Examination Reference Guide to Tables 36 and 37 Examination Program Monitoring.” Tables 36 and 37 are reports based on data from the IRS’s Audit Information Management System (AIMS) database. These reports provide IRS managers with extensive statistical information on the conduct of IRS audits, such as how many audits were conducted, how much auditor time was spent, and how many tax dollars the audits found were owed. The IRS designated the request for IRS Document 7544 as Request No. 2005-00436.

The Denial of Request No. 2005-00436

11. On December 23, 2004, Symeria R. Rascoe, a tax law specialist in the IRS’s Office of Disclosure – FOIA, sent plaintiff Long a “response” to the November 9, 2004, request for IRS Document 7544 (Request No. 2005-00436). Aside from an introductory sentence referencing the request, the response consisted of a single sentence: “Document 7544 is an ‘Internal Use’ document and cannot be released to the public.” The response did not identify any responsible official of the IRS who had authorized denial of the request, did not cite any statutory FOIA exemption that permitted denial of the request, and did not inform the requesters of their appeal rights. IRS regulations specifically require that any “initial determination” to deny a FOIA request provide such information. *See* 26 C.F.R. § 601.702(c)(9). Ms. Rascoe’s letter of December 23, 2004, not only omitted the required information, but did not even expressly state that the request was being denied.

12. On January 5, 2005, counsel for the plaintiffs wrote to Ms. Rascoe pointing out that her letter did not constitute a proper initial determination under IRS regulations because of its omission of the required information. The letter from plaintiffs' counsel also pointed out that FOIA required release of any records not subject to a specific statutory exemption, regardless of the agency's purported designation of the records as for "internal use." Counsel requested that the agency immediately provide the plaintiffs and TRAC with an "initial determination" comporting with its own regulations and that it release the requested record in the absence of an applicable FOIA exemption.

13. On January 25, 2005, Maureen Sapero, a manager in the IRS's Office of Disclosure – FOIA, wrote letters to plaintiff Long and to plaintiffs' counsel providing a further response to the request for IRS Document 7544. The letter to Professor Long stated:

Document 7544 is an "Internal Use" document and cannot be released to the public. We are not denying release of the document; it is an agency policy not to release "Internal Use" documents to the public.

We usually don't have to cite FOIA exemptions for not releasing a document/form that has been categorized as "Internal Use," but in this case, we are citing FOIA exemption 5 USC 552(b)(2) of the Freedom of Information Act.

Notice 393 is enclosed which explains the exemption and your appeal rights.

14. Although the agency's January 25, 2005, letters stated nonsensically that it was "not denying release of the document," plaintiffs Long and Burnham, and TRAC, treated the letters as a denial of their FOIA request and submitted a timely appeal to the IRS's FOIA Appeals operation in Fresno, California, on February 28, 2005. The appeal contended that the IRS's position that it did not need to cite a FOIA exemption to withhold an "Internal Use" document — and that such withholding did not even amount to denying the FOIA request — was directly contrary to FOIA's requirement that all agency records not subject to exemption under

the statute be disclosed upon proper request. The appeal further pointed out that the record requested is not exempt from disclosure under FOIA Exemption 2 — applicable to records “related solely to the internal personnel rules and practices of the agency” — because it is not trivial and lacking in genuine public interest and because its disclosure would not facilitate circumvention of agency regulation or enforcement.

15. As of the date of filing of this complaint, the appeal with respect to the request for IRS Document 7544 has been pending for more than 20 working days with no response.

The Denials of Requests No. 2005-00421 and 2005-00423

16. Meanwhile, on February 4, 2005, Ms. Rascoe of the IRS’s Office of Disclosure – FOIA sent plaintiff Long separate letters responding to the requests for Part 2 of the IRM (Request No. 2005-00421) and for completed IRS Forms 12240 (Request No. 2005-00423).

17. With respect to the request for Part 2 of the IRM, the Ms. Rascoe’s letter stated:

Part II of the (IRM), Information Technology in its entirety, is intended for internal use only and has been designated as “Official Use Only.” Because of new federal security requirements, Part II of the (IRM), is no longer available to the public.

Enclosed is a copy of Delegation Order 89, which gives the authority to designate agency documents or materials as “Official Use Only.”

Enclosed with the letter was a copy of IRS Delegation Order 89, signed by Deputy Commissioner of Internal Revenue Bob Wenzel on July 29, 2002, which delegates to certain IRS personnel the authority “[t]o administratively control information necessarily restricted for official purposes only through approving the marking of the legend OFFICIAL USE ONLY on documents or materials, which require restriction to a lesser degree than those marked LIMITED OFFICIAL USE, but which may be made available only to authorized personnel.”

18. With respect to the request for completed IRS Forms 12240, Ms. Rascoe’s letter stated:

Form 12240 is classified as an “internal use” form and cannot be released to the public. We are not denying the release of the Form; however, it is an agency policy not to release “Internal Use” Forms/Documents to the public.

Enclosed is a copy of Delegation Order 89, which gives the authority to designate agency documents as “Official Use Only.”

The letter attached a copy of Delegation Order 89 but did not state that IRS Form 12240 had actually been designated “Official Use Only” under the terms of that Order.

The Appeals Regarding Requests No. 2005-00421 and 2005-00423

19. On March 8, 2005, plaintiffs Long and Burnham, and TRAC, submitted timely appeals of the IRS’s responses to Requests No. 2005-00421 and 2005-00423 to the IRS’s FOIA Appeals office in Fresno.

20. With respect to the request for Part 2 of the IRM (Request No. 2005-00421), the appeal contended that neither the IRS’s reliance on its own designation of the document as for “Official Use Only” nor its invocation of unspecified “new federal security requirements” was a permissible basis for withholding the document under FOIA in the absence of a statutory exemption from disclosure. The appeal further argued that the IRS’s reliance on “Delegation Order 89” was misplaced because, although the Deputy Commissioner of the IRS may have the power to delegate authority to place markings on documents for internal administrative purposes, such administrative markings cannot override statutory rights of access created by FOIA. Because the Deputy Commissioner himself has no power to withhold documents that are not exempt under FOIA, he cannot purport to delegate such authority to subordinates.

21. With respect to the request for completed IRS Forms 12240 (Request No. 2005-00423), plaintiffs’ appeal similarly argued that an agency’s designation of a document as for “internal use” was not a legitimate basis for withholding it under FOIA and that “Delegation Order 89” could not justify the agency’s action because the Deputy Commissioner has no

delegable authority to withhold records that are not exempt from release under FOIA. The appeal also took issue with the agency's "Through the Looking-Glass" assertion that it was not "denying" release of the requested record, but was just not releasing it.

22. By letters dated March 24, 2005, from Marge Field, Appeals Team Manager for the IRS Appeals Office, the agency denied the appeals with respect to Requests No. 2005-00421 and 2005-00423.

23. With respect to the request for Part 2 of the IRM (Request No. 2005-00421), Ms. Field's letter denying plaintiffs' appeal stated that, "[u]pon review," she had "determined" that:

The IRS has deemed that Part II of the Internal Revenue Manual is for "Official Use Only" because of security reasons. Therefore, it is exempt under 5USC§552(b)(2) which exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency".

In the light of recent terrorism events and heightened security awareness, and in recognition of the concomitant need to protect the nation's critical infrastructure (both its element and records about them) the information requested is afforded protection under Exemption 2 as fundamental importance to homeland security. [S]ee USA PATRIOT [*sic*] Act of 2001 42 U.S.C.A. §5195c.

24. With respect to the request for completed IRS Forms 12240 (Request No. 2005-00423), Ms. Field's letter denying plaintiffs' appeal stated that, "[u]pon review," she had "determined" that:

The IRS has deemed that Form 1120 [*sic*] as [*sic*] for "Official Use Only". Therefore, it is exempt under 5USC§552(b)(2) which exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency".

First Claim for Relief – FOIA – Wrongful Withholding of Records

25. Plaintiffs incorporate the allegations of paragraphs 1 through 24 above.

26. The materials at issue in this action — Part 2 of the IRM, the completed IRS Forms 12240, and IRS Document 7544 — are agency records of the IRS within the meaning of

5 U.S.C. § 552. The plaintiffs have requested release of these records under FOIA, the agency has denied release, and the plaintiffs have exhausted their administrative remedies by filing timely appeals that either have been denied or (in the case of IRS Document 7544) have not been ruled upon within the 20 working days allowed by the statute.

27. The requested documents are not exempt from release under FOIA Exemption 2, 5 U.S.C. § 552(b)(2) because they are not trivial internal records lacking a genuine public interest, nor do they pose a risk of circumvention of agency enforcement or regulation. The agency's mere designation of the documents as for "Official Use Only" or "internal use" does not render them exempt from disclosure under FOIA.

28. On information and belief, Part 2 of the IRM has not been classified pursuant to Executive Order 13292, nor does it qualify as "Critical Infrastructure Information" under 6 U.S.C. § 133. The supposed "security reasons" relied upon by the IRS therefore do not render it exempt from disclosure under the exemptions normally invoked for national security information (Exemptions 1 and 3, 5 U.S.C. §§ 552(b)(1) & (3)), nor do they bring it within the protection of Exemption 2.

29. The plaintiffs have a statutory right under FOIA to release of Part 2 of the IRM, the completed IRS Forms 12240, and IRS Document 7544, and there is no legal justification for the IRS's failure to release those records promptly.

30. The circumstances surrounding the IRS's failure to release these records raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding of the records within the meaning of 5 U.S.C. § 552(a)(4)(F).

Second Claim for Relief – Administrative Procedure Act – Agency Policy Contrary to Law

31. Plaintiffs incorporate the allegations of paragraphs 1 through 30 above.

32. The IRS's responses to plaintiffs' FOIA requests refer to and apply an agency policy of designating records as for "internal use" or "official use only," and of not releasing such records to the public without regard to whether they are subject to an applicable FOIA exemption. The agency has stated that in withholding documents according to this "policy" it is not "denying" release of records under FOIA, even though it is in fact refusing to release them.

33. FOIA expressly requires that agency records be made available to the public upon request unless the records fall within one of the statute's specific exemptions.

34. The agency's policy with respect to "official use" and "internal use" documents has injured the plaintiffs by preventing them from obtaining access to information to which they have a statutory right of access under FOIA, and its ongoing application will continue to injure them in the future by impeding or denying access to additional information that they have requested or will request under FOIA.

35. The agency's policy of refusing release of "official use" and "internal use" documents without regard to whether they are properly exempt under FOIA is contrary to the express command of FOIA and thus constitutes agency action that is arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of statutory authority and limitations, and short of statutory right within the meaning of the APA (5 U.S.C. § 706(2)(A)&(C)). Plaintiffs have a right to judicial review of, and declaratory and injunctive relief against, such action under 5 U.S.C. §§ 702, 704, and 706, and 28 U.S.C. § 2201.

Relief Requested

Wherefore, the plaintiffs pray for the following relief:

- i. A declaratory judgment that the IRS's withholding of the records at issue is unlawful and that the circumstances surrounding its failure to release the records

raise questions whether the particular agency personnel responsible acted arbitrarily or capriciously with respect to the withholding of the records within the meaning of 5 U.S.C. § 552(a)(4)(F);

- ii. An injunction requiring the IRS to make the requested records available to the plaintiffs forthwith;
- iii. A declaratory judgment that the IRS's policy of withholding "internal use" and "official use" documents irrespective of whether they are exempt from release under FOIA is contrary to law;
- iv. An injunction forbidding the IRS from continuing to implement its policy of withholding "internal use" and "official use" documents that are not exempt under FOIA;
- v. An award of costs and reasonable attorney fees as authorized by FOIA, 5 U.S.C. § 552(a)(4)(E) and/or the Equal Access to Justice Act, 28 U.S.C. § 2412;
- vi. Such other and further relief as the Court may deem proper.

Respectfully submitted,

/S/

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