

1 motion. Plaintiff shall file and serve a motion for attorney fees and costs no later than 30 days
2 from the date of this order.

3 The reasons for the Court's ruling are set forth below.

4 **Background**

5 In 1974, Ms. Long and her now-deceased husband Philip Long filed this action under the
6 Freedom of Information Act (FOIA) to obtain statistical information from the Internal Revenue
7 Service (IRS). On July 23, 1976, the Court entered a Consent Order in this matter. Paragraph 3
8 of the Consent Order provided that the IRS:

9 [W]ill, upon proper request by plaintiffs, make all statistical data regardless of the format
10 or particular categorization which are hereafter compiled and are similar to that contained
11 in Document 5301, Document 5302, Quarterly Statistical Reports, Report NO-CP:A-68,
12 or in any of Reports NO-CP:A-231 through -260 promptly available to the plaintiffs for
their inspection However, it is neither the intent nor purpose of this order that the
defendant be required to compile in future years the statistical data which presently
appear in the aforementioned reports.

13 The Consent Order further provided in Paragraph 4 that the IRS:

14 [S]hall, upon proper request by plaintiffs, promptly furnish copies of the records referred
15 to in . . . paragraph 3, to the extent such records are compiled in the future

16 The Consent Order has not been modified or vacated since its entry in 1976, nor does the order
17 contain any provisions limiting its duration.

18 On January 5, 2006, Ms. Long filed this motion to enforce the Consent Order. Based on
19 the parties' representations, it appears that the IRS no longer compiles a number of the reports
20 specifically named in the 1976 Consent Order. However, Ms. Long maintains that the IRS now
21 regularly produces a report – known as Audit Information Management System (AIMS) Table
22 37 – that contains statistical data similar to the data that had been contained in Report NO-CP:A-
23 232, a report referenced in the 1976 Consent Order. Since 2004, Ms. Long has repeatedly
24 requested that the IRS provide her with copies of AIMS Table 37 reports from fiscal year 2002
25 forward. See, e.g., Dkt. 9, Ex. 9 (November 8, 2004 letter from Ms. Long). The IRS has not
26 provided this information to Ms. Long.

1 **Analysis**

2 1. Enforceability of Consent Order

3 “A district court retains jurisdiction to enforce its judgments, including consent decrees.”
4 Hook v. State of Arizona Dept. of Corrections, 972 F.2d 1012, 1014 (9th Cir. 1992). Consent
5 decrees are “essentially contractual agreements” and contract principles are generally applicable
6 in construing and enforcing such agreements. Id. Unless its terms provide otherwise, a consent
7 order generally remains in force unless it is modified or vacated through a motion under Fed. R.
8 Civ. P. 60(b). Id. at 1016. Consistent with these rules, it is undisputed that the 1976 Consent
9 Order remains in effect and that this Court retains jurisdiction to enforce the order.

10 2. Similarity Between Statistical Data Contained in Report NO-CP:A-232 and Data
11 in AIMS Table 37

12 Paragraph 3 of the Consent Order requires the IRS to “make all statistical data . . . which
13 are hereafter compiled and are similar to that contained” in Report NO-CP:A-232 promptly
14 available to Ms. Long upon proper request. There is no serious question that AIMS Table 37
15 contains statistical data that are similar to the data contained in Report NO-CP:A-232. Plaintiff
16 maintains and Defendant does not dispute that both reports provide statistical data on IRS
17 examination of tax returns, specifying types of returns examined, hours spent on examination,
18 additional dollars of taxes recommended, dollars of additional taxes per return examined and
19 hour of examination, and percentage of returns for which no additional taxes were recommended.

20 The IRS does not directly dispute that statistical data in AIMS Table 37 are “similar” to
21 the data that had been contained in Report NO-CP:A-232. However, the IRS notes that Table
22 37 contains some data that had not been not included in Report NO-CP:A-232 and argues that
23 “[r]equiring the IRS to provide more data than it was required to provide under the consent
24 order subjects it to a burden not contemplated at the time of its entry.” (Dkt. No. 17 at 9).

25 The IRS’s argument is not persuasive. By its terms, the Consent Order requires the IRS
26 to provide Ms. Long with data “similar” to the data contained in Report NO-CP:A-232, to the

1 extent that the IRS continues to compile such data. As a result, the fact that AIMS Table 37
2 contains some data that had not been included in Report NO-CP:A-232 does not put Table 37
3 outside the scope of Consent Order; the data contained in the two reports need not be identical in
4 all respects in order to be “similar.” In addition, Ms. Long maintains that of the numbers in Table
5 37 that are not also contained in Report NO-CP:A-232, most if not all either can be derived
6 arithmetically from the data in Report NO-CP:A-232 or can be found in other reports included in
7 the Consent Order.

8 Therefore, the Court finds that the statistical data in AIMS Table 37 is sufficiently similar
9 to the data contained in Report NO-CP:A-232 to come within the scope of the Consent Order.

10 3. Applicability of 26 U.S.C. § 6103

11 The IRS argues that it is precluded by 26 U.S.C. § 6103 from making AIMS Table 37
12 available to Ms. Long. This statute, which was amended shortly after the Consent Order was
13 entered, generally prohibits disclosure of a taxpayer’s “return information.” In relevant part, the
14 statute defines “return information” as:

15 [A] taxpayer’s identity, the nature, source, or amount of his income, payments, receipts,
16 deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld,
17 deficiencies, overassessments, or tax payments, whether the taxpayer’s return was, is
18 being, or will be examined or subject to other investigation or processing, or any other
19 data, received by, recorded by, prepared by, furnished to, or collected by the Secretary
[of the Treasury] 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. . . .

20 26 U.S.C. § 6103(b)(2)(A). However, “return information” under the statute “does not include
21 data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a
22 particular taxpayer.” 26 U.S.C. § 6103(b)(2).

23 The IRS contends that AIMS Table 37 contains “return information” as defined by the §
24 6103. The IRS does not argue that Table 37 contains information that directly identifies any
25 taxpayer. Instead, the IRS asserts that Table 37 sometimes may include “cells of one” – that is,
26 cells indicating that only one unnamed taxpayer within a particular data field had been audited.

1 The IRS argues:

2 [S]tatistical tables that contain “cells of one” taxpayer [data] may not be disclosed
3 without running afoul of section 6103. . . . Table 37 contains certain fields where
4 (because of the combination of the industry described and the income level – such as
5 Fortune 500 companies) it would be possible for “persons in the relevant community” to
6 use information in the table, in conjunction with publicly available information, such as
7 press releases, public SEC or judicial filings and other information on the Internet, to
8 identify a specific taxpayer.

9 (Dkt. No. 17 at 10-11). In response, Plaintiff disputes that Table 37 categorizes taxpayers by
10 particular industry or by whether they are Fortune 500 companies, arguing that “[t]he report’s
11 categories are broad enough that even if a cell in Table 37 contained information about only one
12 audit, a reader would not be able to identify the taxpayer unless he already knew that the
13 taxpayer had been audited in the relevant time period.” (Dkt. No. 19 at 6).

14 On the record before it, the Court finds that § 6103 does not relieve the IRS of its
15 obligation under the Consent Order to provide AIMS Table 37 to Ms. Long upon proper
16 request. First, as Plaintiff notes, consent orders are enforceable despite changes in law, unless
17 they have been properly modified or vacated under Fed. R. Civ. P. 60(b). See, e.g., Hook v.
18 State of Arizona Dept. of Corrections, 972 F.2d 1012, 1017 (9th Cir. 1992) (“Even if the law
19 underlying the consent decree no longer appears to support the decree, a party cannot disobey
20 the decree without bringing a Rule 60(b) motion to modify or vacate the decree”). Here, the IRS
21 has not sought to modify or vacate the consent decree pursuant to Rule 60(b).

22 Second, the IRS’s position that production of AIMS Table 37 could indirectly reveal
23 taxpayers’ “return information” is speculative at best. Aside from conclusory assertions, the IRS
24 provides no evidence to support its contention that a “cell of one” in Table 37 could provide
25 sufficient information to identify the particular taxpayer whose data is included in the cell. The
26 IRS’s position is further undermined by evidence that the IRS has previously provided Ms. Long
with data compilations that included “cell of one” entries. Indeed, Ms. Long asserts that “[s]ince
the Consent Order was entered, on many occasions extending up through March 2004 – the last
release before the IRS started refusing to provide audit statistics to me – the IRS has furnished

1 me thousands of pages of statistical tables containing results from audits that contained cell sizes
2 of only '1.'" (Dkt. No. 20 ¶ 9).

3 Finally, even assuming for the sake of argument that "cell of one" entries in AIMS Table
4 37 may indirectly reveal a taxpayer's "return information," the IRS could redact such entries.
5 Although the IRS asserts that "the burden on the agency to conduct a line-by-line review of
6 Table 37 on a monthly basis would be inordinate," (Dkt. No. 17 at 11), such a bare contention is
7 insufficient to demonstrate that redaction is not feasible.

8 4. Production of Annual Data Book

9 The IRS also suggests that it is currently in compliance with the Consent Order because
10 Ms. Long "has been provided with the Annual Data Book, which provides most of the data
11 plaintiff received in the year end Quarterly Statistical Reports, and much more." (Dkt. No. 17 at
12 9). However, Plaintiff notes that the 1976 Consent Order identified many specific reports other
13 than the Quarterly Statistical Reports. As a result, production of the Annual Data Book does not
14 relieve the IRS of its obligation to produce, upon proper request, existing compilations that
15 contain statistical data that are similar to the data contained in the other reports identified in the
16 Consent Order.

17 5. Frequency of Requests

18 The IRS also contends that Plaintiff is not entitled under the Consent Order to request
19 data on a monthly basis, asserting that "[t]here is nothing in the order . . . which supports this."
20 (Dkt. No. 17 at 9-10). However, the Consent Order does not contain any provisions that restrict
21 the frequency of Ms. Long's requests. By its terms, the order provides that "all statistical data"
22 similar to that in the reports thereafter compiled by the IRS will be made available to Ms. Long
23 "upon proper request," without limiting the number or frequency of such requests. As a result,
24 Ms. Long is not precluded under the terms of the order from requesting information on a
25 monthly basis.

1 6. Attorney Fees and Other Litigation Costs

2 Plaintiff requests an award of her reasonable attorney fees and costs in bringing this
3 motion, in an amount to be established later. As Plaintiff notes, FOIA provides that “[t]he court
4 may assess against the United States reasonable attorney fees and other litigation costs
5 reasonably incurred in any case under this section in which the complainant has substantially
6 prevailed.” 5 U.S.C. § 552(a)(4)(E). The IRS offers no substantive response to Plaintiff’s
7 request for fees and costs.

8 An award of attorney fees and costs to the prevailing party in a FOIA action is not
9 mandatory. Instead, “[t]he legislative history of the FOIA makes it clear that Congress did not
10 intend an award of attorney’s fees to be automatic; rather the trial court ‘must weigh the facts of
11 each case against the criteria of the existing body of law on the award of attorney fees and then
12 exercise its discretion in determining whether an award is appropriate.’” Church of Scientology
13 of California v. U.S. Postal Serv., 700 F.2d 486, 492 (9th Cir. 1983). Therefore, “[i]n order to
14 receive an award of fees, a prevailing party in a FOIA action must demonstrate both *eligibility*
15 for and *entitlement* to such a recovery.” Long v. IRS, 932 F.2d 1309, 1313 (9th Cir. 1991)
16 (emphasis in original).

17 To satisfy the eligibility prong, “the plaintiff must present ‘convincing evidence’ that two
18 threshold conditions have been met: he must prove that (1) his filing of the FOIA action was
19 necessary to obtain the information sought and (2) the action had a ‘*substantial causative effect*’
20 on the ultimate receipt of that information.” Id. (emphasis in original). Here, Ms. Long has
21 presented convincing evidence that it was necessary to file this motion to obtain the information
22 sought, given the IRS’s previous refusals to provide such information after repeated requests by
23 Ms. Long. In addition, this motion obviously has had a “substantial causative effect” on the
24 receipt of the information sought.

25 If a plaintiff satisfies the eligibility criteria, a district court may, in the exercise of its
26 discretion, determine that the plaintiff is entitled to an award of fees. Id. In exercising this

1 discretion, the Court must consider four criteria:

2 (1) the public benefit from disclosure, (2) any commercial benefit to the plaintiff resulting
3 from the disclosure, (3) the nature of the plaintiff's interest in the disclosed records, and
4 (4) whether the government's withholding of the records had a reasonable basis in law.

5 Id. These four criteria "are not exhaustive" and "the court may take into consideration 'whatever
6 factors it deems relevant in determining whether an award of attorney's fees is appropriate.'" Id.
7 (internal citations omitted).

8 Neither side has explicitly addressed these factors in its briefing. However, the record
9 before the Court contains sufficient information to evaluate the relevant criteria.

10 Plaintiff is the co-director of the Transactional Records Access Clearinghouse (TRAC), a
11 research organization associated with Syracuse University. According to Plaintiff, TRAC
12 provides the public with information and reports regarding the IRS's performance. Plaintiff
13 asserts that the statistical information she seeks is "critical to TRAC's efforts to monitor and
14 disseminate information on IRS activities, including audit rates, enforcement activities, and
15 criminal prosecutions." (Dkt. No. 8 at 4).

16 Because Ms. Long seeks to disseminate this information sought in this proceeding to the
17 public, there would be a public benefit from disclosure of the records sought by Ms. Long. It
18 also appears that Ms. Long herself stands to gain little if any commercial benefit from the
19 disclosure of the records sought. See, e.g., Long v. U.S. Dept. of Justice, 10 F. Supp. 205, 207
20 (N.D.N.Y 1998) (noting that TRAC is a non-profit organization). Ms. Long's interest in this
21 matter stretches back 30 years and has both public interest and scholarly components. Finally,
22 for the reasons discussed previously, the Court finds that the government's withholding of the
23 records sought by Ms. Long had little basis in law.

24 Therefore, the Court is satisfied that Ms. Long is entitled to an award of her reasonable
25 attorney fees and costs in bringing this motion to enforce the 1976 Consent Order. Plaintiff is
26 directed to file a motion and supporting materials that document her reasonable attorney fees and
costs within 30 days of the date of this order.

Conclusion

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2 Although the Consent Order in this matter was entered 30 years ago, there is no dispute
3 that the order remains in effect and that the Court retains jurisdiction to enforce the decree. By
4 its terms, the 1976 Consent Order requires the IRS, upon proper request, to provide Ms. Long
5 with existing statistical data that are “similar” to the data contained in Report NO-CP:A-232.
6 Because the data contained in AIMS Table 37 are similar to the data contained in Report NO-
7 CP:A-232, the IRS is obliged to produce Table 37 to Ms. Long on proper request. Therefore,
8 Plaintiff’s motion to enforce the consent order is GRANTED.

9 Within 14 days of the date of this order, Defendant is ORDERED to supply Ms. Long
10 with copies of any monthly, quarterly, and year-end AIMS Table 37 reports for fiscal years 2002,
11 2003, 2004, and 2005, as well as any monthly and quarterly reports for fiscal year 2006 that have
12 been compiled as of the date of this order. Furthermore, Defendant shall, on an ongoing basis
13 and upon proper request by Ms. Long, promptly make available to her for inspection and copying
14 copies of the AIMS Table 37 reports, as long as the agency continues to compile such reports.
15 The Court further finds that Ms. Long is entitled to an award of her reasonable costs and
16 attorney fees incurred in obtaining this order. Plaintiff is directed to file a motion for attorney
17 fees and costs no later than 30 days from the date of this order.

18 The clerk is directed to send copies of this order to all counsel of record.

19 Dated: April 3, 2006.

20
21 s/Marsha J. Pechman
22 Marsha J. Pechman
23 United States District Judge
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