1992

Tax Data Disclosure Under The Freedom of Information Act: Evolution, Issues and Analysis

Mark A. Segal

TAX DATA DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT: EVOLUTION, ISSUES AND ANALYSIS

by

MARK A. SEGAL*

INTRODUCTION

In 1991, the twenty-fifth anniversary of the Freedom of Information Act (FOIA) was celebrated. Although subject to substantial amendment since its original enactment in 1966, the FOIA constitutes one of the most significant developments in federal administrative law and practice. Its importance to federal tax law and practice is evident when one examines the evolution of the FOIA and the case law concerning it. Were it not for the FOIA a significant amount of data commonly used in tax practice might not be available to practitioners, for example, certain return information, statistical data, and private letter rulings.

The legislative history of the FOIA reveals that the Act was enacted to promote government honesty and public access to information about governmental activities and policies.[1] This was believed to be necessary to prevent arbitrary governmental action and help develop the informed electorate deemed necessary for the proper functioning of a democracy.[2] As codified in 5 U.S.C. § 552 the statutory provisions of the FOIA go much further than merely opening the door to government policies and procedures. The Act is a highly structured statute that includes provisions pertaining to: a) disclosure of information;[3] b) procedural steps to review denial of a request for government information;[4] c) exemptions to the disclosure requirements;[5] d) restrictions making withholding of information permissable only if within the purview of the Act;[6] e) requirements that each agency of the federal government submit an annual report to Congress summarizing the amount and nature of requests for disclosure;[7] and f) definitions of the term "agency," as only an agency is subject to the language of the Act.[8]

* Associate Professor of Accounting, University of South Alabama; B.A., J.D., M.B.A., Tulane University; LL.M. (Taxation), Emory University; C.P.A.; Member of Florida, Louisiana, and Washington D.C. Bars.

1 H.R. REP. NO. 1497, 89th Cong., 2d Sess. 12 (1966); S. REP. NO. 813, 89th Cong. 1st Sess. 3 (1965).

2 Fruehauf Corp. v. IRS, 522 F.2d 284, 290 (6th Cir. 1975); Mink v. EPA, 464 F.2d 742 (D.C. Cir. 1971), *rev'd on other grounds*, 410 U.S. 73 (1973).

3 5 U.S.C. § 552(a)(1)-(a)(4)(A) (1988).

4 5 U.S.C. § 552(a)(4)(B)- (a)(4)(G) (1989 & Supp. II 1990).

5 5 U.S.C. § 552(b) (1989 & Supp. II 1990).

6 5 U.S.C. § 552(d) (1989 & Supp. II 1990).

7 5 U.S.C. § 552(e) (1989 & Supp. II 1990).

8 5 U.S.C. § 552(f) (1989 & Supp. II 1990).

In this article an examination and analysis is made of the major provisions of the FOIA, of how the FOIA has been applied in the tax area, and of major emerging issues concerning the FOIA. Particular attention is accorded to the common clash of the FOIA's policy of disclosure with I.R.C. § 6103's general rule of confidentiality and nondisclosure of tax return data.

THE FOIA AND THE TAX AREA

FOIA

Three parts of the FOIA are of particular importance in the tax area. These parts concern disclosure, the procedure for review of a denied request, and exemptions to disclosure.

Disclosure

Pursuant to the FOIA, governmental agencies are required to:

a) Currently publish in the Federal Register the agency's organization, functions, and substantive and procedural rules;[9] and

b) Make available to the public opinions, statements of policy, and interpretations adopted but not published in the Federal Register, as well as staff manuals and instructions for public inspection and copying upon reasonable demand and payment of a reasonable prescribed fee, unless the material is promptly published and otherwise sold.[10]

1. Procedure

Section 552(a)(6) provides that within ten days (excluding Saturdays, Sundays, and legal holidays) of the making of an FOIA request the agency shall notify the requester of the determination and the reasons for it.[11] Should the request be denied the requester shall be informed of the right to appeal to the head of the agency.[12] If an adverse decision is appealed, the agency has twenty days (excluding Saturdays, Sundays, and legal holidays) within which to make a decision.[13] In certain circumstances additional time may be utilized.[14]

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9 5 U.S.C. § 552(a)(1) (1989 & Supp. II 1990).
10 5 U.S.C. § 552(a)(2) (1989 & Supp. II 1990).
11 5 U.S.C. § 552(a)(6)(A) (1989 & Supp. II 1990).
12 5 U.S.C. § 552(a)(6)(A)(ii) (1989 & Supp. II 1990).
13 *Id.*
14 5 U.S.C. § 552(a)(6)(B) (1989 & Supp. II 1990).

Following exhaustion of these administrative steps, should the request still be denied, a court action may be undertaken to enjoin the agency from nondisclosure of the requested information.[15] According to § 552(a)(4)(B):

> On complaint the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera, to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section and the burden is on the agency to sustain its action.[16]

2. Exemptions

Section 552(b) contains nine categories of exemptions from FOIA disclosure requirements. These categories relate to:

1) Matters specifically authorized and properly classified under executive order to be kept secret in the interest of national defense or foreign policy;[17]

2) Internal personnel rules and practices;[18]

3) Information specifically exempted from disclosure by a statute either: a) leaving no discretion as to withholding; or b) establishing criterion for withholding;[19]

4) Trade secrets and commercial or financial information of a privileged or confidential nature;[20]

5) Interagency or intraagency memorandum;[21]

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15 5 U.S.C. § 552(a)(4)(B) (1989 & Supp. II 1990).
16 *Id.*
17 5 U.S.C. § 552(b)(1) (1989 & Supp. II 1990).
18 5 U.S.C. § 552(b)(2) (1989 & Supp. II 1990).
19 5 U.S.C. § 552(b)(3) (1989 & Supp. II 1990).
20 5 U.S.C. § 552(b)(4) (1989 & Supp. II 1990).
21 5 U.S.C. § 552(b)(5) (1989 & Supp. II 1990).

6) Personnel, medical, or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy;[22]

7) Investigatory records compiled for law enforcement purposes the disclosure of which would impede an investigation, endanger a life, or threaten harm to evidence;[23]

8) Certain records prepared by or for an agency responsible for the regulation or supervision of financial interests;[24] and

9) Geological and geophysical information and data concerning wells.[25]

Where a document or record contains some information falling within these categories, and some information or data which does not, any reasonably segregable portion of the disclosable information shall be provided the requester after deletion of the nondisclosable information.[26]

The FOIA and the Tax Area

In the tax area attempts have been made to gain access to a wide variety of information through use of the FOIA. This information has ranged from information pertinent to an ongoing civil or criminal investigation,[27] to that of taxpayers with return data that may conflict with a tax position taken by the requester,[28] to that of statistical compilations,[29] to taxpayer names and addresses.[30] While not all of these attempts have met with success, the evolution of FOIA case law indicates the significance of the FOIA to the development of the tax law.

The impact of the FOIA in the tax area is evident in the landmark case of *Tax Analysts and Advocates v. IRS,*[31] decided early in the history of the FOIA. *Tax Analysts* concerned whether disclosure of private letter rulings (PLRs) and technical advice memorandum (TAMs) were required upon reasonable request

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22 5 U.S.C. § 552(b)(6) (1989 & Supp. II 1990).

23 5 U.S.C. § 552(b)(7) (1989 & Supp. II 1990).

24 5 U.S.C. § 552(b)(8) (1989 & Supp. II 1990).

25 5 U.S.C. § 552(b)(9) (1989 & Supp. II 1990).

26 5 U.S.C. § 552(b) (1989 & Supp. II 1990).

27 Chamberlain v. Kurtz, 589 F.2d 827 (5th Cir.), *cert. denied,* 444 U.S. 842 (1979).

28 Martin v. IRS, 857 F.2d 722 (10th Cir. 1988).

29 Long v. IRS, 742 F.2d 1173 (9th Cir. 1984), *vacated,* 487 U.S. 1201 (1988); *see also* Long v. IRS, 596 F.2d 362 (9th Cir. 1979), *cert. denied,* 446 U.S. 917 (1980).

30 Aronson v. IRS, 767 F. Supp. 378 (D. Mass. 1991), *aff'd in part, rev'd in part,* 973 F.2d 962 (1st Cir. 1992).

31 Tax Analysts and Advocates v. IRS, 362 F.Supp. 1289 (D.C.D.Ct. 1973), *modified,* 505 F.2d 350 494 (D.C. Cir. 1974).

under the FOIA.[32] In resolving this matter, the principal question raised concerned whether the requested data fell within the purview of § 552(a)(2)(b) which requires agencies to make available statements of public policy and interpretations adopted but not published in the Federal Register.[33]

The IRS contended that only interpretations constituting precedent should be deemed adopted by the agency for FOIA purposes.[34] Accordingly, since PLRs and TAMs were claimed not to be relied upon by the agency to make new determinations, they were not subject to FOIA disclosure.[35]

The court disagreed with the Service and held that the PLRs and TAMs did have precedential value, as they had been cited in certain court cases, and were valuable if someone conducts research on point, as the references in the PLRs and TAMs often constitute a valuable source of references and authorities.[36] The court determined that the PLRs should be disclosed, but did not so hold at the time on the TAMs, due to finding them exempt from disclosure at the time under I.R.C. §§ 6103 and 7213.[37]

In the more recent case of *Tax Analysts v. Department of Justice,* Tax Analysts was successful in gaining access to Department of Justice files containing records of federal district court opinions.[38] In reaching this decision, the court rejected Department of Justice claims that there was no need to satisfy the FOIA since the records would eventually become public anyway, and that requiring the provision of access would constitute administrative inconvenience.[39] In the eyes of the court, the fact that information would become public in the future does not relieve a governmental agency from its having to comply with bona fide requests for information pursuant to the FOIA where the publication would not be considered prompt.[40] In addition, according to the court, administrative inconvenience alone is insuficient grounds for upholding nondisclosure under the FOIA.[41]

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32 *Id.* at 1300.
33 *Id.* at 1302-03.
34 *Id.* at 1304.
35 *Id.* at 1301.
36 *Id.* at 1309-10.
37 *Id.* at 1308.
38 Tax Analysts v. Department of Justice, 845 F.2d 1060, 1066-67 (D.C. Cir. 1988), *aff'd,* 492 U.S. 136 (1989). *See also* Payne Enters. v. United States, 837 F.2d 486, 494 (D.C. Cir. 1988).
39 *Tax Analysts,* 845 F.2d at 1067.
40 *Id.*
41 *Id.* at 1066.

1. Section 6103

I.R.C. § 6103 has been the major statutory obstacle to taxpayer acquisition of tax data.[42] Section 6103(a) prescribes the general rule that tax returns and "return information" shall remain confidential unless otherwise authorized. Authorization is provided for disclosure of such returns and information to the taxpayer or his designated representative, absent the Secretary's determination that the disclosure would seriously impair federal tax administration.[43]

The terms "tax return" and "return information" are expansively defined. A "return" includes any tax or information return signed under penalties of perjury, as well as related forms, schedules, lists, attachments, and amended returns.[44] "Return information" encompasses the taxpayer's identity and nature, source and amount of income, payments, receipts, deductions, exemptions, credits, assets, net worth, tax liability, tax withheld, deficiencies, overassessments, and tax payments.[45] This type of information is considered tax return information regardless of whether the return is or will be investigated as is any data recorded potentially impacting on the taxpayer's tax liability. In addition, "return information" includes:

> 1) Administrative and procedural data regarding whether the return has been or will be examined, or has been or will be the subject of further investigation and planning;[46]
>
> 2) Other data received, recorded, prepared or collected by, or furnished to the Service regarding a return or the determination of the existence of a liability (or the amount thereof), such as, memoranda, transcripts and records of interviews, and letters;[47] and
>
> 3) Any written determination or any background file relating to such written determination not available to the public pursuant to I.R.C. § 6110.[48]

In certain cases, § 6103 permits disclosure to parties other than the taxpayer of otherwise confidential information. The primary such parties are governmental agencies and parties with a material interest.[49]

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42 I.R.C. § 6103 (1992).
43 I.R.C. § 6103(c) (1992).
44 *See* I.R.C. § 6103(b)(1) (1992).
45 I.R.C. § 6103(b)(2), (3) (1992).
46 I.R.C. § 6103(b)(2)(A) (1992).
47 *Id.*
48 Gerald A. Kafka & J. Walker Johnson, *Obtaining Information from the Government – Disclosure Statutes and Discovery*, 414 TAX MGMT. PORTFOLIOS 10-11 (1992).
49 Provisions concerning such disclosure are contained in I.R.C. § 6103(c)–(o) (1992).

Pursuant to what is referred to as the Haskell Amendment, the term "return information" does not pertain to data in a form which can not be associated with or otherwise identify, directly or indirectly, a particular taxpayer.[50] Still, without such identifying information, no disclosure is required where the Secretary determines that the disclosure will seriously impair assessment, collection, or enforcement of the federal tax laws.[51]

As suggested by the Haskell Amendment, disclosure is particularly restricted where it may identify a confidential informant or seriously impair a civil or criminal investigation.[52]

2. Clash

In light of the conflict between I.R.C. § 6103's general requirements of confidentiality and the FOIA's promotion of disclosure, the question arises as to whether the FOIA applies to § 6103 and, if so, how.

The stakes involved are considerable and may well affect the determination of what information may be ordered disclosed. The major difference between § 6103 and the FOIA concerns the standard for reviewing the propriety of nondisclosure. If § 6103 is not subject to the FOIA, the standard for review will be whether nondisclosure is arbitrary and capricious with the burden of proof falling on the complainant (requester of information).[53] Should the FOIA be found applicable, the burden of proof will fall on the governmental agency not providing disclosure and the standard for review will be the more rigorous de novo review prescribed by the FOIA.[54]

The majority of courts which have heard cases on this issue have held that § 6103 is subject to review under the FOIA due to § 6103's falling within the language of the third FOIA exemption.[55] Where such has been held, courts have typically implemented the following three-pronged process:

1) Examine the standard upon which nondisclosure is claimed;

2) Determine if the claimed standard applies; and

3) Review the claim in light of the FOIA.

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50 I.R.C. § 6103(b)(2) (1992).
51 *Id.*
52 *Id.*
53 5 U.S.C. § 706 (1989 & Supp. II 1990).
54 5 U.S.C. § 552(a)(4)(B) (1989 & Supp. II 1990).
55 *See, e.g.*, Linstead v. IRS, 729 F.2d 998 (5th Cir. 1984); Barney v. IRS, 618 F.2d 1268 (8th Cir. 1980); Chamberlain v. Kurtz, 589 F.2d 827 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979).

In the tax area, three major issues have risen to the forefront in litigation concerning application of the FOIA and I.R.C. § 6103. These issues are:

1) Is denial of dislosure under § 6103 subject to review under the FOIA standards?

2) If subject to review under the FOIA, what should such review entail? and

3) How should the Haskell Amendment to § 6103 be construed in determining when data sought will not be deemed tax return information subject to withholding under the language of § 6103?

3. Subjection to FOIA

Whether nondisclosure under § 6103 is subject to FOIA review has been primarily determined by examining if the nondisclosure fell within the purview of the third FOIA exemption.[56] Most jurisdictions have found that it in fact falls within exemption 3(b), as § 6103 provides strict criteria for withholding information or refers to particular matters to be withheld, for example, tax returns or tax return information.[57] To a lesser degree the seventh exemption has come into play in cases involving the denial of disclosure with regard to cases concerning investigations or law enforcement procedures.[58] And, more recently in the unusual case of *Aronson,* involving a request for information to enable an attorney to attempt to locate and contact taxpayers with unclaimed refund checks in return for a contingent fee, the spectre of the sixth exemption has come into question.[59]

In general the courts have held that nondisclosure under § 6103 is subject to review under the FOIA standards. Essentially courts have viewed § 6103 as prescribing a substantive basis for nondisclosure and the FOIA as providing procedural rules for review of the withholding of requested data under § 6103. This perspective is reflected by the Third Circuit in *Grasso,*[60] the Fifth Circuit in *Linsteadt,*[61] the Ninth Circuit in *Long,*[62] the Eleventh Circuit in *Currie,*[63] the District Court for the District of Columbia in *Church of Scientology,*[64] the Eighth

56 *See Barney,* 618 F.2d at 1274.

57 I.R.C. § 6103(a), (b) (1992).

58 *See, e.g.,* Stephens v. IRS, 54 A.F.T.R.2d (P-H) 5348 (N.D. Ill. Jan. 27, 1984).

59 Aronson v. IRS, 767 F. Supp. 378, 380 (D. Mass 1991), *aff'd in part, rev'd in part,* 973 F.2d 962 (1st Cir. 1992).

60 Grasso v. IRS, 785 F.2d 70 (3rd Cir. 1986).

61 Linsteadt v. IRS, 729 F.2d 998 (5th Cir. 1984).

62 Long v. IRS, 742 F.2d 1173 (9th Cir. 1984).

63 Currie v. IRS, 704 F.2d 523 (11th Cir. 1983).

64 Church of Scientology of Cal. v. IRS, 792 F.2d 146 (D.C. Cir. 1986), *aff'd,* 484 U.S. 9 (1987).

Circuit in *Barney,*[65] and the Tenth Circuit in *De Salvo.*[66] The Second Circuit in *Kuzma* [67] and the Fourth Circuit in *Willard*[68] have also applied the FOIA to review I.R.C. § 6103 nondisclosure.

A minority position first evinced in the 1979 District Court for the District of Columbia case of *Zale v. IRS*[69] has met with some approval in the Sixth[70] and Seventh Circuits[71] as well as certain lower district courts.[72] According to these courts, § 6103 is self-governing and not subject to review under the FOIA. Deemed self-governing, great deference should given to § 6103's nondisclosure provisions, and review should be made using the arbitrary and capricious standard.[73]

Zale concerned a taxpayer's attempt to inspect government documents relating to an ongoing investigation.[74] The court held that the FOIA was not applicable to I.R.C. § 6103.[75] In reaching this decision, the court noted that § 6103 was enacted within a few weeks of the amendment of the FOIA.[76] According to the court, statutory construction demands that an attempt be made to construe statutes harmoniously where reasonable.[77] Since the statute made no mention of the FOIA, despite Congress being clearly cognizant of it at the time of its enactment of § 6103, and since § 6103 is an elaborate provision which on its face attempts to balance reasonable expectations of privacy with the need for disclosure, the court held that it could not read the application of the FOIA into the statute.[78]

4. Nature of Review

Despite the presence of the FOIA de novo review requirement, early cases suggest that courts merely accepted the Service's alleged rationale in determining if nondisclosure would be upheld. In the landmark case of *Long,* the clear need to

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65 Barney v. IRS, 618 F.2d 1268 (8th Cir. 1980) (dictum).

66 De Salvo v. IRS, 861 F.2d 1217 (10th Cir. 1988).

67 Kuzma v. IRS, 775 F.2d 66 (2nd Cir. 1985).

68 Willard v. IRS, 776 F.2d 100 (4th Cir. 1985).

69 Zale v. IRS, 481 F.Supp. 486 (D.D.C. 1979).

70 White v. IRS, 707 F.2d 897 (6th Cir. 1983).

71 King v. IRS, 688 F.2d 488 (7th Cir. 1982).

72 Green v. IRS, 556 F. Supp. 79 (N.D. Ind. 1982), *aff'd,* 734 F.2d 18 (7th Cir. 1984); Meyer v. Department of Treasury, 1982 WL 1699 (W.D. Mich. Oct. 2, 1982); Goldborough v. IRS, 1984 WL 612 (D. Md. May 10, 1984).

73 *Green,* 556 F. Supp. at 83-84.

74 Zale v. IRS, 481 F. Supp. 486, 487 (D.D.C. 1979).

75 *Id.* at 489.

76 *Id.* at 488.

77 *Id.*

78 *Id.* at 488-89.

examine the propriety of Service allegations by thoroughly reviewing the returns or return information involved became clearer.[79]

Long was a Ninth Circuit decision overturning a lower district court decision which had held that computer tapes and other records prepared by the IRS Taxpayer Compliance Measurement Program (TCMP) were exempt from FOIA disclosure.[80]

According to the Ninth Circuit, judicial review involves more than simply accepting and relying on the agency's own findings and representations.[81] If it were otherwise, the same problem that led to enactment of the FOIA would continue unabated leaving agencies with discretion as to what information to dis close.[82] In keeping with this view, the court held nondisclosure subject to review under the FOIA standard rather than the arbitrary and capricious standard.[83]

In rejecting the approach used in *Zale,* the court noted that neither the statute nor the legislative history suggests that § 6103 operates independently of the FOIA, and that several other courts had held § 6103 to be a statute falling within the FOIA exemption provisions.[84]

While the court's making of a separate inquiry into the propriety of nondisclosure seems needed, it is necessary to determine just what it is that should be reviewed. 5 U.S.C. § 552(a)(4)(B) provides that an in camera inspection be made. Clearly in many instances, an in camera inspection is not practical given limitations on judicial resources, the time involved, and the large number of documents often in dispute. Thus the requirement has been tempered by courts' acceptance of alternative means revealing the substance of the documents and the related rationale for nondisclosure. Clearly, the mere making of an affidavit by IRS officials or personnel expressing but conclusory statements as to the need for nondisclosure is inadequate. An acceptable middle ground, however, is the submission of a *Vaughn* index or something of like nature.[85]

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79 Long v. IRS, 742 F.2d 1173, 1178 (9th Cir. 1984).

80 TCMP is a statistical study measuring the level of taxpayer compliance with the tax law and is useful in the Discriminant Function (DIF) system used to identify taxpayers for potential audit. Under DIF a computer checks the taxpayer's return and accords it a score based upon examination potential. Certain returns are then reviewed manually in order to choose returns to be examined. Depending upon the problems detected on an an examined return the return will then be sent to an I.R.S. Service Center or the I.R.S. district office. Prentice Hall 1991 Federal Tax Course 1344-1345.

81 *Long,* 742 F.2d at 1182-83.

82 *Id.* at 1180-81.

83 *Id.* at 1181-82.

84 *Id.* at 1178.

85 Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974) (holding that a reasonably detailed affidavit describing the documents and facts sufficient to enable the court to make an independent assessment of the government's claim of examption may be acceptable). *See also,* Church of Scientology of Cal. v. U.S. Dept. of Army, 611 F.2d 738 (9th Cir. 1979).

A *Vaughn* Index is a submission satisfying the following criteria:

1) The index should be contained in a single document complete in itself;

2) The index must adequately describe each withheld document or deletion from a released document; and

3) The index must state the exemption claimed for each withheld document or deletion and explain why the exemption applies.[86]

As expressed in *Vaughn v. IRS,*[87] absent a *Vaughn* index, affidavits or documentation must be submitted at least comparable to a *Vaughn* index to enable the reviewing court to make a decision.

5. The Haskell Amendment

An issue which has surfaced in recent litigation concerns application of § 6103(b)(2), otherwise known as the Haskell Amendment.[88] According to this section, return information does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.[89] Interpretation of this provision has been problematic. For example, does it mean that redaction of clearly identifying language will generally be sufficient to cause data to fall outside of the § 6103 nondisclosure language? Or, taken literally, can the language be construed so that little information can be disclosed due to the possibility that an informed requester could identify a given taxpayer from the information given? The legislative history of the amendment gives little guidance.

According to Senator Haskell, the purpose of the amendment was to insure that statistical studies and other compilations of data "prepared by the IRS and disclosed to it by outside parties will remain subject to disclosure as under the law extant at the time of enactment."[90] Courts viewing the matter have come to different conclusions. In some instances the provision has been seen as opening the door to widespread disclosure after deletion of clearly identifying language and in others as requiring IRS reformulation of return information in a manner so that taxpayer identification can not be ascertained.[91]

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86 *Rosen,* 484 F.2d at 827.

87 Vaughn v. United States, 936 F.2d 862 (6th Cir. 1991); Osborn v. IRS, 754 F.2d 195 (6th Cir. 1985).

88 I.R.C. § 6103(b)(2) (1992).

89 *Id.*

90 *See* Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520, 122 CONG. REC. 24012 (1976).

91 Neufeld v. IRS, 646 F.2d 661 (D.C. Cir. 1981); King v. IRS, 688 F.2d 488 (7th Cir. 1982).

Qualification of the scope of the Haskell Amendment was made by the amendment of I.R.C. § 6103(b) in the Economic Recovery Tax Act of 1981 (ERTA).[92] The ERTA amendment was largely enacted out of concern that the *Long* decision could serve to undermine the Service's ability to conduct audits and enforce the tax laws.[93] According to this amendment, "nothing . . . shall be construed to require disclosure of the standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.[94]

Further clarity as to the scope of the Haskell Amendment was finally provided by the Supreme Court decision in *Church of Scientology.*[95] In *Church of Scientology,* the Court held that the Haskell Amendment should be read restrictively, for, if mere deletion of identifying language were sufficient to allow release of documents, such expansive reading would be awkward in light of the language of the amendment and at odds with the legislative history surrounding the amendment.[96] In addition, according to the Court, where substantial editing of the records would be necessary to prevent identification, the resulting records could be viewed as constituting new records which need not be disclosed.[97]

6. Disclosure of Taxpayer Identifying Data

The Service has had great success in maintaining the confidentiality of certain records and data such as: information clearly identifying the taxpayer;[98] memoranda, opinions, and interviews of third parties related to an ongoing criminal investigation of the taxpayer;[99] and returns of third parties.[100] Nondisclosure of such information has typically been grounded upon the need to avoid impairing an ongoing investigation. For example, the revelation of what inculpatory evidence exists or the identity of a prospective witness or informant could well lead to the alteration, destruction or removal of evidence and the intimidation or harming of witnesses and informants.

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92 H.R. REP. NO. 201, 97th Cong. 1st Sess. 238 (1981); H.R. REP. NO. 215, 97th Cong. 1st Sess. 195 (1981).

93 *Id.*

94 I.R.C. § 6103(b)(2) (1992).

95 Church of Scientology v. IRS, 484 U.S. 9 (1987).

96 *Id.* at 15. (holding that the legislative history indicates that the amendment was largely enacted to insure disclosure of statistical studies and compilations of data (not identifying particular taxpayers) for research purposes as existed at the time of enactment).

97 *Id.* at 16.

98 *Id.*

99 Chamberlain v. Kurtz, 589 F.2d 827 (5th Cir. 1979); Currie v. IRS, 704 F.2d 523 (11th Cir. 1983); Linsteadt v. IRS, 729 F.2d 998 (5th Cir. 1984); Willard v. IRS, 776 F.2d 100 (5th Cir. 1985).

100 DeSalvo v. IRS, 861 F.2d 1217 (10th Cir. 1988).

The extent to which a third party requester can obtain the disclosure of taxpayer identifying data in the face of Service denial was recently dealt with in the case of *Aronson.*[101] Upon first hearing the United States District Court for the District of Massachussets held in favor of the requester only to be reversed by the First Circuit Court of Appeals.[102]

In *Aronson,* the requester, an attorney, sought release of entire files of taxpayers to whom the IRS owed a refund but had been unable to deliver the refund checks.[103] These files included the names, last known addresses, identification numbers, and amounts of refund due.[104] The requester desired the information in order to try to trace the taxpayers entitled to refunds and collect a commission (contingent fee) for helping them collect a refund.[105] The IRS claimed nondisclosure pursuant to I.R.C. § 6103 and the third and sixth FOIA exemptions.[106]

The taxpayer claimed that the information should be released under I.R.C. § 6103(m)(1).[107] Section 6103(m)(1) gives the Secretary discretion to disclose taxpayer identity to the "press and other media" in order to notify persons entitled to tax refunds when the Secretary, despite reasonable effort and the lapse of time, has been unable to locate such taxpayers.[108]

In response to this claim, the IRS asserted that the presence of its discretion made the matter unreviewable.[109] The district court, nonetheless, subjected the case to de novo review under the FOIA, and found that the IRS had not met its burden of proof.[110] In the court's eyes, Congress' allowing disclosure in the case of unclaimed refunds reveals congressional belief that in certain circumstances the public interest in providing tax refunds outweighs privacy interests.[111]

Although the requester was not per se a member of the press or media, he essentially took on a media role of helping taxpayers attain refund claims to which they were entitled. Using alternative means to notify taxpayers of their entitlement to a refund was not unusual in light of the Service's multimedia dissemination of information, such as news releases, to notify taxpayers of their right to a refund.[112]

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101 Aronson v. IRS, 767 F. Supp. 378 (D. Mass. 1991), *aff'd in part, rev'd in part,* 973 F.2d 962 (1st Cir. 1992).
102 *Id.*
103 *Id.* at 379.
104 *Id.* at 380.
105 *Id.*
106 *Id.* at 379.
107 *Id.* at 382.
108 I.R.C. § 6103(m)(1) (1992).
109 *Aronson,* 767 F. Supp. at 383.
110 *Id.* at 384.
111 *Id.* at 392.
112 *Id.* at 393.

Since the taxpayers could not be contacted by the Service at their last known address, little invasion of privacy was considered to result from providing such information as well as the taxpayer's name.[113] Access was not permitted however to either taxpayer social security numbers because this could more readily give rise to gaining other information about the taxpayers, such as credit reports, in violation of expected privacy; similarly, access was denied regarding refund amounts.[114]

On appeal, the First Circuit Court of Appeals reversed.[115] In reversing, the court held that nondisclosure under I.R.C. § 6103(a) falls within the third statutory exemption to the FOIA.[116] In essence, with regard to the issue of dispute in *Aronson,* § 6103(a) prevents the Service from disclosing taxpayer identifying information to one other than the taxpayer to which it pertains absent particular criteria being met and the requester being a member of the press or media.[117]

With regard to these issues, the court found that the requester fell outside of the scope of what would commonly be considered press or other media.[118] The court found that the IRS had acted within its power and that where an agency denies disclosure pursuant to the third exemption, denial should be generally respected and not subjected to de novo review.[119] According to the court, this position is in keeping with the legislative history which gives priority to the confidentiality of tax data rather than to its disclosure.[120]

Issues of Tomorrow

Several issues continue to exist regarding the FOIA and its application. These range from procedural issues concerning the form of request cost and sanctions for agency noncompliance to such matters as defining what constitutes a reasonable search. Three of the most significant emerging issues concerning the FOIA are:

1) What standard should apply in reviewing governmental nondisclosure under I.R.C. § 6103?

2) How should taxpayers' expectations of privacy be balanced against the public benefits derived from disclosure under the FOIA? and

113 *Id.*
114 *Id.* at 388.
115 Aronson v. IRS, 973 F.2d 962 (1st Cir. 1992).
116 *Id.* at 964.
117 *Id.* at 967.
118 *Id.*
119 *Id.*
120 *Id.* at 966.

3) How should the FOIA be applied in an age of growing use of computer technology in maintaining governmental records?

1. Standard of Review

In order to prevent forum shopping and provide equity and consistency, the establishment of a uniform standard of review is desirable. It is contended that the FOIA de novo standard be the controlling standard of review of nondisclosure under I.R.C. § 6103. At present, the majority of courts which have examined the issue have held that the FOIA de novo standard of review should be controlling. The minority position reflected in *Zale*[121] appears implicitly rejected by the language of the Code. Congress, in amending I.R.C. § 6103 in response to *Long*,[122] revealed its awareness of the case law developing with regard to the FOIA and its willingness to engage in statutory enactments where it deemed them appropriate. The absence of any language in § 6103 regarding the standard of review suggests that Congress did not want § 6103 to be viewed as independent of the FOIA. Applying § 6103 in a manner consistent with the FOIA is in keeping with the rule of statutory construction which provides that absent clear conflict statutes should be interpreted as harmonious with each other.[123] In addition, adoption of the minority view poses a major threat to the utility of the FOIA, as it would enable governmental agencies to withhold disclosure of information requested under the FOIA by pointing to a statute or adminstrative rule with such nondisclosure only being overturned if deemed arbitrary.

2. Privacy and Disclosure

As reflected by the *Long*[124] decision and its aftermath, conflict exists between the FOIA's objective of increasing public access to information concerning governmental policies and practices and the need of agencies to keep certain information confidential in order to execute effectively their duties. In applying the FOIA in the tax area, additional tension exists in complying with requested full disclosure under the FOIA due to the fact that a significant amount of the information maintained by the IRS relating to particular taxpayers has been acquired pursuant to an expectation of privacy. In the tax area there is no means of assuring complete confidentiality. Even information such as letter rulings which delete names and social security numbers can result in others being able to identify the

121 Zale v. IRS, 481 F. Supp. 486 (D.D.C. 1979).

122 Long v. IRS, 742 F.2d 1173 (9th Cir. 1984).

123 Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1140 (1992).

124 *Long*, 742 F.2d 1173.

taxpayer to whom the ruling relates from the facts, and possibly discover information concerning the taxpayer, his family, and his business and financial situation.

The *Aronson*[125] case raises questions concerning how the objectives of the FOIA can be balanced with the protection of the taxpayer's privacy. The district court's approach in *Aronson* opens the door to third-party requesters' gaining of information about particular taxpayers where the request is based upon an alleged positive purpose. While the court limited the information to names and last known addresses, even releasing this information can be offensive and lead to harrassment. Through this information insight into the lifestyle and apparent socio- economic class of the named party may be acquired. The information can lead to physically investigating the address and attempts to gather information from neighbors of the taxpayer. Although, according to the court, the invasion of privacy was nominal due to people generally being listed in the telephone directory, this seems an inadequate examination into the potential harm. Not only does the information provide the requester with the ability to pry into facts and a basis to approach the named person, but it also is particularly offensive where the person has essentially pronounced his desire for privacy by having an unpublished address or telephone number. The reversal by the First Circuit seems correct, but still gives too much discretion to the Service to deny disclosure without confronting to what extent nondisclosure under the FOIA should be based upon privacy and how privacy should be defined.

In balancing the concerns of privacy and disclosure, courts should exercise particular caution in allowing the disclosure of information which clearly identifies a particular taxpayer without closing the door on giving due consideration to legitimate requests for information.

3. The FOIA in the Electronic Age

Increasingly tax data are maintained by the government through the use of computer technology and electronic records. The FOIA does not expressly state how it should be applied in light of these innovations. Compliance with the FOIA in the new technological age will likely require significant time, effort, and expense and the development of certain software programs. These programs will be necessary not only to locate requested data, but to produce such data with appropriate deletions. A recent Department of Justice survey reveals[126] that a dominant attitude among governmental agencies is that disclosure under the FOIA should not be

125 Aronson v. IRS, 767 F. Supp. 378 (D. Mass. 1991), *aff'd in part, rev'd in part,* 973 F.2d 962 (1st Cir. 1992).

126 Office of Information and Privacy, Department of Justice, *Department of Justice Report on "Electronic Record" FOIA Issues: Part I,* FOIA Update (note that the report was issued in several installments during 1990). *See also* Sean E. Andrussier, *The Freedom of Information Act in 1990: More Freedom for the Government; Less Information for the Public,* 1991 DUKE L.J. 753, 789-99.

applicable to data maintained in electronic form. According to this survey, the agencies contend:

> 1) Data maintained in electronic form does not constitute agency records for purposes of the FOIA; and
>
> 2) The FOIA requires that a reasonable search be made for data which must be disclosed under the FOIA, and that a reasonable search will not produce data maintained in electronic form.

The legislative history of the FOIA indicates that, although Congress recognizes that different search and retrieval techniques must be developed to comply with the FOIA in light of technological change, governmental agencies must still comply with the general provisions of the FOIA.[127] At present, two bills – H.R. 2773 and S. 1430 – have been introduced to clarify the scope of the FOIA, and expressly extend its provisions to information kept on computer technology, tapes, or other electronic media.[128] This approach appears necessary to avoid having the FOIA lose its vitality; were it otherwise, most data would eventually not be subject to disclosure merely due to their being maintained in electronic form.

CONCLUSION

Over its twenty-five-year history, the FOIA has been the subject of both amendment and controversy. During this period, as application of the FOIA has been examined in a wider variety of fact patterns, the statute's use and construction has become increasingly clearer. The FOIA has been useful in opening the door to statistical data, nonidentifying data, rulings, TAMs, procedures, and policies. In contrast, it has proven of little usefulness as a tool in expediting discovery of an ongoing investigation. As reflected by the issues emerging with regard to the application of the FOIA in the tax area, the further evolution of the FOIA promises to be both exciting and intriguing.

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127 *House Comm. on Government Operations, Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview*, H.R. REP. No. 560, 99th Cong., 2d Sess. (1986); *U.S. Cong. Office of Technology Assessment, Informing the Nation: Federal Information Dissemination in an Electronic Age* (1988). *See also* H.R. 3695, 101st Cong., 2d Sess. (1990).

128 *See* 138 CONG. REC. S. 8973 (1991); 137 CONG. REC. H. 1726, 102d Cong. 1st Sess. (1991).