

1  
2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

7 SUSAN B. LONG, et al., )  
8 )  
9 Plaintiffs, ) No. C 74-724S  
10 v. ) **MOTION OF PLAINTIFF**  
11 UNITED STATES INTERNAL REVENUE ) **SUSAN B. LONG TO ENFORCE**  
SERVICE, ) **CONSENT ORDER AGAINST**  
12 Defendant. ) **DEFENDANT UNITED STATES**  
13 ) **INTERNAL REVENUE**  
14 ) **SERVICE**  
15 ) NOTE ON MOTION CALENDAR:  
16 ) January 27, 2006

---

17  
18  
19  
20  
21  
22  
23  
**I. INTRODUCTION**

Plaintiff Susan B. Long respectfully moves this Court for an order enforcing the Consent Order issued in this Freedom of Information Act (FOIA) case on July 23, 1976. The Order (Exhibit 1 hereto)<sup>1</sup> requires the Internal Revenue Service to provide Ms. Long with statistical data it compiles concerning its activities. Because the IRS recently has refused to make data covered by the Order available to her, Ms. Long invokes this Court's continuing jurisdiction to compel compliance with the Order. *See Hook v. State of Arizona Dept. of Corrections*, 972 F.2d 1012, 1014 (9th Cir. 1992). Specifically, Ms. Long seeks an order requiring the IRS to provide her with copies of computer reports entitled "AIMS

<sup>1</sup> All cited Exhibits are attached to the concurrently filed Declaration of Susan B. Long ("Long Decl.").

1 Table 37,” which provide statistical data within the scope of the Consent Order.

2 Paragraph 3 of the Consent Order requires the IRS to continue providing data  
3 similar to that contained in specified reports, “regardless of the format or particular  
4 categorization ....” For many years, the IRS provided the required data to Ms. Long.  
5 Since 2004, however, the IRS has refused to comply with Ms. Long’s proper requests for  
6 data, even though it acknowledges the existence both of the Consent Order and of  
7 statistical analyses similar to the reports referenced in the Order. Ms. Long now returns to  
8 this Court for enforcement of the Order that long ago established her entitlement to the  
9 information she seeks. Ms. Long further seeks an award of her reasonable attorneys’ fees  
10 and expenses incurred in obtaining enforcement of the Court’s decree.

## 11 II. FACTUAL BACKGROUND

12 Plaintiff Susan B. Long is an Associate Professor of Management Information and  
13 Decision Sciences at the Martin J. Whitman School of Management at Syracuse  
14 University. She is also Co-Director of the Transactional Records Access Clearinghouse  
15 (TRAC), a data gathering, research, and distribution organization associated with Syracuse  
16 University. Established in 1989, TRAC seeks to provide the general public – and members  
17 of Congress, journalists, public interest groups, businesses, scholars, and lawyers – with  
18 comprehensive information about the federal government’s staffing, spending, and  
19 enforcement activities. Ms. Long and TRAC have for many years provided the public with  
20 statistical information and reports concerning the IRS’s performance of tax collection,  
21 examination and auditing, enforcement, and litigation functions. To make this information  
22 more timely, complete, and accurate, TRAC attempts to obtain statistical information from  
23 the IRS’s own databases to the extent possible. *See* Long Decl. ¶ 2.

1 Ms. Long's professional interest in data concerning IRS activities precedes the  
2 establishment of TRAC. She and her husband (now deceased) became keenly interested in  
3 the subject in the 1970s, when she was pursuing her Ph.D. at the University of Washington  
4 and sought access to IRS data in connection with the preparation of her dissertation. The  
5 IRS's refusal to provide the requested data led to the filing, in 1974, of this lawsuit, in  
6 which the plaintiffs claimed that the IRS's refusal to provide the requested data violated  
7 FOIA. The claims were resolved through the entry of the Consent Order signed by then-  
8 Chief District Judge Walter T. McGovern on July 23, 1976. Long Decl. ¶¶ 1, 3 & Exh. 1.

9 The Consent Order "ordered, adjudged, declared, and decreed" that several  
10 specifically identified statistical tables "are not exempt from disclosure under the Freedom  
11 of Information Act," and it required the IRS to retain those records and make them  
12 available to the plaintiffs. *Id.* Exh. 1, ¶¶ 1-2. The Order also imposes a continuing  
13 obligation to produce statistical information to the plaintiffs in response to future requests:  
14 it provides that the IRS "will, upon proper request by plaintiffs, make all statistical data  
15 regardless of the format or particular categorization which are hereafter compiled and are  
16 similar to that contained in [the specified reports] promptly available to the plaintiffs" for  
17 inspection and copying. *Id.* ¶¶ 3-4. Although the Order states that the IRS is not "required  
18 to compile in future years the statistical data which presently appear in the aforementioned  
19 reports," it requires the IRS to make such data available as long as it continues to compile  
20 the data. *Id.* ¶ 3. The IRS has admitted, in another FOIA action pending in the U.S.  
21 District Court for the District of Columbia, that the Consent Order in this case requires the  
22 IRS "to make certain information available to plaintiff Long on an ongoing basis." *See*  
23 Long Decl. ¶ 13 & Exh. 13 (Complaint) at ¶ 7, Exh. 14 (Answer) at ¶ 7.

1           After this Court entered the Consent Order, Ms. Long continued to make regular  
2 requests for IRS statistical information, including both information subject to the Order  
3 and other data that was obtained only after further litigation (*see Long v. IRS*, 932 F.2d  
4 1309 (9th Cir. 1991)). With the foundation of TRAC in 1989, such statistical information  
5 became critical to TRAC’s efforts to monitor and disseminate information on IRS  
6 activities, including audit rates, enforcement activities, and criminal prosecutions.<sup>2</sup>  
7 Throughout the 1990s and down to the present, Ms. Long has regularly requested IRS  
8 audit, examination, and enforcement statistics, which are the basis for much of the  
9 information TRAC publishes. *See* Long Decl. ¶ 4.

10           In mid-2004, however, the IRS informed Ms. Long that it would not give her its  
11 monthly statistical reports under FOIA, allegedly because of the burden of compiling such  
12 statistics for her. Ms. Long responded that she did not seek to have data specially  
13 compiled for her, but requested only existing reports already prepared and used by agency  
14 managers. She also advised the IRS that this Court’s 1976 Consent Order required that  
15 such reports be furnished to her. The IRS’s initial response was to deny any knowledge of  
16 this Court’s Order. *Id.* ¶ 5 & Exhs. 2, 3.

17           On July 2, 2004, Ms. Long wrote a letter to the IRS’s Freedom of Information  
18 Office attaching a copy of the Consent Order and emphasizing the language of paragraphs  
19 3 and 4, which impose an ongoing requirement on the IRS to provide statistical  
20 information it compiles “regardless of the format or particular categorization” if that  
21 information is “similar” to that contained in the reports referenced in the Order. *See id.* ¶ 6  
22 & Exh. 4. Invoking FOIA and the Consent Order, Ms. Long requested (Exh. 4):  
23

---

<sup>2</sup> For an overview of the information TRAC publishes about the IRS, see <http://trac.syr.edu/tracirs/index.html>.

1 copies of IRS records containing statistical data covering any audits carried out  
2 by the IRS during the period starting with the first quarter of fiscal year 2004  
3 beginning on October 1, 2003 through the third quarter ending June 30, 2004.  
4 For this time period, we are requesting IRS examination figures for individual  
5 and corporate tax returns broken down by IRS *organizational unit and area*  
6 *office*, and within them by *examination classes*, providing: number of audits,  
7 number of auditor hours, additional taxes recommended, additional taxes  
8 assessed, number of no change audits, number of no change auditor hours.

9 On September 23, 2004, the IRS sent Ms. Long a “partial response” to the July 2  
10 letter. Long Decl. ¶ 7 & Exh. 5. Although Ms. Long’s letter had specifically requested  
11 only copies of existing records, the IRS asserted that her requests for data sought the  
12 creation of “special statistical studies and compilations” that could only be provided under  
13 26 U.S.C. § 6108(b). Section 6108(b), unlike FOIA, provides that the IRS may charge a  
14 requester a fee for creating such a special study or compilation. The IRS informed Ms.  
15 Long that it would provide a compilation for the first half of fiscal year 2004 without a fee,  
16 but that future compilations would require payment of fees estimated at \$12,000. *Id.*<sup>3</sup>

17 On October 15, 2004, Ms. Long replied to the IRS’s letter. *See id.* ¶ 8 & Exh. 6.  
18 She pointed out that the IRS letter was not responsive to her FOIA request, which sought  
19 only extant IRS records and not creation of a special compilation, and that

20 there is ample evidence of existing agency records containing statistical data  
21 we have requested, for example, on such matters as the number of audits  
22 conducted, or the number of audit hours expended. The agency’s own  
23 Internal Revenue Manual is replete with references to weekly, monthly and  
quarterly statistical reports on the conduct and results of examination  
activity, and to the need of managers to monitor these on a regular basis.

Ms. Long again invoked her rights under the Consent Order, and concluded: “The facts

---

<sup>3</sup> The IRS response also stated that “[i]n light of the IRS’s determination that this request is governed by I.R.C. 6108(b) and not by FOIA, we are not providing you notice of the administrative appeal rights established by the FOIA.” Accordingly, under both FOIA and the IRS’s implementing regulations, 26 C.F.R. § 601.702(c)(9)(iv), the response was not a “denial” of Ms. Long’s FOIA request, and thus did not trigger the requirement that she file an administrative appeal to exhaust administrative remedies.

1 amply demonstrate that the agency has not met its legal burden and its failure to do so puts  
2 the agency in open violation of both explicit FOIA legal requirements, as well as the  
3 standing court injunction that covers the requested statistical data.”

4           Meanwhile, Ms. Long had learned of a specific IRS report that provided much of  
5 the information sought by the July 2, 2004, request. The report, known as “Table 37,” is  
6 generated at regular intervals from the IRS’s Audit Information Management System  
7 database, or “AIMS.” AIMS Table 37 provides data on examination of tax returns, broken  
8 out by type of return (individual, corporate, fiduciary, estate, etc.), and reports numbers of  
9 hours spent examining such returns, additional taxes recommended, and additional taxes  
10 agreed to by the taxpayer, among other information. The information included on Table 37  
11 is very similar to that provided on one of the reports that was specifically referenced in this  
12 Court’s 1976 Consent Order (Report NO-CP:A-232). Like AIMS Table 37, that report  
13 provided examination data, broken out by type of return, including number of hours spent  
14 examining returns, as well as additional taxes recommended by the examiner. Both Table  
15 37 and Report NO-CP:A-232 also report dollars of additional taxes per return and per man  
16 hour spent on examination, as well as the percentage of returns examined in which no  
17 change was recommended. *See* Long Decl. ¶ 9 & Exhs. 7, 8.

18           Based on her discovery that AIMS Table 37 was an existing agency record that  
19 contained much of the information she wanted and that was directly comparable to one of  
20 the reports specified in this Court’s Consent Order, Ms. Long on November 8, 2004,  
21 requested copies of the AIMS Table 37 monthly and quarterly reports for fiscal years 2002  
22 through 2004. *Id.* ¶ 10 & Exh. 9. Again, the request invoked not only FOIA, but also “the  
23 standing court injunction [Ms. Long] has prohibiting withholding of this information....”

1 Ms. Long has updated this request monthly, seeking new AIMS Table 37 monthly and  
2 quarterly reports as they are generated by the agency. *Id.* ¶ 10 & Exh. 10.

3 Despite the time limits FOIA imposes for responses to requests for agency records,  
4 the IRS has, since November 2004, neither produced AIMS Table 37 to Ms. Long nor  
5 denied her FOIA requests. On December 10, 2004, however, the agency responded to Ms.  
6 Long's October 15, 2004, letter (in which she had emphasized that she was seeking only  
7 existing agency records in the form of reports periodically generated for use by IRS  
8 managers). The IRS's December 10 letter identified a number of such reports, including  
9 AIMS Table 37, which it described as "a cumulative AIMS report providing examination  
10 data on the National level." The letter provided sample pages from Table 37, and  
11 acknowledged that Table 37 "has many of the fields you are seeking," though "not all of  
12 the fields." The letter also described a number of other reports that contain some of the  
13 information sought by Ms. Long, and it ended by offering to provide her with a specially  
14 formatted report based on information from Table 37. *See* Long Decl. ¶ 11 & Exh. 11.

15 Interpreting the December 10 letter as an offer to provide Table 37 if she preferred  
16 it to the specially formatted report mentioned at the end of the letter, Ms. Long responded  
17 on December 15, 2004, that she would like to receive Table 37 and two other reports  
18 described in the IRS letter, and she inquired when the IRS would be prepared to make  
19 them available. *Id.* ¶ 12 & Exh. 12. She also requested more information to evaluate the  
20 IRS's offer to prepare a specially formatted report based on Table 37. The IRS never  
21 responded to this letter. Despite Ms. Long's regular requests, the IRS's acknowledgment  
22 that Table 37 exists and contains data that she has requested, and the IRS's admission that  
23 it remains subject to this Court's Consent Order, the IRS continues to withhold the AIMS

1 Table 37 reports, and has never even issued a proper response to her requests for the  
2 reports. *Id.* ¶ 12.

3 In late November 2005, Ms. Long received a series of letters from an IRS FOIA  
4 officer purporting to “extend” the time to respond to some of her pending FOIA requests,  
5 including some of the Table 37 requests, until March 31, 2006. *Id.* ¶ 14 & Exh. 15. The  
6 letters asserted that although Ms. Long could decline to consent to an extension and bring  
7 suit, she could not bring suit until March 31, 2006. The letters invoked 5 U.S.C.  
8 § 552(a)(6)(B), but that section permits an agency unilaterally to extend its response time  
9 by no more than 10 days, and only if it does so before its initial response time expires. The  
10 IRS letter, by contrast, sought to extend by many months the time to respond to requests  
11 for which responses were long overdue. On December 8, 2005, Ms. Long notified the IRS  
12 that the extension letters were without legal effect, that she did not consent to any  
13 extensions beyond those authorized by statute, and that the purported prohibition on  
14 bringing suit until March 31, 2006, even if she did not consent to the extension, was not  
15 authorized by FOIA. *Id.* ¶ 14 & Exh. 16.

### 16 III. ARGUMENT:

#### 17 **Ms. Long Is Entitled to an Order Enforcing the Consent Order and Requiring the** 18 **IRS to Provide Copies of AIMS Table 37.**

19 A federal district court undoubtedly has authority to compel obedience to its  
20 injunctive orders: “There can be no question that courts have inherent power to enforce  
21 compliance with their lawful orders ....” *Shillitani v. United States*, 384 U.S. 364, 370  
22 (1966). This principle applies fully to consent orders. As the Supreme Court has  
23 explained, “A consent decree ... is an agreement that the parties desire and expect will be

1 reflected in, and be enforceable as, a judicial decree that is subject to the rules generally  
2 applicable to other judgments and decrees.” *Rufo v. Inmates of Suffolk County Jail*, 502  
3 U.S. 367, 378 (1992). The Supreme Court and the Ninth Circuit have repeatedly enforced  
4 consent orders in the same way as other equitable decrees. *See, e.g., Frew v. Hawkins*, 540  
5 U.S. 431 (2004); *Spallone v. United States*, 493 U.S. 265, 276 (1990); *United States v.*  
6 *Yacoubian*, 24 F.3d 1, 5 (9th Cir. 1994); *Hook*, 972 F.2d at 1014; *City of Las Vegas v.*  
7 *Clark County*, 755 F.2d 697, 701 (9th Cir. 1985). “A district court retains jurisdiction to  
8 enforce its judgments, including consent decrees.” *Hook*, 972 F.2d at 1014.

9         The age of the Consent Order does not diminish its enforceability. In *Hook*, the  
10 Ninth Circuit held that Arizona prisoners could enforce a consent decree issued 18 years  
11 earlier in a case that had since been administratively closed. *See id.* at 1013. The state  
12 claimed it was no longer bound by the decree even though it had never moved to modify it,  
13 but the Ninth Circuit held that “the Department is bound by the consent decree until the  
14 district court issues an order otherwise under Rule 60(b).” *Id.* at 1017. *Hook*’s recognition  
15 that consent decrees are enforceable until modified or terminated is consistent with other  
16 federal case law. *See Floyd v. Ortiz*, 300 F.3d 1223, 1226-27 (10th Cir. 2002) (district  
17 court had jurisdiction to enforce 20-year-old consent decree); *Florida Ass’n for Retarded*  
18 *Citizens v. Bush*, 246 F.3d 1296, 1298-99 (11th Cir. 2001) (district court had jurisdiction to  
19 enforce 19-year-old consent decree even though case was “administratively closed”); *In re*  
20 *Pearson*, 990 F.2d 653, 657 (1st Cir. 1993) (district court had jurisdiction to enforce 19-  
21 year-old consent decree). As the Eleventh Circuit said in *Bush*, “the age of [a] case ...  
22 does not provide a basis for declining to enforce an existing order of the court. Although  
23 not all injunctions operate in perpetuity, a district court should enforce an injunction until

1 either the injunction expires by its terms or the court determines that the injunction should  
2 be modified or dissolved.” 246 F.3d at 1298.

3 Here, the Court’s Order imposes an ongoing requirement, acknowledged by the  
4 agency, that the IRS make available to Ms. Long, upon proper request, statistical data  
5 similar to that contained in certain specified reports. That the particular reports listed in  
6 the Order are no longer produced does not affect Ms. Long’s entitlement to the data,  
7 because paragraph 3 of the Order requires the IRS to produce “statistical data regardless of  
8 the format or particular categorization which are hereafter compiled and are similar to that  
9 contained in” the specified reports. The only limitation on the IRS’s obligation to provide  
10 similar data is that it is not required to provide data that it no longer compiles.

11 There is no doubt that the IRS continues to compile the data: the IRS has confirmed  
12 that it regularly produces the AIMS Table 37 reports. Nor is there any question but that  
13 the data in Table 37 is “similar” to that contained in one of the reports listed in the Consent  
14 Order, Report NO-CP:A-232. As a comparison of Report NO-CP:A-232 (Exh. 8) with the  
15 sample pages of Table 37 supplied to Ms. Long by the IRS (Exh. 7) makes clear, both  
16 reports provide statistics on IRS examination of tax returns, specifying types of returns  
17 examined, hours spent on examination, additional dollars of taxes recommended, dollars of  
18 additional taxes per return examined and hour of examination, and percentage of returns  
19 for which no additional taxes were recommended, among other items. The formats of the  
20 reports differ slightly, and the data conveyed is not identical, but they are “similar” under  
21 any reasonable interpretation of the word. And Ms. Long has made a “proper request” for  
22 the records: she specifically identified the records she seeks and explicitly invoked this  
23 Court’s Consent Order as one of the bases for her entitlement to them. The Consent Order

1 therefore requires that the IRS permit Ms. Long to inspect and copy these records.

2         Despite Ms. Long’s repeated requests, and the IRS’s admission that this Court’s  
3 Order remains in effect, the IRS has refused without explanation to comply. Such defiance  
4 calls for an exercise of this Court’s inherent authority to enforce its decrees. Indeed, Ms.  
5 Long would be justified in seeking civil contempt sanctions to enforce the Order. *See, e.g.,*  
6 *Bush*, 246 F.3d at 1298. Ms. Long’s goal, however, is only to obtain the data to which she  
7 is entitled. An order enforcing the Order, similar to that entered by Judge Rothstein of this  
8 Court in *Washington Toxics Coalition v. Office of the United States Trade Representative*,  
9 No. C00-730R, 2003 WL 23742560 (W.D. Wash. Jan. 15, 2003), should achieve that end  
10 without the need for contempt sanctions.

11         Ms. Long regrets troubling this Court to enforce its Order, but she must do so to  
12 vindicate her rights under the Order. As the issuing Court, this Court is the one to compel  
13 compliance with the Order. *See, e.g., Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th  
14 Cir. 1985). Ms. Long’s only alternative is to file a new FOIA action in another court and  
15 relitigate her entitlement to the records. “Not only would that require the parties and the  
16 courts to waste judicial resources re-litigating issues which have been dealt with, it would  
17 also deny the plaintiffs the benefit of the bargain which was reached in the original consent  
18 decree and which the defendants obliged themselves to provide.” *Bush*, 246 F.3d at 1299.

19         Finally, Ms. Long requests that the Court award her reasonable attorney fees and  
20 expenses (in an amount to be established). FOIA provides that “[t]he court may assess  
21 against the United States reasonable attorney fees and other litigation costs reasonably  
22 incurred in any case under this section in which the complainant has substantially  
23 prevailed.” 5 U.S.C. § 552(a)(4)(E). This FOIA action is a “case under this section,” and

1 Ms. Long will be a prevailing party once the Court orders the IRS to comply with the  
2 Consent Order (just as she was originally awarded fees as a prevailing party by virtue of  
3 obtaining the Consent Order). *See Buckhannon Bd. & Care Home, Inc. v. West Virginia*  
4 *Dept. of Health & Human Resources*, 532 U.S. 598, 603-04 (2001) (prevailing party is one  
5 who “has been awarded some relief by a court” or obtained “a court-ordered ‘chang[e][in]  
6 the legal relationship between [the plaintiff] and the defendant’”).

### 7 CONCLUSION

8 This Court nearly thirty years ago ordered the IRS to provide Ms. Long with  
9 records containing statistical data upon proper request. Ms. Long has complied with the  
10 Order by making a proper request for records that fall within the terms of the Order. The  
11 IRS has without explanation refused to comply. This Court should enforce the Consent  
12 Order by ordering the IRS to provide the requested records to Ms. Long forthwith.

13 DATED this 5th day of January, 2006.

14 Davis Wright Tremaine LLP  
15 Attorneys for Plaintiff Susan B. Long

16 By /s/Eric M. Stahl

17 Michele Earl-Hubbard, WSBA # 26454  
18 Eric M. Stahl, WSBA #27619  
19 1501 Fourth Avenue # 2600  
Seattle, WA 98101-1688  
Phone: 206-622-3150/Fax: 206-628-7699  
E-mail: [micheleearlhubbard@dwt.com](mailto:micheleearlhubbard@dwt.com)  
[ericstahl@dwt.com](mailto:ericstahl@dwt.com)

20 Of Counsel:

21 Scott L. Nelson  
22 Public Citizen Litigation Group  
23 District of Columbia Bar # 413548  
1600 20th Street, N.W.  
Washington, D.C. 20009-1001  
Phone: 202-588-7724/Fax: 202-588-7795  
E-mail: [snelson@citizen.org](mailto:snelson@citizen.org)

MOTION TO ENFORCE CONSENT ORDER  
(C 74-724S) — 12

SEA 1738650v3 9950100-189

Davis Wright Tremaine LLP  
LAW OFFICES  
2600 Century Square · 1501 Fourth Avenue  
Seattle, Washington 98101-1688  
(206) 622-3150 · Fax: (206) 628-7699