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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PUBLIC.RESOURCE.ORG,
Plaintiff,
v.
UNITED STATES INTERNAL REVENUE
SERVICE,
Defendant.

Case No. [13-cv-02789-WHO](#)

**ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 46, 47

The Freedom of Information Act (FOIA) requires federal agencies to provide records in the format requested by the requester if the records are readily reproducible, absent compelling evidence of significant interference or burden. Here, the IRS objects to a request that it produce nine Form 990s to plaintiff Public.Resource.org in the Modernized E-file (MeF) format even though there is no dispute that the nine Form 990s at issue were submitted to the IRS in the MeF format and that the IRS maintains them in the MeF format. The IRS asserts that its policy of producing Form 990s only as image files complies with the FOIA and that the \$6200 cost of responding to the request for disclosure of nine Form 990s in the MeF format excuses it from complying with Public.Resource.org’s request. Based on the undisputed facts before me, I find that the IRS is required under the FOIA to produce to Public.Resource.org the small set of documents it requested in the MeF format.

BACKGROUND

On March 11, 2013, plaintiff Public.Resource.org submitted a FOIA request to defendant United States Internal Revenue Service (IRS) seeking release in Modernized E-file (MeF) format of Form 990s for nine tax exempt organizations that had been filed electronically. The IRS refused to provide the requested Form 990s in the MeF format, stating that “Form 990 data in the MeF format do not constitute a recognizable record, but rather a continuous string of numbers that

1 includes confidential return information. Our existing process for providing releasable copies of
2 Forms 990 is to convert the MeF data into a PDF format and withhold confidential return
3 information from the resulting form.” Ex. I to Complaint. The IRS explained that it did not have
4 an existing process to convert the releasable portions of the Form 990s back into MeF and for
5 those reasons was “unable to provide the requested records in MeF format because they are not
6 readily reproducible in a form” that complies with IRS requirements to redact certain information
7 from released Form 990s. *Id.*

8 Since 1998, the IRS has used its “SEIN system” to process requests for copies of Form
9 990s. Declaration of Jalyne Archibald [Docket No. 46-5], ¶ 1-3. Using SEIN, IRS staff convert
10 both paper-filed Form 990s and MeF-filed Form 990s into TIF image files; follow establish
11 protocols to redact exempt information; and then process the image files for release to requestors.
12 Archibald Decl., ¶¶ 3-5, 12-13, 16. Using SEIN to process and release to the public Form 990s –
13 which under current IRS procedures can only be produced as image files in a “raw” or searchable
14 “alchemy” format – costs the IRS approximately \$1.63 per Form 990. Declaration of Maria D.
15 Hooke [Docket No. 46-7], ¶ 6.

16 The IRS does not dispute that the requested Form 990s were e-filed in the MeF format and
17 are currently maintained by the IRS in the MeF format. However, the IRS argues that production
18 of the nine Form 990s in MeF is not “readily” or “reasonably” available because the IRS has not
19 developed protocols or trained staff to be able to redact sensitive information that is exempt from
20 disclosure in the MeF format. In order to comply with Public.Resource.org’s request and produce
21 the nine Form 990s in MeF, the IRS asserts it would have to shift significant resources – at a cost
22 of \$6200 – to develop a new protocol, train its employees, and develop the technical capacity to
23 produce the requested Form 990s with exempt information redacted. Declaration of Lisa
24 Rosenmerkel [Docket No. 46-6] ¶¶ 9-15. The IRS argues that having to undertake these extensive
25 efforts and expense demonstrate as a matter of law that production of Form 990s is not “readily
26 producible” in the MeF format and not “reasonable” under FOIA.

27 Public.Resource.org counters that the burden on the IRS to produce the Form 990s is
28 irrelevant because the IRS already maintains these documents in the exact format requested. The

1 organization also disputes the factual assertions regarding the difficulty and expense the IRS
2 would need to bear in order to comply with its discrete request for nine Form 990s in the MeF
3 format. Finally, Public.Resource.org contends that production of the information in MeF format –
4 as opposed to production as image files through SEIN – would enhance the public’s ability to
5 review and study the data contained in those Form 990s. Declaration of Carl Malamud [Docket
6 No. 48], ¶¶ 19, 32-34; Declaration of Beth Simone Noveck [Docket No. 49], ¶ 6-10; Declaration
7 of Scott Klein [Docket No. 50], ¶¶ 6-8. Production of the data in MeF format would allow
8 Public.Resource.org and other requestors to more easily review the operations of the non-profit
9 entities who submit Form 990s, but would also shed additional light on the IRS’s operations;
10 specifically how the IRS treats different non-profit entities and how well the IRS complies with its
11 statutory duties to release certain information and withhold other information about the Form 990
12 filers. Malamud Decl. ¶ 19; Noveck Decl. ¶¶ 10-13.

13 After Public.Resource.org filed suit, the IRS moved to dismiss on the ground that its
14 regulations on the production of Form 990s applied instead of the FOIA. I denied the motion to
15 dismiss, finding that the requirements of the FOIA applied to Public.Resource.org’s request. The
16 parties cross-moved for summary judgment, and I heard argument on January 14, 2015.

17 LEGAL STANDARD

18 The FOIA requires federal agencies to release all non-exempt agency records responsive to
19 a request for production. 5 U.S.C. § 552(a)(3)(A). Under the E-FOIA amendments passed in
20 1996, agencies are also required to “provide the record in any form or format requested by the
21 person if the record is readily reproducible by the agency in that form or format.” 5 U.S.C. §
22 552(a)(3)(B). Finally, “[e]ach agency shall make reasonable efforts to maintain its records in
23 forms or formats that are reproducible for purposes of this section.” *Id.* A court should afford
24 “substantial weight” “to an affidavit of an agency concerning the agency’s determination” as to
25 “reproducibility under paragraph (3)(B).” 5 U.S.C. § 552(a)(4)(B). However, this deference “does
26 not amount to a blanket exemption from judicial review of the agency’s justification for declining
27 to comply with a specific format request or failing to maintain records in readily reproducible
28 formats. . . .” *Scudder v. CIA*, 25 F. Supp. 3d 19, 39 (D.D.C. 2014).

1 MeF format and are currently maintained by the IRS in the MeF format.¹ The only question is
2 whether the fact that the IRS would need to spend \$6200 to develop protocols and train staff to be
3 able to redact exempt information from the Form 990s at issue in the MeF format before the non-
4 exempt information is produced means those Form 990s are not “readily producible” as a matter
5 of law under the FOIA.² In making that determination, I consider not only the fact that Form 990s
6 are currently maintained in MeF, but also the purported burden the IRS would face if required to
7 produce the requested nine Form 990s in MeF format after redacting exempt information.³
8 Contrary to Public.Resource.org’s position (*see* Cross-Motion [Docket No. 47] at 10, the Ninth
9 Circuit has indicated that “when an agency already creates or converts documents in a certain
10 format . . . requiring that it provide documents in that format to others does not impose an
11 unnecessarily harsh burden, *absent specific, compelling evidence as to significant interference or*
12 *burden.”* *TPS, Inc. v. United States DOD*, 330 F.3d at 1195 (emphasis added). The agency’s
13 evidence of burden, however, must be not only compelling, but also demonstrate that compliance
14 with a request would impose a *significant* burden or interference with the agency’s operation. *Id.*

15 The IRS argues that requiring it to comply with the request at a cost of \$6200 would
16 impose a significant burden and interfere with its other responsibilities. It points out that it is the

18 ¹ Therefore, the cases relied on by the IRS for the proposition that an agency need not preserve
19 records that have not been requested (*Kissinger v. Reporters Comm. for Freedom of Press*, 445
20 U.S. 136, 155 n.9 (1980); *Kim v. United States DOI*, 859 F. Supp. 2d 13, 18 (D.D.C. 2012)) and
21 need only produce records that are currently within an agency’s control (*United States DOJ v. Tax*
22 *Analysts*, 492 U.S. 136, 145 (1989); *Jones v. FBI*, 41 F.3d 238, 249 (6th Cir. 1994)) are inapposite.
23 Similarly, the IRS’s cases standing for the proposition that an agency need not engage in
24 “unreasonable searches” are likewise inapposite because here the IRS admits it maintains and can
25 easily locate the nine requested Form 990s. *But see Trentadue v. FBI*, 572 F.3d 794, 797 (10th
26 Cir. 2009) (FOIA cannot “be read to demand that an agency provide every nonexempt requested
27 document regardless of the cost of locating it”); *Nation Magazine v. United States Customs Serv.*,
28 71 F.3d 885, 892 (D.C. Cir. 1995) (requiring agency to search through 23 years of unindexed files
would impose an unreasonable burden on the agency); *Marks v. United States*, 578 F.2d 261, 263
(9th Cir. 1978) (“all-encompassing search” of the records of every field office of the FBI not
required; must search only where requestor reasonably describes records that an employee can
locate with a “reasonable amount of effort.”).

² I review the evidence of burden on the request before me, not the cost of developing software to
routinize responses to all future requests for Form 990 data. For that reason, the declarations of
Dwayne Ross that estimate the total cost of implementing new software are not relevant to my
analysis.

³ There is no dispute the various portions of the Form 990s are exempt from disclosure, including
Schedule B donor information. *See, e.g.,* Archibald Decl. ¶ 16.

1 only agency still operating under a “sequestration-level” budget and has sustained significant
2 reductions of staffing and the freezing of new IT initiatives because of lack of funds. *See*
3 Declaration of Adina Leach [Docket No. 46-2], ¶¶ 4-6. The wisdom of Congressional
4 appropriations is not an issue before me. The fact that an agency may be under significant
5 financial distress because it is underfunded does not excuse an agency’s duty to comply with the
6 FOIA. There is no evidence that the general business of the IRS or even the business of the IRS
7 employees tasked with responding to FOIA requests will be *significantly* burdened or affected by
8 fulfilling Public.Resource.org’s request for production of nine Form 990s in MeF.

9 The IRS also says that in order to comply with Public.Resource.org’s request, it will need
10 to develop new protocols and train staff, and that work would have to be done by higher level
11 staff. Public.Resource.org disputes some of the assertions in the IRS declarations regarding the
12 time required to redact exempt information and the level of staff needed to comply with its
13 request. *See, e.g.*, Malamud Decl. ¶ 31; Declaration of Clay Johnson [Docket No. 54], ¶¶ 16-24;
14 Declaration of Tim Bray [Docket No. 55], ¶¶ 15-20; *but see* Second Declaration of Lisa
15 Rosenmerkel [Docket No. 56-3], ¶¶ 11-37. Assuming that the IRS is correct, it has failed to make
16 a compelling showing that accommodating the request to produce nine Form 990s in MeF at a cost
17 of \$6200 – much of which is characterized by the government as “one-time expenses” to set up a
18 protocol and train staff – would significantly burden or interfere with the agency’s ability to
19 respond to FOIA requests or meet its other responsibilities.

20 That the IRS will have to develop new protocols and train staff to respond to
21 Public.Resource.org’s request does not somehow excuse its need to comply with E-FOIA. If that
22 was a valid excuse, anytime there was a request for production in a format that the agency has not
23 accommodated before, the agency could argue undue burden.⁴ To the contrary, in enacting E-
24 FOIA, Congress expressly recognized that new and changing technology could improve both
25 agency FOIA compliance and public access to government information, and as such, Congress

26
27 ⁴ The same would be true of a request for records an agency has not had to produce before.
28 Numerous types of FOIA requests could force an agency to develop protocols and train employees
on production.

1 demanded that agencies act proactively to enhance public access to and use of government
2 information. *See, e.g., TPS, Inc. v. United States DOD*, 330 F.3d at 1195-96; *Nat'l Sec.*
3 *Counselors v. CIA*, 960 F. Supp. 2d 101, 202 (D.D.C. 2013).

4 Relatedly, the IRS portrays Public.Resource.org's request for production in the MeF
5 format as "unique," presumably to convince me that production in MeF format should not be
6 required in light of its current use of the SEIN system and the burden of producing the requested
7 Form 990s in MeF. However, it seems likely that Public.Resource.org's request for production in
8 MeF is "unique" because the IRS by its own admission *requires* requesters to use its Form 4506-A
9 ("Request for Public Inspection or Copy of Exempt Organization IRS Form."). Declaration of
10 Denise Higley [Docket No. 46-3], ¶¶ 4, 8. That form offers requestors a choice of production in
11 only two formats: tif files in "raw" or "alchemy." *Id.* ¶ 5. The IRS cannot defeat
12 Public.Resource.org's request for disclosure of information in the MeF format by relying on its
13 own prior practices that are inconsistent with the E-FOIA amendments.

14 It is worth noting that the "one-time expenses" related to developing a protocol and
15 training staff may well be recouped if the IRS receives and responds to other modest requests for
16 Form 990s in MeF in the future. In this decision, I have confined my analysis to determining
17 whether the imposition of \$6200 in expenses to produce nine Form 990s would cause a significant
18 burden or interference with IRS functions and have not considered (and need not consider)
19 whether a broader request for more Form 990s in MeF format would unduly burden the IRS.
20 However, the record demonstrates that if the IRS were to comply with additional requests for
21 production of Form 990s in MeF, the costs would be significantly less than for these initial nine
22 requested by Public.Resource.org.

23 Based on the evidence before me, requiring the IRS to respond to Public.Resource.org's
24 limited request for nine Form 990s in MeF format will not impose a significant burden on or
25 interfere with the IRS's functions. The records, therefore, are "readily producible" under 5 U.S.C.
26 552(a)(3)(B) and should be produced within sixty days of the date of this Order.

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produce the requested nine form 990s in the MeF format within sixty days of the date of this Order.

IT IS SO ORDERED.

Dated: January 29, 2015



WILLIAM H. ORRICK
United States District Judge