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SCOPE OF DISCLOSURE OF INTERNAL REVENUE COMMUNICATIONS AND INFORMATION FILES UNDER THE FREEDOM OF INFORMATION ACT

Recent decisions\(^1\) applying the Freedom of Information Act (FOIA)\(^2\) to various administrative and policy materials and information files of the Internal Revenue Service have eroded the previously privileged status of many IRS documents.\(^3\) The FOIA mandates disclosure of federal agency records to "any person" upon request,\(^4\) and further requires that certain materials be published in the Federal Register\(^5\) and that certain others be made

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\(^{3}\) Prior to the 1974 amendment, § (a) (3) of the FOIA provided in part:

Except with respect to the records made available under [§ 552(a)(1) and (2)], each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person.

5 U.S.C. § 552(a)(3) (1967) (emphasis added). The amendment substituted the following language:

Except with respect to the records made available under [§ 552(a)(1) and (2)], each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.


\(^{4}\) 5 U.S.C. § 552(a)(1) (1967) provides in part:

Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organizations and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
available for public inspection and copying,\(^6\) unless the records or materials fall within one of nine specified exemption provisions.\(^7\)

\(^6\) 5 U.S.C. § 552(a)(2) (1967) provides in part:

Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public, unless the materials are promptly published and the copies offered for sale.

\(^7\) Prior to the 1974 amendment, § (b) of the FOIA stated that:

This section does not apply to matters that are —

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

5 U.S.C. § 552 (b) (1967). Two exemptions were rewritten by the 1974 amendment. The following language replaced § (b)(1):

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.

Pub. L. No. 93-502, § 2(a) (Nov. 21, 1974), amending 5 U.S.C. § 552(b)(1) (1967). For cases construing the statute prior to the amendment, see note 87 infra. Section (b)(7) was replaced by the following provision:

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a
The IRS is a federal agency within the meaning of the Act. However, the boundaries of disclosure of IRS files and materials under the Act remain under dispute.

This article will discuss the proper scope of disclosure under the Freedom of Information Act of the files and administrative and policy materials of the IRS, with particular attention to the following currently contested issues: (1) the extent to which IRS guideline documents and private letter rulings are subject to disclosure; (2) the proper scope of the FOIA exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" as applied to the IRS; and (3) the scope of the exemption for "investigatory records compiled for law enforcement purposes" as applied to the IRS.

I. BACKGROUND

Each federal agency has adopted its own interpretation of the FOIA in applying the Act to its operations. The broad language of the statute and the disparities between the final Senate commit-

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9 Private letter rulings are letters written to taxpayers in response to their request for an opinion on the tax effect of a specific transaction. Private rulings are of two types: "letter rulings" issued by the Office of the Assistant Commissioner (Technical) in Washington, which treat novel cases, and "determination letters" issued by a district director, applying previously announced interpretations. Only about 600 of the approximately 26,000 letter rulings issued each year are published in the Internal Revenue Bulletins. See generally J. CHOMMIE, THE LAW OF FEDERAL INCOME TAXATION 862-66 (2d Ed. 1973).


tee report\textsuperscript{13} and the final House committee report\textsuperscript{14} left many problems of interpretation,\textsuperscript{15} several of which directly concern the IRS.\textsuperscript{16}

After enactment of the FOIA in 1966, spokesmen for the IRS construed its provisions narrowly, relying on qualifying language in the House report not present in the Senate report.\textsuperscript{17} Only limited changes were made in the Service’s disclosure policy. The regulations implementing the FOIA\textsuperscript{18} provided for inspection upon request of one type of record not previously available.\textsuperscript{19} Final adjudications in alcohol and tobacco cases were added to those materials which were already being published in the Federal Register.\textsuperscript{20} A heavily-edited version of the Internal Revenue Manual was placed in IRS reading rooms.\textsuperscript{21} However, the IRS contended from the outset that its private letter rulings, "manuals, handbooks, policy statements, and instructions [to staff]," internal communications, and materials both factual and interpretative in its files on taxpayers were privileged.\textsuperscript{22} This followed in the long-

\textsuperscript{13} S. REP. NO. 89-813, 89th Cong., 1st Sess. (1965) [hereinafter cited as 1965 S. REP.].
\textsuperscript{14} H. R. REP. NO. 89-1497, 89th Cong., 2d Sess. (1965) [hereinafter cited as 1965 H. REP.].
\textsuperscript{15} Davis, The Information Act: A Preliminary Analysis, 34 U. CHI. L. REV. 761, 762 (1967).
\textsuperscript{16} Among these issues were: whether private letter rulings are "interpretations which have been adopted by the agency" within the meaning of the FOIA, \textit{id.} at 773-74; whether "interpretations" include decisions to investigate, litigate, or settle, \textit{id.} at 777; whether IRS audit guidelines are "staff manuals and instructions" within the meaning of the FOIA, \textit{id.} at 779; what are "internal personnel rules and practices," \textit{id.} at 785-86; and the scope of the exemptions for "inter-agency memorandums" and for "investigatory files," \textit{id.} at 794.
\textsuperscript{17} Uretz, Freedom of Information and the IRS, 20 ARK. L. REV. 283 (1967); Uretz, Remarks before the A.B.A. Section of Taxation, Honolulu, Hawaii, August, 1967, 21(1) TAX LAWYER 17 (1967); Panel Discussion on Freedom of Information Act, 20(3) TAX LAWYER 43 (1967).
\textsuperscript{19} Comments submitted on or after August 2, 1967, on proposed regulations, except as to any comment or portion which the submitter specifically requests be treated as confidential. 26 C.F.R. § 601.601(b) (1974).
\textsuperscript{20} Schmidt, Freedom of Information Act and the Internal Revenue Service, 20 SO. CAL. TAX INST. 79, 87 (1968). This article describes procedures the IRS adopted for disclosure of information under the FOIA and lists IRS materials published in the Federal Register and otherwise routinely made available to the public under the Act.
\textsuperscript{22} Uretz, Freedom of Information and the IRS, 20 ARK. L. REV. 283, 287 (1967).
standing tradition of IRS resistance to forced disclosure.\textsuperscript{23} Overall, the FOIA had little immediate effect on the extent of IRS disclosure to the public.

Tax law practitioners and commentators disagreed with the IRS position but recognized that the interpretative problems with the FOIA referred to above made it difficult to determine the Act's applicability to the materials which the IRS protected.\textsuperscript{24} Litigation inevitably followed.\textsuperscript{25} IRS reluctance to make materials available under the FOIA drew strong criticism from the House subcommittee which investigated the administration of the Act by the federal bureaucracy in 1972.\textsuperscript{26} The authority of the original House report,\textsuperscript{27} on which the IRS had based its interpretation, has been

\textsuperscript{23} IRS claims of privilege antedate even the present income tax. For example, an early Internal Revenue regulation required collectors of federal revenues not to disclose their files to anyone. A Kentucky state court ordered an excise tax collector jailed for contempt for refusing to disclose information concerning bonded whiskey, which Kentucky wanted to subject to a property tax. The Supreme Court upheld the regulation under a statute (repealed in 1958) which stated that heads of departments could make regulations for the "custody, care and preservation of their records." Boske v. Comingore, 177 U.S. 459 (1900).


\textsuperscript{25} As one district court remarked:

Based upon the number of reported decisions . . . the Internal Revenue Service presently holds the track record as the most reluctant bureaucratic dragon in its claims of confidentiality, but other agencies are making a yeoman's effort to catch up.


\textsuperscript{26} H.R. REP. NO. 92-1419, 92nd Cong., 2d Sess. 34 (1972) [hereinafter cited as 1972 H. REP.]:

Testimony by Mr. Donald O. Virdin, Chief, Disclosure Staff, Office of the Assistant Commissioner (Compliance), Internal Revenue Service (IRS) and that of Mrs. Charlotte T. Lloyd, Assistant General Counsel, Treasury Department covered some of the most serious cases of bureaucratic abuses uncovered during the subcommittee's investigation of the administration of the Freedom of Information Act . . . .

The list provided by IRS for the hearing record which summarizes the types of requests received under the FOI Act since July 1967, is a revealing insight into the impact which the act has on day-to-day activities of a Federal agency. Almost half of the requests to IRS were denied. In addition, many of the requests recorded in the list were for copies of printed handbooks or manuals available in the public reading room, so that the denial record on substantive requests under the act is even higher than the percentages show (citations omitted).

\textsuperscript{27} Cf. notes 13-16 and accompanying text supra.
rejected in the courts. The Attorney General's Memorandum interpreting the FOIA, which had favored the House report and which supported the IRS position, was criticized as overly restrictive by the investigating subcommittee. As yet, however, no definitive standards for availability of IRS materials have been offered.

II. KEY RECENT DECISIONS

The blanket protection originally invoked by the IRS under the FOIA has been partially removed by the courts. Strong attacks have been made on the nondisclosure of unpublished private letter rulings and the Internal Revenue Manual.

A. Private Letter Rulings

The District of Columbia Circuit Court of Appeals affirmed the District Court's determination in Tax Analysts and Advocates v. Internal Revenue Service that unpublished private letter rulings are "interpretations" of tax law adopted by the IRS, within the meaning of the FOIA, which must be made available to the public. The lower court holding, which is fully discussed in the literature, extended availability to technical advice memorandums as well. The Court of Appeals refused to compel production of the latter on the ground that, since the memorandums deal with individual tax returns, they are protected by statutes preventing disclosure of information on returns. The District Court held

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28 The House report was published after the Senate had passed its version of the FOIA, which was enacted intact by the House. Since only the Senate report was considered by both Houses of Congress, the Senate report is the better indicator of legislative intent when the two reports conflict. Benson v. General Services Administration, 289 F. Supp. 590, 595 (W. D. Wash. 1968), aff'd 415 F.2d 878 (9th Cir. 1969); Consumers Union of the United States v. Veterans Administration, 301 F. Supp. 796,801 (S.D.N.Y. 1969), appeal dismissed 436 F. 2nd 1363 (2d Cir. 1971); K. Davis, ADMINISTRATIVE LAW TREATISE § 3A.2, 116-117 (Supp. 1970). The origins of the more restrictive provisions of the House report lie in the questionable attempt by the House Government Operations Committee to water down the FOIA, to avoid a threatened Presidential veto, without altering the language of the bill as passed by the Senate. Statement of Benny Kass, Attorney at Law, in Executive Privilege, Secrecy in Government, Freedom of Information, 1973 Hearings, vol. 2, 122-29. (1973).

29 See note 8 and accompanying text supra.

30 1972 H. REP. at 64-65.


34 362 F. Supp. 1298, 1310. Technical advice memorandums are responses from Washington to requests submitted by a district director for resolution of issues raised by audited tax returns.

35 505 F.2d 350, 354.
that private letter rulings were not exempted from disclosure as "trade secrets and confidential financial information,"36 or "matters specifically exempted from disclosure by statute,"37 or "intra-agency memorandums."38 Both courts found that nondisclosure of letter rulings created a secret body of law to which taxpayers did not have equal access.39 The public policy behind the FOIA—the prevention of the development of secret federal agency law—required that agency interpretations of law be disclosed.40

In its appeal the IRS did not contest either the finding that private letter rulings and technical advice memoranda are adopted interpretations of law within the meaning of the FOIA or the finding that the exemptions for inter-agency memorandums and for trade secrets and confidential financial information do not bar their disclosure.41 The Service appealed the finding that letter rulings and technical advice memorandums were not "specifically exempted from disclosure by statute,"42 citing two statutes protecting the confidentiality of tax returns,43 and sought the protection of the court's equitable powers.44 The Court of Appeals disagreed with this finding. 505 F.2d 350, 355 (dictum).

The IRS argument that letter rulings are not interpretations because they are not precedent was unequivocally rejected by the District Court:

It matters not that the interpretation is never again cited or relied upon by the agency or anyone else, for this cannot obliterate the fact that the interpretation was once adopted by the agency and thereby came within the express terms of the Freedom of Information Act.

362 F. Supp. 1298, 1303. The Court of Appeals agreed, stating that:

It is well established that information which either creates or provides a way of determining the extent of substantive rights and liabilities constitutes a form of law that cannot be withheld from the public.


505 F.2d 350, 352-53. The court questioned the IRS decision not to appeal the adverse ruling on the trade secrets and "commercial or financial information" exemption. 505 F.2d 350, 355. But the exemption is of limited protective value to IRS documents. See Part III C 3 infra.

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42 505 F.2d 350, 352.


44 505 F.2d 350, 352.
any powers under the FOIA to refuse disclosure on equitable
grounds, and held that private letter rulings are not exempt from
disclosure by statute, since a letter ruling is not part of a tax
return. By announcing that it will require waivers of
confidentiality from those seeking private letter rulings in the
future, the IRS has indicated that it will not appeal the Court of
Appeals ruling.

B. Internal Revenue Manual

A portion of the Internal Revenue Manual was made public
soon after the effective date of the FOIA. Other portions of the
Manual have been released voluntarily by the IRS, either pursuant
to litigation (as evidence) or upon requests under the FOIA.
Federal courts have upheld demands pursuant to the FOIA for
production of specific unreleased portions of the Manual in Long v. Internal Revenue Service and in Hawkes v. Internal Revenue Service. Courts in both cases ruled that the Manual constitutes an "administrative staff manual" within the meaning of the Act. In Hawkes, the court held that the exemption for "internal personnel rules and practices" was inapplicable to the Manual, reasoning that the exemption should be construed as pertaining to employer-employee relations. The Long court rejected both the claim that the Manual was exempt as an "intra-agency memorandum" and the contention that the Manual constituted "internal personnel

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45 505 F.2d 350, 355.
46 505 F.2d 350, 354-55.
47 P-H 1974 FEDERAL TAXES REPORT BULLETIN 60, 410.
48 The manual was described by a federal court as follows:
   The Manual guides agents in negotiating with the public and promotes uniformity
   by detailing information and instructions pertaining to the processing and technical
   aspects involved in the drafting, processing, reviewing, and signing of closing agreements.
49 See Soboloff, supra note 21, at 130.
51 349 F. Supp. 871 (W.D. Wash. 1972). See also 1972 H. REP. at 23 (congressional
criticism of IRS withholding of documents requested in this case).
52 467 F.2d 787 (6th Cir. 1972).
55 467 F.2d 787, 796. See notes 92-94 and accompanying text infra.
rules and practices," emphasizing the FOIA's guarantee of the public's right of access to federal agency procedures affecting members of the public.\(^{57}\) According to the court, any prejudice to the government was outweighed by the public's right to have access to these procedures.\(^{58}\)

The *Long* and *Hawkes* decisions freed specified portions of the Manual only. These cases establish that Manual portions specifiable by the seeker are subject to disclosure upon request. But the FOIA requires that agencies make administrative staff manuals available for public inspection and copying.\(^{59}\) This requirement extends to "interpretations" adopted by an agency as well,\(^{60}\) and therefore also applies to previously unpublished private letter rulings.\(^{61}\) The FOIA also requires the publication and distribution of current indexes to all staff manuals, instructions to staff that affect the public, and adopted interpretations of law, from 1967 forward, unless such publication would be unnecessary and impracticable.\(^{62}\)

### III. APPLYING THE FOIA

Prior to the decisions in *Tax Analysts*, *Long*, and *Hawkes*, it was apparent that the FOIA would have to be given a broader scope than that provided by the original IRS interpretation if it were to achieve meaningful disclosure for taxpayers.\(^{63}\) The results in these cases, and the criticisms of the IRS position discussed above,\(^{64}\) strongly suggest that reinterpretation is warranted. The decisions applying the FOIA to other federal agencies, and to the IRS, provide a detailed and reliable outline for such a reinterpretation.

**A. FOIA Status of IRS Materials**

For required disclosure under the FOIA, Internal Revenue files and materials must fall within one of the three subdivisions of § (a)

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\(^{57}\) 349 F. Supp. 871, 874.
\(^{58}\) 349 F. Supp. 871, 875.
\(^{61}\) See note 31 and accompanying text supra.
\(^{64}\) See notes 24-28 and accompanying text supra.
(2) of the Act or constitute records within the meaning of § (a) (3). Although the Hawkes and Long courts upheld requests for production of certain materials in addition to the specified portions of the Manual, neither court expressly identified such materials as "administrative staff manuals" under § (a) (2) (C). Subsection (a) (2) (B) "interpretations" have to date been held to apply to private letter rulings but not to technical advice memorandums. However, it is arguable that these classifications also apply to any similar IRS documents which offer guidelines or instruction to staff in administering tax laws, or which apply or interpret tax law. If materials do not fall within § (a) (2) classifications, they are disclosable as "records" under § (a) (3), in any case, unless an exemption provision applies. The FOIA in effect creates a liberal disclosure requirement subject only to the nine stated exemptions.

B. Procedure

Requests for information or documents must comply with certain procedural requirements. Prior to the 1974 amendment, a seeker of IRS materials needed to name the particular documents sought; requests for all materials on a specific issue were denied as too broad. A seeker under present law need only supply a

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65 The subdivisions are: § (a)(2)(A) final opinions or orders made in the adjudication of cases; § (a)(2)(B) statements of policy and interpretations adopted by an agency; and § (a)(2)(C) administrative staff manuals and instructions to staff that affect a member of the public. 5 U.S.C. § 552 (1967).
68 See text accompanying note 31 supra.
69 1965 S. REP. at 10:
   The purpose of this subsection [§ (a)] is to make it clear beyond doubt that all materials of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions in [§ (b)].
The House report is substantially identical. 1965 H. REP. at 11.
"reasonable description" enabling the agency to identify and locate the materials sought. Seekers of materials must exhaust IRS administrative procedures before production will be compelled by the district courts. A court may not use equitable powers, rather than a stated FOIA exemption, to deny production of requested IRS materials. District court orders to produce information pursuant to the FOIA are appealable by the interested agency.

Since the United States Tax Court lacks rules permitting the type of discovery which may be carried out in the district courts or in the United States Court of Claims, the FOIA is a potentially valuable collateral method of discovery for use in tax litigation. In general, a discoverant may elect to use either the FOIA, or the discovery tools of the Federal Rules of Civil Procedure, as suits his tactics. But questions of propriety arise when the discoverant proceeds with civil discovery while also suing under the FOIA.

The 1974 amendment to the FOIA granted important procedural rights to information seekers. Fees for document search and duplication are limited to the reasonable direct cost of these services. Agencies must serve answers to complaints in FOIA suits within thirty days. A successful complainant may recover

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72 Pub. L. No. 93-502, § (b)(1) (Nov. 21, 1974), amending 5 U.S.C. § 552(a) (3) (1967). See note 4 supra. The House report states that the amendment is designed to insure that a requirement for a specific title or file number cannot be the only requirement of an agency for the identification of documents. A description of a requested document would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.


75 Theriault v. United States, 503 F.2d 390, 391 (9th Cir. 1974).


reasonable attorney fees and costs of FOIA litigation.\textsuperscript{82} Arbitrary or capricious withholding of materials is subject to disciplinary action.\textsuperscript{83} Under normal circumstances, agencies must act on FOIA requests within ten working days.\textsuperscript{84}

\textit{C. The Proper Scope of the FOIA Exemptions as Applied to the IRS}

The IRS has used most of the nine exemption provisions of the FOIA to deny requests for documents. Of these nine, the exemptions for reports of agencies which regulate financial institutions\textsuperscript{85} and for geological information concerning wells\textsuperscript{86} are clearly inapplicable to the IRS. The exemption for materials classified as secret by executive order for national security reasons would rarely apply to materials in IRS possession.\textsuperscript{87}

1. \textit{Internal personnel rules and practices}—Relying on a broad interpretation of the provision found only in the House report,\textsuperscript{88} the IRS has claimed that the exemption for internal personnel rules and practices\textsuperscript{89} shields its manuals and other guideline documents.\textsuperscript{90} The \textit{Hawkes} and \textit{Long} courts, however, rejected this interpretation.\textsuperscript{91} Both decisions followed the orthodox view, adopted by federal courts from language in the Senate report,\textsuperscript{92} that the exemption pertains to employer-employee relations, not guidelines for staff in executing their assignments.\textsuperscript{93} Material sub-

\textsuperscript{82} Id., § 4(E). See 1974 H. REP. at 6208; 1974 S. REP. at 6224.
\textsuperscript{83} Id., § 4(F). See 1974 S. REP. at 6224-25.
\textsuperscript{88} 1965 H. REP. at 10; contra, 1965 S. REP. at 8.
\textsuperscript{89} 5 U.S.C. § 552(b)(2) (1967).
\textsuperscript{90} Uretz, \textit{Freedom of Information and the IRS,} supra note 17, at 287.
\textsuperscript{91} Hawkes v. IRS, 467 F.2d 787, 796 (6th Cir. 1972); Long v. IRS, 349 F. Supp. 871, 874 (W.D. Wash. 1972).
\textsuperscript{92} The Senate report gives these examples of “personnel rules”: [E]mployee use of employer’s plant and equipment, and amount of time in each working day which is to be devoted to the employer’s business and activity [and] rules as to personnel’s use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.
ject to this exemption must be related solely to such matters in order to fall within the exemption.94 Thus, this exemption blocks access only to those IRS rules and regulations pertaining to "housekeeping" and employee conduct.

2. Statutory exemptions—The FOIA provides that materials previously or subsequently protected from disclosure by statute remain protected.95 There is only limited controversy in this area. The IRS regulations list statutes which may prevent disclosure of some records.96 In a case not involving Internal Revenue materials, the federal statute making unauthorized release of confidential information by a federal officer unlawful97 was held not to bar disclosures pursuant to the FOIA.98 Technical advice memorandums, which discuss individual tax returns, may be protected99 by the statutory prohibition against disclosure of information on tax returns.100 However, a taxpayer's papers turned over to the IRS are not exempt under this statute from the taxpayer's own request for their return.101 In any case, this exemption merely preserves statutory protections from implicit repeal by the FOIA; only the previous limitations of such statutes restrict disclosure under the FOIA.102

3. Trade secrets and confidential financial information—The FOIA exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential" from disclosure.103 The IRS contention that this exemption applied to any information given to the government in confidence was rejected by the district court in Tax Analysts,104 in light of the settled doctrine that this provision exempts only materials which are either trade secrets or information obtained from a person outside

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96 26 C.F.R. § 601.701(b)(2) (1974). Prior statutes requiring and prohibiting disclosure which apply to the IRS and were unaffected by the FOIA are listed in Schmidt, supra note 20, at 84. Some dealing with information on narcotics have been repealed, but information on most tax returns remains protected. See Int. Rev. Code of 1954 §§ 6103, 6104, 6105, 6106, and 6108.
99 See text accompanying notes 31-35 supra.
102 1965 H. REP. at 10.
the agency which is commercial or financial and privileged or confidential. A claim or promise of confidentiality by the agency will not suffice. The materials must be independently confidential, based upon their contents, and entitled to a reasonable expectation of privacy. The Court of Appeals for the District of Columbia Circuit has adopted the test that commercial or financial information is confidential for purposes of this exemption to the FOIA only if disclosure of the information will either impair the government’s ability to obtain necessary information in the future or will cause substantial harm to the competitive position of the person from whom the information was obtained. However, the exemption only operates if the information sought can not be rendered confidential by deletion of names and other identifying information or portions of the materials. This judicially developed rule that materials which can be separated from exempt documents or files must be disclosed has been incorporated into the FOIA and applied to all nine exemptions. IRS records are therefore protected by this exemption only if it can be demonstrated that they are both independently confidential and not capable of being rendered anonymous.

4. Invasion of personal privacy—A closely related exemption is the one for “personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Except for information on the IRS’s own employees,
The type of information protected is "intimate details" of a "highly personal" nature. In general, this protection is not relevant to taxpayer requests for decisional or guideline documents from the IRS. Both the purposes of this exemption and of the exemption for confidential information may be served by deletion of names and other identifying data from materials released by the IRS.

5. Intra-agency "memorandums"—The IRS has invoked the FOIA exemption for "intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" against requests for its guideline documents, manuals, and policy materials. The potentially broad terms of this exemption were intended only to protect governmental personnel from routine disclosure of their exchanges of opinion and recommendations. Two restrictions which narrow and define the scope of this exemption have been developed by the courts.

The most generally accepted restriction on the scope of the exemption is that it does not apply to documents which contain fact, rather than policy or recommendations for policy. This exemp-

114 See note 96 and accompanying text supra.
115 Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 136 (3d Cir. 1974); Getman v. NLRB, 450 F.2d 670, 674 (D.C. Cir. 1971); stay denied, 404 U.S. 1204 (1971).
116 Getman v. NLRB, 450 F.2d 670, 675 (D.C. Cir. 1971). See 1965 S. Rep. at 9; 1965 H. Rep. at 11. A recent decision has held that material exempt from disclosure must be both a personnel or medical file and such that disclosure would constitute a "clearly unwarranted invasion of personal privacy." Robles v. EPA, 484 F.2d 843 (4th Cir. 1973).
118 See notes 31, 51, 52 and accompanying text supra.
tion is interpreted as permitting production up to the limits imposed by the Federal Rules of Discovery on litigants with the agencies.\(^{121}\) Since factual material and investigative reports are routinely subject to discovery,\(^{122}\) courts have held that such material is not covered by the intra-agency memorandums exemption.\(^{123}\) Also, purely factual material which is separable from the policy or recommendation portion of documents is subject to disclosure under the FOIA.\(^{124}\) Courts may apply the fact/policy test by in-camera inspection and exclude policy portions of documents from production.\(^{125}\) The fact/policy test was applied to IRS materials in both the Long\(^{126}\) and the Tax Analysts\(^{127}\) decisions.

The second limitation which courts have applied to the exemption for intra-agency memorandums is that statements of policy or interpretations of law actually adopted by an agency and docu-

\(^{121}\) FED. R. CIV. P. 26(b). The Supreme Court stated in EPA v. Mink, 410 U.S. 73, 86 (1973) that:

This language clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency.

\(^{122}\) Government documents containing legal analyses and recommendations may in some circumstances be subject to discovery, but granting discovery of such documents is not a routine matter. See, e.g., Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966).


\(^{124}\) EPA v. Mink, 410 U.S. 73, 91 (1973) (dictum); National Cable Television Ass’n v. FCC, 479 F.2d 183, 194 (D.C. Cir. 1973); Sterling Drug, Inc. v. FTC, 450 F.2d 698, 704 (D.C. Cir. 1971). This rule was explicitly incorporated into the FOIA by the 1974 amendments. See notes 7, 111 supra.


\(^{126}\) 349 F. Supp. 870, 874.

\(^{127}\) 362 F. Supp. 1298, 1309.
ments containing the basis and rationale for an agency's disposition of particular cases are outside the scope of the exemption. 128 This interpretation, which reflects the FOIA policy of eliminating secret law, 129 does not rest on previous law of federal discovery, but upon the need to read the exemption compatibly with the FOIA requirement that "statements of policy and interpretations" 130 and "staff manuals or instructions to staff that affect" the public 131 be disclosed. 132 The Long court implicitly ruled that the Manual, which it determined was a "staff manual" under the FOIA, was not exempted as an intra-agency memorandum, despite the fact that it contained rules for the disposition of cases rather than fact. 133

These restrictions have been further refined by recent decisions in the District of Columbia Circuit Court of Appeals. In Grumman Aircraft Engineering Corporation v. Renegotiation Board, 134 the court ruled that, since pre-decisional deliberations by agencies require the protection of privacy, materials composed exclusively for purposes of policy formation are exempt from the FOIA, but the court also found that those materials which reflect policy already made or communicated to the public are subject to disclosure. 135 Entirely factual material which can be separated from pre-decisional documents is also disclosable. 136 In Montrose Chemical Corporation of California v. Train 137 the court further developed the fact/policy test, holding that, since the intra-agency memorandums exemption protects the deliberative process of an agency, factual summaries prepared for an administrator by his staff for his use in decisionmaking are exempt from disclosure. 138

133 349 F. Supp. 870, 874.
135 482 F.2d at 719-20.
136 Id. at 720. See notes 109-11 supra.
138 491 F.2d 63, 66-71.
Nevertheless, once used as the basis for decision, both factual and deliberative memorandums become available under the FOIA despite the exemption.139

Thus, according to the judicially developed standards, this exemption can not shield IRS materials which are factual documents, separable factual parts of documents containing pre-decisional policy and recommendations, documents containing adopted policy or the rationale for adopted policy, guideline manuals for staff which interpret or apply tax law or instruct staff members in procedure, or documents applying law to a given case from requests for disclosure pursuant to the FOIA.

6. Law enforcement investigation files—The original language of the FOIA exempted “investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency” from disclosure.140 This exemption was successfully used by the IRS to block access to its information and documents. In the course of the litigation leading to the Long decision, a district court upheld nondisclosure of IRS files containing financial information pertaining to the taxpayer and affiliated corporations which he controlled on the ground that the files were investigatory and therefore shielded by this exemption.141 In B & C Tire Company v. Internal Revenue Service,142 a corporation’s FOIA request for return of papers it had surrendered to the IRS in the course of audit proceedings was denied on the ground that the papers had become part of an investigatory file. In Williams v. Internal Revenue Service,143 the District Court of Delaware denied a request for production of an IRS agent’s files containing schedules, workpapers, and background data used in determining the seeker’s taxable income.144 The court adopted the broad interpretation that the original investigatory files exemption merely prevented the existing federal discovery rights of litigants from being implicitly overruled by the FOIA. The effect of the Williams ruling was to deny use of the FOIA as a collateral method of civil discovery,145 unless the files were not compiled for law enforcement purposes.146

See note 7 supra.
144 345 F. Supp. 591, 593.
145 Id. at 594. Cf: note 76 and accompanying text supra.
146 345 F. Supp. 591, 594.
The *Williams* ruling followed one of the two approaches to the original investigatory files exemption which had been taken by federal courts. In several jurisdictions the original exemption was viewed as merely affirming the independent right of a litigant to use the federal discovery rules, therefore granting no greater access to investigatory files than that which existed prior to the Act.\(^{147}\) This interpretation, consistent with *Williams*, was suggested by language found only in the House report on the FOIA.\(^{148}\) The interpretation was criticized by the 1972 House subcommittee investigating agency compliance with the FOIA.\(^{149}\) Moreover, the majority of decisions adopted the narrower reading that the original exemption only prevented disclosure of records necessary for law enforcement functions; thus the FOIA was viewed as authorizing production of such materials when such production would not hinder law enforcement.\(^{150}\) Since the purpose of the original investigatory files exemption was to protect the government’s case in court, administrative records and records of past actions were not shielded.\(^{151}\) An investigation begins when inquiry departs from the routine and focuses on a particular party;\(^{152}\) therefore, the original exemption did not apply to material which, while it may alert the agency to a violation of law, was acquired essentially as a matter of routine.\(^{153}\) However, even this narrow reading of the original investigatory files exemption was subsequently broadened in scope. Courts ruled that an agency did not need to show that adjudicatory

\(^{147}\) Frankel v. SEC, 460 F.2d 813, 817 (2d Cir. 1971), cert. denied, 409 U.S. 889 (1972); Evans v. Department of Transportation, 446 F.2d 821, 824 (5th Cir. 1971), cert. denied, 405 U.S. 918 (1972); Cowles Communications, Inc. v. Department of Justice, 325 F. Supp. 726, 727 (N.D. Cal. 1971).

\(^{148}\) 1965 H. REP. at 11 states:

The [FOIA] is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings.

The Senate report contains no language of this sort and arguably supports the narrower construction of this exemption. 1965 S. REP. at 9. See note 76 supra. CF. text accompanying notes 76-78 supra.

\(^{149}\) 1972 H. REP. at 84.


\(^{151}\) Wellford v. Hardin, 444 F.2d 21, 24 (4th Cir. 1971).


\(^{153}\) Id. at 373.
proceedings were imminent, but only that the requested files were compiled for inquiry into possible violations of law, and that the exemption was available even after enforcement proceedings are terminated or no further proceedings are planned. Courts retained the requirement that substantial possibilities of law enforcement activity be anticipated by the agency undertaking the investigation and the requirement that the court determine for itself whether the exemption properly applied rather than relying upon the representations of the agencies.

Defenders of the broad scope given to the original investigatory files exemption argued that the government must be allowed to keep its investigatory procedures and techniques confidential. The need to protect the privacy both of persons investigated and of persons giving testimony was cited. It was argued that access under federal discovery rules alone best protects the government's ability to prove its case in court. However, Congress has criticized the broad interpretation of the original investigatory files exemption, since it has prevented the FOIA from achieving its intended scope.

The 1974 amendment to the FOIA replaced the original "to the extent available by law" limitation on the investigatory files exemption with an enumeration of six specific and exclusive types of investigatory files which alone are exempt from disclosure. The change strikes down the ruling in Williams and other decisions

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154 Id. at 373; Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 82 (D.C. Cir. 1974).
156 Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 82 (D.C. Cir. 1974).
159 See 1965 S. REP. at 3; Evans v. Department of Transportation, 446 F.2d 821, 823 (5th Cir. 1971), cert. denied, 405 U.S. 918 (1972); Cowles Communications v. Department of Justice, 325 F. Supp. 726 (N.D. Cal. 1971).
160 See, e.g., 110 CONG. REC. 17667 (1964) (Remarks of Senator Humphrey).
163 See note 7 supra; 1974 S. REP. at 6227.
164 See notes 143-148 and accompanying text supra.
that the FOIA grants no access to investigatory files in addition to that available to litigants under discovery rules.\textsuperscript{165} The new language also restricts even the previous narrow reading of the investigatory files exemption adopted by most courts\textsuperscript{166} to the six named exemptions,\textsuperscript{167} thus freeing routine scientific tests and procedures\textsuperscript{168} and, arguably, information files after contemplated law enforcement efforts have ended as well. Since most IRS enforcement proceedings are civil rather than criminal, the identity of IRS informants is protected by the new language, but the information they furnish to the Service is disclosable.\textsuperscript{169} Furthermore, although IRS investigative procedures and techniques are protected from disclosure, those procedures and techniques which constitute administrative staff manuals or instructions to staff that affect a member of the public (the Manual and other guideline documents of general applicability) remain subject to disclosure.\textsuperscript{170} The IRS has objected to changes in the investigatory files exemption on the ground that they would create administrative burdens and would hamper law enforcement efforts.\textsuperscript{171}

\section*{IV. CONCLUSION}

The IRS has resisted the application of the FOIA to its materials and files. However, courts are recognizing that under the FOIA many IRS materials are subject to production upon request or to public disclosure. Present interpretations of the FOIA suggest that guidelines and policy materials of general applicability to members of the public and applications of law to fact in particular cases (with identifying data omitted) should be made available to the public under the terms of the FOIA. This availability implements the FOIA's purpose of avoiding secret federal agency law. Information gathered or held by the IRS should be subject to production upon demand, except the following types of information: (1) personal facts, disclosure of which would constitute invasion of pri-

\begin{itemize}
  \item \textsuperscript{165} See 1974 S. REP. at 6227.
  \item \textsuperscript{166} See notes 150-157 and accompanying text \textit{supra}.
  \item \textsuperscript{167} See 1974 S. REP. at 6227.
  \item \textsuperscript{168} \textit{Id}.
  \item \textsuperscript{169} See 1974 S. REP. at 6227-28.
  \item \textsuperscript{170} See 1974 S. REP. at 6227-28.
\end{itemize}
vacy (but not factual material which may be rendered anonymous before release); (2) files relating to particular taxpayers and for use in current litigation or law enforcement activity; (3) opinion and policy materials relating to particular persons or issues not of general applicability or which are pre-decisional recommendations; (4) specific statutory protections. IRS efforts to make private letter rulings and the Manual available to the public should be commended. The implementation of the above-suggested standards for disclosure would constitute a major advance in accomplishing the congressional purpose of the Freedom of Information Act.

—Peter R. Spanos