

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SUSAN B. LONG, et al.,)	
)	
Plaintiffs,)	No. C 74-724S
)	
v.)	MOTION OF PLAINTIFF
)	SUSAN B. LONG TO ENFORCE
UNITED STATES INTERNAL REVENUE)	THIS COURT’S 2006 ORDERS
SERVICE,)	AND ITS 1976 CONSENT ORDER
)	
Defendant.)	NOTE ON MOTION CALENDAR:
)	March 7, 2008

I. INTRODUCTION

This case concerns a 1976 Consent Order in which this Court required the IRS to produce certain public records to plaintiff Susan B. Long under the Freedom of Information Act (FOIA). In 2006, after the IRS had ceased to comply with the Consent Order, Ms. Long returned to this Court to enforce it. The Court ruled for Ms. Long, entering orders that confirmed the IRS’s continuing obligation to produce the records and awarding Ms. Long her attorneys’ fees. Ms. Long now seeks this Court’s intervention once more because the IRS, again, is refusing to comply with the Court’s orders.

Specifically, Ms. Long respectfully moves for an order enforcing the Court’s Orders of April 3, 2006, and August 2, 2006 (the “April 3 Order” and “August 2 Order”),

1 and requiring the IRS to provide her complete, unredacted, electronic copies of a regularly
2 produced statistical report called AIMS Table 37, and to certify complete production. Ms.
3 Long further requests that the Court: (1) order the IRS to produce electronic copies of
4 AIMS Tables 35, 36, and 38, which (like Table 37) fall within the scope of this Court’s
5 1976 Consent Order; (2) direct the IRS to provide Ms. Long with samples of “A-CIS”
6 reports that are within the scope of the Consent Order; (3) order the IRS, on an ongoing
7 basis, to provide statistical reports that are determined to be covered by the Consent Order
8 within one month of her requests; and (4) order that the IRS not routinely redact cells with
9 information on one or two taxpayers from reports produced under the Consent Order.

10 As detailed below, the IRS has not fully complied with the April 3 Order requiring
11 production of Table 37 and has directly violated the August 2 Order, which required it to
12 move to amend the Consent Order *before* redacting Table 37 without Ms. Long’s
13 agreement. In particular, the IRS has redacted cells of one or two from Table 37 (a
14 practice this Court refused to permit in the August 2 Order); withheld some copies of Table
15 37 entirely based on arguments that are groundless and waived; and produced incomplete
16 copies of Table 37 with hundreds of pages missing. Even the incomplete and redacted
17 copies have been provided only after months of delays, and the IRS has produced them in
18 barely usable paper copies rather than electronically as 5 U.S.C. § 552(a)(3)(B) requires.

19 The IRS has refused to abide by the terms of the Consent Order in other ways as
20 well. Despite this Court’s ruling that the Consent Order remains fully in effect, the IRS
21 has failed to provide other reports (including AIMS Tables 35, 36, and 38) that, like Table
22 37, include the types of data the Consent Order covers. Indeed, the IRS has rejected Ms.
23 Long’s requests for other reports on the ground that its delayed and incomplete production

1 of Table 37 constitutes full compliance with the Consent Order, even as it has conceded
2 that other reports requested by Ms. Long contain information not found in Table 37. In
3 addition, the IRS has frustrated Ms. Long's efforts to obtain information within the scope
4 of the Consent Order by not responding to her requests for examples of statistical reports
5 that would allow her to determine whether those reports are covered by the Consent Order.

6 The relief Ms. Long seeks is limited to actions that would directly remedy the
7 IRS's failure to comply with this Court's orders by compelling the complete and prompt
8 production of statistical reports subject to the Consent Order. Ms. Long regrets that it is
9 necessary to call upon this Court again to enforce its orders, but she does so only after
10 having exhausted all avenues of obtaining voluntary compliance by the IRS.

11 II. FACTS

12 Plaintiff Susan B. Long is an associate professor at Syracuse University and the co-
13 director of the Transactional Records Access Clearinghouse, an organization devoted to
14 obtaining and providing to the public statistical and other information about the activities
15 of the federal government, including the IRS. As an academic researcher, Ms. Long has
16 long been particularly interested in obtaining statistical information about IRS audit,
17 collection, and enforcement activities. In the mid-1970s, her efforts to obtain such
18 information under FOIA led her and her late husband to file this lawsuit against the IRS,
19 which was resolved in 1976 through the entry of a Consent Order requiring the IRS, upon
20 request, to make available to her a range of statistical reports described in the Order.¹

21 In January 2006, Ms. Long moved to enforce the Consent Order. She sought
22 production of the IRS's regularly produced AIMS Table 37, which, her motion showed,

23 ¹ Copies of the Consent Order and this Court's April and August 2006 Orders concerning its enforcement are
appended hereto for the convenience of the Court.

1 fell within the scope of the Order. On April 3, 2006, the Court granted the motion, holding
2 “that the 1976 Consent Order remains in effect and that this Court retains jurisdiction to
3 enforce the order.” April 3 Order at 3. The Court determined that the Table 37 reports
4 were covered by the Consent Order, and it required the IRS to provide Ms. Long “copies
5 of any monthly, quarterly, and year-end AIMS Table 37 reports” from FY 2002 through
6 April 2006 and, “on an ongoing basis,” to provide her with Table 37 reports “promptly,”
7 upon request, “as long as the agency continues to compile such reports.” *Id.* at 1.

8 **A. The Redaction Issue and This Court’s Orders.**

9 The IRS opposed Ms. Long’s 2006 motion partly because, it claimed, production of
10 Table 37 reports with cells containing data on one or two taxpayers would violate 26
11 U.S.C. § 6103, a 1976 law prohibiting the IRS from disclosing “return information”
12 identifying specific taxpayers. The Court rejected the argument for several reasons:

13 First, as Plaintiff notes, consent orders are enforceable despite changes in law,
14 unless they have been properly modified or vacated under Fed. R. Civ. P. 60(b).
15 ... Here, the IRS has not sought to modify or vacate the consent decree
16 pursuant to Rule 60(b).

17 Second, the IRS’s position that production of AIMS Table 37 could indirectly
18 reveal taxpayers’ “return information” is speculative at best. Aside from
19 conclusory assertions, the IRS provides no evidence to support its contention
20 that a “cell of one” in Table 37 could provide sufficient information to identify
21 the particular taxpayer whose data is included in the cell. The IRS’s position is
22 further undermined by evidence that the IRS has previously provided Ms. Long
23 with data compilations that included “cell of one” entries. ...

Finally, even assuming for the sake of argument that “cell of one” entries in
AIMS Table 37 may indirectly reveal a taxpayer’s “return information,” the IRS
could redact such entries.

April 3 Order, at 6.

Following this Court’s April 3 Order, the IRS produced partial copies of Table 37
reports through the month of March 2006, the last month for which reports were available

1 as of the date of compliance specified in the Court’s Order. Declaration of Susan B. Long
2 in Support of Motion to Enforce this Court’s 2006 Orders and its 1976 Consent Order
3 (“4th Long Dec.”) (filed herewith) ¶ 3. Thereafter, Ms. Long began requesting Table 37
4 reports for subsequent months, beginning with April 2006. *Id.* ¶ 15. The IRS eventually
5 produced Table 37 reports for April 2006, but it redacted cells with data concerning one or
6 two taxpayers. Later, the IRS also produced Table 37 reports for May 2006, but it again
7 redacted them. *Id.*

8 Meanwhile, on June 2, 2006, the IRS filed a protective notice of appeal from the
9 April 3 Order, but it did not yet have approval from the Solicitor General of the United
10 States to pursue the appeal. *Id.* ¶ 7. Then, on June 5, 2006, the IRS filed a motion in this
11 Court seeking a stay pending appeal, “to permit defendant ... to redact cells of one or two
12 from Table 37.” Def. Mot. for Stay, Dkt. No. 38, at 2. Ms. Long opposed the motion, and
13 on August 2, 2006, this Court denied it. The Court ruled that a stay motion was not an
14 appropriate way to raise the redaction issue (Aug. 2 Order, at 3):

15 If the IRS is uncertain about whether or not redaction is permitted, the IRS
16 should seek to amend the order to clarify this point. If, on the other hand, the
17 IRS does not agree with the order as written, it should move to properly modify
or vacate the order pursuant to Fed. R. Civ. P. 60(b)(6). Regardless, a motion
for stay is not the appropriate step.

18 The Court also found that none of the factors governing issuance of a stay (likelihood of
19 success on the merits, irreparable harm, relative hardship, and the public interest) favored a
20 stay. As to likelihood of success, the Court stated (August 2 Order, at 4-5):

21 [T]he IRS does not produce convincing evidence to support its contention that
22 cells of one or two could provide sufficient information to identify the particular
taxpayer whose data is included in the cell. On the other hand, Ms. Long
23 demonstrates that similar data is available on the IRS website and, furthermore,
that the categories of taxpayers in particular examples of cells of one (such as
income range or industry type) are so large that millions of possible individual or

1 corporate taxpayers could feasibly be the one referenced.

2 The Order concluded (Aug. 2 Order, at 5):

3 [T]he Court DENIES the IRS's motion for stay. If the IRS still wishes to redact
4 cells of less than three from Table 37, the parties should meet and confer. If the
5 parties cannot reach an agreement on redaction, the IRS should move to have the
6 consent order modified or vacated pursuant to Fed. R. Civ. P. 60(b).

7 Because the IRS's appeal had been assigned to the Ninth Circuit's mediation
8 program, counsel for the parties agreed to meet and confer on the redaction issue, as well
9 as any other issues that might lead to a resolution of the appeal, as part of that program,
10 with periodic progress reports to a Ninth Circuit mediator. 4th Long Dec. ¶¶ 10, 14.
11 Counsel for Ms. Long met face-to-face with Justice Department and IRS lawyers on
12 September 1, 2006, and engaged in many telephone conferences and exchanges of e-mail
13 and correspondence, principally with the Justice Department attorney who was
14 representing the IRS on appeal, in an attempt to resolve the case. The discussions did not
15 lead to agreement on redaction or any other issue. *Id.* ¶¶ 16, 19.

16 In December 2006, while these discussions were ongoing, the Justice Department
17 informed Ms. Long's counsel that the Solicitor General had not approved the IRS's appeal,
18 that the appeal would be dismissed and the appellate mediation process terminated, and
19 that the Justice Department appellate lawyer would no longer participate in discussions
20 aimed at resolving the case. *Id.* ¶ 20. Counsel for Ms. Long therefore resumed
21 correspondence with the Justice Department attorney representing the IRS in this Court.
22 By March 2007, however, it had become apparent that those efforts would not lead to
23 agreement either on redaction or on a broader resolution of issues as to Ms. Long's
entitlement to statistical information from the IRS. *Id.* ¶¶ 21-24. On March 27, 2007,
counsel for Ms. Long sent the IRS's attorney a letter expressing Ms. Long's view that the

1 negotiations had failed. *Id.* ¶ 24. The letter concluded:

2 [I]t is our position that the parties have more than satisfied Judge Pechman's
3 requirement that they meet and confer with respect to the issue of redaction of
4 Table 37. They have been unable to reach agreement on that issue, as they have
5 also been unable to reach agreement on any alternative to full compliance by the
6 IRS with the orders in the Seattle litigation. It is now up to the IRS to comply
7 with the court's orders or to seek relief from the court if it wishes to redact Table
8 37 or otherwise avoid the court's order that Table 37 be produced in its entirety.
9 Of course, Ms. Long reserves the right to seek additional relief from the court to
10 see that the IRS satisfies its obligations under the court's orders.

11 *Id.* Counsel for the IRS never answered the letter. *Id.* ¶ 25. IRS officials subsequently
12 informed Ms. Long that their position on redaction was dictated by the IRS Chief Counsel
13 and was not subject to change. *Id.* ¶ 27.

14 **B. The FOIA Exemption 5 Issue**

15 In opposing Ms. Long's 2006 motion to compel production of all Table 37 reports,
16 the IRS mentioned only one ground on which it claimed that any of the reports would be
17 exempt from disclosure under FOIA even in part: namely, its argument that revealing cells
18 of one or two would violate 26 U.S.C. § 6103. Accordingly, the Court's April 3 Order
19 directed the IRS to produce "any" extant monthly, quarterly or yearly Table 37 reports for
20 fiscal years 2002 through 2006, and that it continue to provide the reports upon proper
21 request from Ms. Long as long as it continued to compile them.

22 When the IRS made its first production of Table 37 reports in response to the April
23 3 Order, its cover letter indicated that it was complying with the Court's Order and did not
24 identify any reports that were being withheld. However, when Ms. Long reviewed the
25 materials provided, she noticed that for each of the completed fiscal years, two reports
26 were missing: the first and second "preliminary" year-end reports that the IRS routinely
27 generates in September and October of each fiscal year before completion of a "final"

1 year-end report in November. Only the final year-end report runs were provided. *Id.* ¶ 5.

2 Counsel for Ms. Long inquired in a letter dated April 26, 2007, about the omission
3 of the preliminary year-end reports (and other apparent omissions). *Id.* ¶ 6. Eventually,
4 the IRS revealed that it was withholding the “preliminary” year-end Table 37 runs under
5 Exemption 5 to FOIA. *Id.* ¶ 12. This exemption, which the IRS did not raise in response
6 to Ms. Long’s 2006 motion, permits withholding of records that would be privileged from
7 disclosure in litigation, *see* 5 U.S.C. § 552(b)(5), including records subject to the
8 “deliberative process privilege,” which the IRS invoked here. Subsequently, as part of her
9 regular monthly requests for production of Table 37 data in accordance with the April 3
10 Order, Ms. Long requested the preliminary year-end Table 37 runs for FY 2006, which
11 were generated in September and October 2006. In a letter dated January 10, 2007, the
12 IRS denied those requests, again relying on its assertion of deliberative process privilege
13 under Exemption 5 notwithstanding this Court’s unqualified order that it produce *any*
14 monthly, quarterly and annual Table 37 reports. *Id.* ¶ 22.

15 **C. The IRS’s Ongoing Failure to Provide Table 37 Fully and Promptly**

16 As noted above, in April 2006, shortly before the 14-day deadline set by the April 3
17 Order, the IRS sent counsel for Ms. Long an initial but apparently incomplete set of Table
18 37 reports covering FYs 2002 through 2005 and FY 2006 through March 2006. *Id.* ¶¶ 3-4.
19 In response to counsel’s April 26, 2006, letter questioning the completeness of the reports,
20 *id.* ¶ 6, the IRS said that it had discovered that Table 37 was more extensive than the
21 materials provided in April 2006, and it provided additional files for FY 2002 through May
22 2006 electronically in August 2006. *Id.* ¶ 11. That same month, the IRS provided Ms.
23 Long’s counsel with electronic files purportedly containing the complete April and May

1 2006 Table 37 reports (with cells of one and two redacted). *Id.* ¶ 15.

2 Ms. Long’s review of these reports convinced her that some parts of Table 37 were
3 missing from the IRS’s production. In particular, the reports did not appear to contain data
4 on examination of returns by the IRS’s Wage and Investment (W&I) Division. When Ms.
5 Long raised this apparent omission with the IRS, she was informed that although most of
6 the detail concerning W&I audits was contained in a separate report (AIMS Table 38),
7 Table 37 does contain “inventory figures” for W&I audits. Thereafter, Ms. Long
8 thoroughly reviewed the copies of Table 37 provided her and found that none of them
9 contained the sections with the W&I inventory data. Because Table 37 is continuously
10 paginated, Ms. Long’s review of the copies provided to her also revealed that each month’s
11 Table 37 report was typically missing hundreds of pages, based on gaps in the page
12 numbers of the reports as provided. *Id.* ¶¶ 17-18.

13 After its August 2006 production of incomplete Table 37 reports for April and May
14 2006, the IRS provided Ms. Long with *no* Table 37 reports for nearly a year, despite her
15 regular monthly requests.² *Id.* ¶¶ 19, 25, 28. Then, on August 20, 2007, the IRS belatedly
16 sent copies of Table 37 reports for June and July 2006. In the months that followed, the

17 ² After the parties’ attempted settlement discussions ended, the IRS did begin providing Ms. Long with a
18 much less extensive monthly report generated from its “A-CIS” system, which provides a small subset of the
19 data contained in Table 37 as well as some additional data, and the IRS later expanded this production to
20 include a few additional reports on collections and enforcement. 4th Long Dec. ¶ 25. Ms. Long made it
21 clear to the IRS that her acceptance of these reports did not reflect relinquishment of her rights under this
22 Court’s orders, and the course of communications between the parties confirms that the IRS is not providing
23 them on the understanding that Ms. Long has agreed to give up her entitlement to Table 37 reports. Indeed,
at a meeting between Ms. Long and Mr. Burnham and Acting Commissioner Brown and Deputy
Commissioner Stiff in June of this year, the Acting Commissioner assured Ms. Long and Mr. Burnham that
the IRS would continue the regular monthly production of A-CIS reports regardless of any actions that Ms.
Long took in this case. *Id.* ¶¶ 26-27. More recently, in December 2007, the IRS presented Ms. Long with a
proposal to amend the Consent Order to require only the provision of the A-CIS reports and the other limited
data, to eliminate the requirement that it provide Table 37 and other data similar to the reports listed in the
Consent Order, and to foreclose Ms. Long from making any FOIA requests for such reports. The proposed
amendment would also have authorized the IRS to redact cells of one or two. Ms. Long rejected the IRS’s
proposal in January 2008. *Id.* ¶¶ 53-56.

1 IRS provided copies of Table 37 for October and August 2006 as well as the final year-end
2 September 2006 report (but not the two “preliminary” runs of that report). *Id.* ¶28.

3 In the Table 37 copies provided since August 2007, cells of one or two have again
4 been redacted. *Id.* ¶29-30. In addition, the belatedly provided copies contain no W&I
5 inventory tables and have thousands of pages of gaps in their page numbers, demonstrating
6 that the complete reports have not been provided. *Id.* ¶ 31. Moreover, the reports, unlike
7 the ones sent in 2006, have been provided on paper rather than electronically (with
8 redactions done manually with marker pens), making it much more difficult to extract data
9 from them for computer analysis and to integrate them into databases to which other
10 members of the public can be given access. *Id.* ¶¶ 28-29, 33-41. And the IRS is still more
11 than a year behind in its production of Table 37 reports, not having provided any reports
12 from November 2006 to the present, even though the IRS has now generated monthly
13 reports through January 2008 (including the September 2007 year-end reports). *Id.* ¶ 28.

14 **D. The IRS’s Refusal to Provide Other Statistical Reports.**

15 Ms. Long’s effort to obtain statistical data covered by the Consent Order has not
16 been limited to Table 37, as Table 37 is not, and does not purport to be, a complete source
17 of data concerning the IRS’s examination of returns. In particular, as the IRS has informed
18 Ms. Long, Table 37 does not provide detail about the W&I Division’s examinations;
19 rather, comparable statistical breakdowns about those activities are found in AIMS Table
20 38. *Id.* ¶¶ 44-45. In addition, IRS publications indicate that reports paralleling Tables 37
21 and 38, known as AIMS Tables 35 and 36, are regularly prepared by the IRS’s various
22 regional “campuses” (formerly “service centers”). *Id.* ¶ 47. The IRS also has informed
23 Ms. Long that it has a variety of other systems, including “A-CIS,” that generate statistical

1 reports concerning the examination of tax returns. *Id.* ¶ 49.

2 Ms. Long has made a number of attempts to obtain this IRS statistical data pursuant
3 to the Consent Order. In each case, Ms. Long has run up against a stone wall. First,
4 beginning in November 2004, she has made regular monthly requests for particular reports
5 in addition to Table 37 – specifically, for Tables 35, 36, and 38. The IRS has not
6 responded to these requests. *Id.* ¶¶ 44-48. Second, she has made regular “generic”
7 requests for any reports that provide “IRS examination statistics.” The IRS has purported
8 not to deny these requests, but to “close” them administratively on the ground that they are
9 fully satisfied by its delayed, incomplete, and redacted production of Table 37 – even
10 though the IRS has acknowledged that Table 37 does not contain all the information Ms.
11 Long seeks and is not the only regularly generated IRS report covering audit statistics. *Id.*
12 ¶¶ 49-50. Third, based on information that the A-CIS system provides a number of
13 preformatted reports responsive to her requests for examination statistics, Ms. Long
14 specifically requested samples of the A-CIS preformatted reports. The IRS has never
15 responded to this request. *Id.* ¶¶ 51-52.

16 III. ARGUMENT

17 The IRS’s unwillingness to comply fully and promptly with this Court’s April 3
18 and August 2 Orders, and its refusal to provide Ms. Long with other reports under the
19 Consent Order, unfortunately require further judicial intervention. The agency has flouted
20 this Court’s decisions and disregarded the public’s right to information under FOIA. This
21 pattern can only be remedied by a specific and unambiguous order directing the IRS to
22 produce the documents falling within the scope of the prior orders. The agency has made
23 it clear that, absent such specific directives, it will not obey the dictates of this Court.

1 **A. The IRS Must Produce Table 37 Without Redaction.**

2 In its August 2 Order, this Court ordered that if the parties were unable to agree on
3 the issue of redaction of cells of one or two, the IRS must seek the Court’s permission if it
4 wished to redact Table 37. The parties met and conferred and were unable to agree, and
5 counsel for Ms. Long informed counsel for the government in March 2007 that the process
6 was at an end. In the many months that followed, the IRS has made no effort to comply
7 with the Court’s order that it “move to have the consent order modified or vacated,” nor
8 has it produced unredacted copies of Table 37.

9 The IRS’s prolonged disregard of this Court’s orders necessitates a further order
10 directing full compliance. The IRS has had ample opportunity to move for permission to
11 produce redacted versions of Table 37, and has chosen instead to ignore the Court’s
12 direction. In light of the IRS’s default, and the Court’s findings in both the April 3 Order
13 and the August 2 Order that the IRS’s submissions had failed to “produce convincing
14 evidence to support its contention that cells of one or two could provide sufficient
15 information to identify the particular taxpayer whose data is included in the cell” (Aug. 2
16 Order 4), the Court should now order the IRS to provide unredacted copies because of its
17 failure to justify any redaction.

18 Given the IRS’s default, the Court need not revisit the merits of the Section 6103
19 issue. Should the Court feel inclined to address the merits, however, it remains apparent
20 that disclosure of cells of one or two in Table 37 would not disclose return information.
21 As this Court has previously recognized, the IRS’s position fails to come to grips with the
22 critical proviso to § 6103(b)(2), which states that “return information” “does not include
23 data in a form which cannot be associated with, or otherwise identify, directly or indirectly,

1 a particular taxpayer.” As the Supreme Court has held, this proviso, the “Haskell
2 Amendment,” was intended to “insure that statistical studies and other compilations of data
3 now prepared by the Internal Revenue Service and disclosed to outside parties will
4 continue to be subject to disclosure to the extent allowed under present law.” *Church of*
5 *Scientology v. IRS*, 484 U.S. 9, 16 (1987) (quoting 122 Cong. Rec. 24012 (1976)
6 (statement of Sen. Haskell)). The Amendment was intended “to neither enhance nor
7 diminish access now obtainable under the Freedom of Information Act to statistical studies
8 and compilations of data by the Internal Revenue Service.” *Id.* at 17 (quoting 122 Cong.
9 Rec. 24012 (1976) (statement of Sen. Haskell)).

10 Thus, courts consistently hold that statistical data in a report, document, or database
11 that does not contain individual taxpayer information is not exempt from production under
12 § 6103 even if the data is derived from “return information.” *See Church of Scientology v.*
13 *IRS*, 792 F.2d 153, 160 (D.C. Cir. 1986), *aff’d*, 484 U.S. 9 (1987); *King v. IRS*, 688 F.2d
14 488, 493 (7th Cir. 1982); *Willamette Indus. v. United States*, 689 U.S. 865, 869 (9th Cir.
15 1982); *cf. Long v. IRS*, 891 F.2d 222, 223 (9th Cir. 1989) (records that actually contain
16 individual taxpayer identifying information are not subject to disclosure under Haskell
17 Amendment). As one district court has noted, the inapplicability of § 6103 to statistical
18 information about audits is underscored by the fact “that the IRS often releases general
19 information about the number of audits it conducts on various classes of taxpayers.”
20 *Branch Ministries, Inc. v. Richardson*, 970 F. Supp. 11, 18 (D.D.C. 1997).

21 To be sure, the Haskell Amendment provides that even statistics may constitute
22 “return information” if they would identify a particular taxpayer. But the IRS has offered
23 no evidence to support its speculation that some of the data in Table 37 could identify a

1 taxpayer, and absent such evidence it has not borne its burden of proving that records may
2 be withheld as “return information.” *See Kamman v. IRS*, 56 F.3d 46, 49 (9th Cir. 1995).
3 Although the government has stated that a taxpayer’s identity could be revealed by cells of
4 one or two in parts of Table 37 that provide information specific to particular industries
5 that have very few firms (such as locomotive or light aircraft manufacture), Ms. Long has
6 now had the opportunity to thoroughly review all parts of Table 37 that have been provided
7 to her for the period from October 2001 through October 2006, and she has found no parts
8 of Table 37 that provide information with that degree of specificity. 4th Long Dec. ¶ 32.
9 Rather, the Table 37 reports break down statistics about examination of tax returns by very
10 broad categories of income level and, in some cases, industrial sector. The report’s
11 categories are broad enough that even if a cell in Table 37 contained information about
12 only one audit, a reader would not be able to identify the taxpayer unless he already knew
13 that the taxpayer had been audited in the relevant time period. *Id.* There is no evidence
14 that a reasonable person in any appropriate community would have such information.
15 Moreover, the IRS has not confined redaction to parts of Table 37 that cover categories of
16 taxpayers where it claims identification of individual taxpayers might be possible; rather, it
17 has redacted cells of one or two wherever they appear in Table 37, *id.* ¶ 29, belying any
18 assertion that its redactions reflect any reasonable possibility that information in particular
19 cells could identify a taxpayer.³

20 In addition, as recently as 2004, the IRS routinely released examination statistics

21
22 ³ In addition, the IRS has substantially over-redacted, by redacting all totals in any column where it has
23 redacted cells containing information concerning one or two taxpayers. The ostensible basis for redacting
totals is to prevent the contents of the redacted cells from being deduced by subtraction from the total; but the
IRS has redacted the total even when more than one cell in the column has been redacted, which makes such
“reverse engineering” impossible. 4th Long Dec. ¶ 30.

1 with cells containing only a single entry—which would, under the IRS’s current argument,
2 violate § 6103. In addition, to this day, the IRS releases statistical abstracts of individual
3 tax returns with identifying information removed, a practice inconsistent with its position
4 that any information in Table 37 that is specific to one or two taxpayers must be redacted
5 regardless of the actual likelihood that it would identify a specific taxpayer. *Id.* ¶ 9.

6 In short, the IRS’s position that release of statistical data containing cells within
7 information about one or two taxpayers is a per se violation of § 6103 is untenable. The
8 Court should accordingly direct that the IRS provide Ms. Long with *unredacted* copies of
9 Table 37 from the beginning of FY 2002 to the present, and, to prevent the IRS’s
10 unwarranted position from interfering with Ms. Long’s access to other materials covered
11 by the Consent Order, the Court should direct that the agency cease its routine withholding
12 of statistical information containing cells with data on one or two taxpayers.

13 **B. The IRS’s FOIA Exemption 5 Claim Is Waived and Is Meritless.**

14 The Consent Order, on its face, requires that covered reports be provided to Ms.
15 Long upon request, and contains no suggestion that any such reports might be subject to
16 any claim of exemption from FOIA. Moreover, in contesting Ms. Long’s 2006 motion for
17 an order requiring production of any Table 37 reports for FYs 2002 through the date of the
18 court’s order, and of any such reports compiled thereafter, the IRS never even mentioned
19 to the Court that any of the requested reports might be exempt in their entirety. Nor did the
20 government seek to alter or amend the judgment or move for reconsideration once the
21 Court ordered production of any Table 37 reports covering the period from the beginning
22 of FY 2002 through April 3, 2006, as well as any Table 37 reports compiled thereafter.

23 Instead, without informing the Court, let alone seeking permission not to comply fully with

1 the Court's orders, the IRS simply declined to provide the preliminary year-end reports for
2 FYs 2002 through 2005, and only when questioned about this omission did it inform Ms.
3 Long's counsel (but, again, not the Court) that it was claiming that these copies of the
4 reports were protected by the deliberative process privilege and, therefore, Exemption 5 of
5 FOIA. 4th Long Dec. ¶ 12. Similarly, the IRS has informed Ms. Long that it is not
6 abiding by the Court's direction to produce Table 37 with respect to the FY 2006
7 preliminary year-end reports. *Id.* ¶ 22.

8 An agency's failure to raise a FOIA exemption as a defense in the district court
9 waives the exemption. *See Ryan v. Dep't. of Justice*, 617 F.2d 781, 792 (D.C. Cir.1980)
10 (“[A]n agency must identify the specific statutory exemptions relied upon, and do so at
11 least by the time of the district court proceedings.”) (quoted in *Louis v. U.S. Dept. of*
12 *Labor*, 419 F.3d 970, 978 (9th Cir. 2005)); *see also Fendler v. U.S. Parole Comm'n*, 774
13 F.2d 975, 978 (9th Cir. 1985) (declining to address Exemption 5 issue where government
14 did not raise it before the district court); *Long v. Bureau of Econ. Analysis*, 646 F.2d 1310,
15 1320 (9th Cir.) (noting that the government “has the burden of specifying any exemption
16 claimed in its answer as an affirmative defense” but that an exemption is not waived if it is
17 actually “litigated by the implied consent of the parties”), *vacated on other grounds*, 454
18 U.S. 934 (1981); *Maydak v. U.S. Dept. of Justice*, 218 F.3d 760, 764 (D.C. Cir. 2000)
19 (“We have plainly and repeatedly told the government that, as a general rule, it must assert
20 all exemptions at the same time, in the original district court proceedings.”).

21 Here, the government not only did not raise the Exemption 5 claim in a *timely*
22 manner in this Court; it did not even raise it *belatedly* by way of a post-judgment motion.
23 Nor did it even raise the claim on appeal; rather, having taken an appeal from this Court's

1 order requiring production of the Table 37 reports, it dismissed the appeal. This Court’s
2 order requiring production is now final and no longer subject to appeal. The government
3 may not now assert a new basis for ignoring it.

4 In any event, the government’s Exemption 5 claim is frivolous. The deliberative
5 process privilege incorporated in Exemption 5 is narrowly focused on protecting materials
6 that would reveal an agency’s deliberations over the formulation of policy:

7 The deliberative process privilege shields from disclosure intra-governmental
8 communications relating to matters of law or policy. See *National Wildlife*
9 *Federation v. U.S. Forest Service*, 861 F.2d 1114, 1116-17 (9th Cir.1988). The
10 underlying purpose of the privilege is to protect the quality of governmental
decision-making by maintaining the confidentiality of advisory opinions,
recommendations, and deliberations that comprise part of the process by which
government formulates law or policy.

11 *Greenpeace v. National Marine Fisheries Serv.*, 198 F.R.D. 540, 543 (W.D. Wash. 2000).

12 Thus, “factual material is protected only to the extent it reflects an agency’s ‘preliminary
13 positions or ruminations about how to exercise discretion on some policy matter.’” *Id.*

14 Here, the material Ms. Long seeks is purely factual — the data contained in the two
15 “preliminary” year-end statistical reports that are generated before the production of the
16 agency’s “final” year-end report. The reports contain no editorial comment, and no
17 material reflecting the agency’s deliberations over any matter of policy. Although it
18 appears that the IRS may correct some of the data before generating the final report, there
19 is nothing to suggest that these corrections reflect any deliberation over matters of policy,
20 and even if they did, the data itself would not reveal that deliberation; at most, it would
21 reveal only what adjustments were made, not the thought processes that led to them.

22 The Ninth Circuit has twice in recent years squarely rejected the notion that
23 statistical data may be withheld on Exemption 5 grounds simply because its production

1 would reveal adjustments made to the data by the agency. In *Assembly of California v.*
2 *United States Dept. of Commerce*, 968 F.2d 916 (9th Cir.1992), and again in *Carter v. U.S.*
3 *Dept. of Commerce*, 307 F.3d 1084 (9th Cir. 2002), the court held that adjusted census data
4 could not be withheld on Exemption 5 grounds, because it was neither “predecisional”
5 (that is, the data itself was not created for the purpose of informing a policy decision), nor
6 “deliberative,” because it would not reveal the agency’s thought processes leading to a
7 decision. *See id.* at 1089-91. The same is true of the raw numbers Ms. Long seeks.

8 **C. The Court Should (Again) Order Prompt and Complete Production of**
9 **Table 37.**

10 Last year, this Court ordered the IRS to produce any extant Table 37 reports from
11 FY 2002 to the date of its order, and to produce future reports *promptly* upon request.
12 Even leaving aside the redaction and Exemption 5 issues discussed above, the IRS has
13 failed to comply with the Court’s order in two significant respects: it has not produced
14 Table 37 in its entirety, but has instead held back hundreds of pages (including W&I
15 inventory tables) from the reports provided to Ms. Long, and it has not produced the
16 reports promptly. Indeed, between September 2006 and August 2007 it produced no Table
17 37 reports at all, and its recent, belated production still does not include reports completed
18 well over a year ago. 4th Long Dec. ¶¶ 28, 31.

19 Under these circumstances, a further order directing that *complete* copies of all
20 existing Table 37 reports from FY 2002 that have not so far been produced to Ms. Long in
21 their entirety be provided to her within 14 days of the Court’s entry of the order is called
22 for. The agency’s ability to meet (and even beat) the 14-day deadline imposed in the
23 original order suggests that this would be no hardship for the agency, especially given that
it is simply a matter of collecting reports that have already been generated and providing

1 them to Ms. Long. The only explanation the agency has ever offered for why producing
2 the reports is at all time-consuming is that it has redacted them, which, as demonstrated
3 above, is not only unnecessary but also impermissible under this Court’s orders and the
4 law. Moreover, the agency’s poor track record of compliance requires that, to ensure
5 accountability, a responsible agency official should be directed to certify that the
6 production is complete.

7 **D. The Court Should Order Production of Electronic Copies.**

8 The IRS provided the copies of Table 37 that it produced in 2006 in electronic
9 formats, but after the nearly year-long hiatus in providing reports it sent Ms. Long only
10 photocopies of the reports, notwithstanding her requests for electronic files. As Ms.
11 Long’s declaration explains, the agency’s provision of paper records adds immeasurably to
12 the difficulty of using the data and providing it to other members of the public. 4th Long
13 Dec. ¶¶ 33-41. Recognizing the utility of electronic records, the “E-FOIA Amendments”
14 of 1996 added to FOIA a new subparagraph providing that “[i]n making any record
15 available to a person under this paragraph, an agency *shall* provide the record in any form
16 or format requested by the person if the record is readily reproducible by the agency in that
17 form or format.” 5 U.S.C. § 552(b)(3)(B) (emphasis added). Now, when records are
18 readily reproducible in electronic format, “[t]here is a clear statutory obligation to produce
19 the records in electronic format when that format is requested.” *Sample v. Bureau of*
20 *Prisons*, 466 F.3d 1086, 1088 (D.C. Cir. 2006); *see also TPS, Inc. v. U.S. Dept. of Defense*,
21 330 F.3d 1191, 1195 (9th Cir. 2003) (“The statute, on its face, requires that the agency
22 satisfy a FOIA request when it has the capability to readily reproduce documents in the
23 requested format.”).

1 Here, there is no doubt that Table 37 is “readily reproducible” in electronic form.
2 The data that it contains is stored electronically in the AIMS database, and Table 37 itself
3 is the output of a computer program. If that were not clear enough, the fact that the agency
4 has earlier provided it in electronic form demonstrates that it is reproducible in that form.
5 *See Sample*, 466 F.3d at 1088 (government “conceded” that records were reproducible
6 electronically by offering to produce them to others in that format).

7 Nor is there any plausible argument that producing the records electronically would
8 be unduly burdensome to the agency. As the Ninth Circuit has recognized, “[w]hen an
9 agency already creates or converts documents in a certain format—be it for FOIA
10 requestors, under a contract, or in the ordinary course of business—requiring that it
11 provide documents in that format to others does not impose an unnecessarily harsh burden,
12 absent specific, compelling evidence as to significant interference or burden.” *TPS*, 330
13 F.3d at 1195. Moreover, any suggestion that the need to redact the records necessitates
14 providing them in paper format is unsupported given that (1) there is no basis for
15 redaction, and (2) even if there were, the agency’s electronic production of redacted Table
16 37 reports for April and May 2006 last year demonstrates that the records need not be on
17 paper to be redacted. 4th Long Dec. ¶ 40. Indeed, finding cells of one and two through a
18 manual search of paper records and blotting them out with a marker is a much more
19 tedious and labor-intensive process than searching and redacting electronically. *Id.* ¶¶ 41-
20 42. Together with the time consumed in the repeated photocopying that the process
21 requires, this wasteful redaction process undoubtedly accounts for some of the unnecessary
22 delay that has occurred in providing the records to Ms. Long.

1 **E. The Court Should Take Steps to Enforce the Consent Order Beyond**
2 **the Production of Table 37.**

3 The Consent Order is not limited to any one report, but extends to all reports
4 generated by the IRS that contain data similar to that in the many reports listed in the
5 Consent Order. There is no doubt that there are many such reports beyond AIMS Table
6 37. Indeed, Ms. Long has specifically identified and requested three of them: AIMS
7 Table 38, which contains the same types of audit figures as Table 37 for W&I Division
8 audits and “correspondence” audits, and AIMS Tables 35 and 36, which provide
9 information similar to Tables 37 and 38 for each IRS campus. In addition, the IRS itself
10 has informed Ms. Long that statistical reports on the examination of tax returns are
11 regularly generated from its A-CIS system, among others. *Id.* ¶¶ 43-51.

12 Nonetheless, the agency has consistently frustrated Ms. Long’s attempt to gain
13 access to statistical reports other than Table 37 that are covered by the Consent Order. The
14 agency has simply not responded to regular requests for Tables 38, 35, and 36, even
15 though such requests have been pending for over two years. *Id.* ¶¶ 46, 48. With respect to
16 Ms. Long’s more generic requests for reports that provide breakdowns of audit statistics,
17 the IRS has unilaterally pronounced that Table 37 is the sole responsive record, even
18 though it has acknowledged that Table 37 does not provide all the information that Ms.
19 Long has requested and that there are other extant statistical reports that provide additional
20 information. *Id.* ¶ 50. And the IRS has prevented Ms. Long from specifically identifying
21 and requesting such reports by declining to respond to her specific request for samples of
22 preformatted A-CIS reports that would allow her to determine which reports are covered
23 by the Consent Order and are suitable to her needs. *Id.* ¶¶ 50-51.

 As in the case of Table 37, the IRS’s actions require further orders from this Court

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1 to give meaning to its obligations under the Consent Order. First, the Court should order
2 production, within 30 days, of Tables 38, 35 and 36 from FY 2002 to the present, since
3 these reports can be specifically identified as subject to the Consent Order. (As in the case
4 of Table 37, such production should be complete, unredacted, and in electronic form.)

5 Second, the Court should order the IRS to provide Ms. Long with the sample A-
6 CIS reports she has requested, as well as samples of reports responsive to her “generic”
7 requests for examination statistics, to facilitate enforcement of the Consent Order’s
8 requirement that reports similar to those listed in the Consent Order be provided.

9 Although the Consent Order on its face does not require production of sample reports, this
10 relief is reasonably ancillary to enforcement of the basic obligations imposed by the order.

11 As the Supreme Court has emphasized, “[f]ederal courts are not reduced to approving
12 consent decrees and hoping for compliance. Once entered, a consent decree may be
13 enforced.” *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 440 (2004). A court’s
14 enforcement authority includes the power, when a party has made insufficient efforts to
15 carry out its obligations under an order, to “revie[w] [the party’s] efforts to date, and,
16 finding them lacking, ... impos[e] additional, consistent burdens on [the party] to ensure
17 implementation of the decree.” *Brewster v. Dukakis*, 675 F.2d 1, 4 (1st Cir. 1982). That is
18 all Ms. Long requests here.

19 **F. The Court Should Require Genuinely Prompt Production of Data.**

20 Finally, the Court should order that, on an ongoing basis, the IRS provide reports
21 determined to fall within the scope of the consent decree (including Table 37, Tables 38,
22 35, and 36, and other covered reports that may later be identified) within 30 days of a
23 request by Ms. Long or 30 days after the report is generated, whichever is later, unless a

1 report is *properly* subject to redaction and additional time is required for that purpose. In
2 addition, the agency should be required to certify the completeness of its production of
3 reports. Events have shown that this Court’s directive that the IRS provide reports
4 completely and “promptly” is not specific enough: the agency is over a year behind in
5 providing Table 37. And, given the agency’s extreme unwillingness to provide, or even
6 identify, reports other than Table 37 that are subject to the Consent Order, there is
7 unfortunately no reason to think that it will be any more prompt it providing other reports.
8 Moreover, a 30-day requirement (which actually exceeds the statutory time limit for
9 responding to a request under FOIA) should not prove unduly burdensome, because the
10 reports are already being generated regularly by the agency, searching for and locating
11 them is not an issue, Ms. Long is requesting that they be provided in convenient electronic
12 format, and no redactions or other processing of the reports is required.

13 IV. CONCLUSION

14 For the foregoing reasons, Ms. Long respectfully requests that the Court enter an
15 order (1) directing the IRS, within 14 days, to produce complete, unredacted, electronic
16 copies of all Table 37 reports from FY 2002 to the present, and to certify the completeness
17 of its production; (2) directing the IRS to cease its practice of routinely redacting cells of
18 one or two from reports covered by the Consent Order; (3) ordering the IRS, within 30
19 days, to produce complete, unredacted, electronic copies of AIMS Tables 38, 35, and 36
20 from FY 2002 to the present, and to certify the completeness of its production; (4) ordering
21 the IRS to produce the sample preformatted A-CIS statistical reports requested by Ms.
22 Long as well as samples of other reports responsive to her generic requests for examination
23 statistics, within 30 days; and (5) ordering the IRS, on an ongoing basis, to provide Ms.

1 Long with reports covered by the Consent Order within 30 days of her request or the
2 production of the report, whichever is later, and to certify the completeness of its
3 production.

4 DATED this 11th day of February, 2008.

5
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on February 11, 2008, I caused the foregoing document to be
3 electronically filed the with the Clerk of the Court using the CM/ECF system which will
4 send notification of such filing to the following:

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7 DATED at Seattle, Washington this 11th day of February 2008.

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