UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SMART-TEK AUTOMATED SERVICES INC., Plaintiff, v. UNITED STATES INTERNAL REVENUE SERVICE, Defendant.	Case No.: 15-cv-0453-BTM-JMA **ORDER GRANTING IN PART AND DENYING WITHOUT PREJUDICE IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** **[ECF NO. 26]**

The United States Internal Revenue Service ("IRS") has filed a motion for summary judgment as to Plaintiff's claims under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, et seq. (ECF No. 26.) For the reasons discussed below, the IRS's motion will be granted in part and denied without prejudice in part.

I. BACKGROUND

This is one of five actions filed by related entities against the IRS.[1] Each case is based on the claim that the IRS failed to comply with its obligations under 5 U.S.C. § 552 to respond to FOIA requests submitted by the plaintiffs. Plaintiffs

[1] The five actions (including this one) are: Trucept, Inc., fka Smart Tek Solutions Inc. v. United States Internal Revenue Service, Case No. 15-cv-0447-BTM-JMA; Smart-Tek Services, Inc. v. United States Internal Revenue Service, Case No. 15-cv-0449-BTM-JMA; Smart-Tek Service Solutions Corp. v. United States Internal Revenue Service, Case No. 15-cv-0452-BTM-JMA; Smart-Tek Automated Services Inc. v. United States Internal Revenue Service, Case No. 15-cv-0453-BTM-JMA; and American Marine LLC v. United States Internal Revenue Service, Case No. 15-cv-0455-BTM-JMA.

contend they submitted their requests after the IRS filed a series of liens against them between 2011 and 2013 holding them liable for payroll tax liabilities of other corporations under alter ego and/or successor liability theories.

Plaintiff Smart-Tek Automated Services Inc. ("Plaintiff") alleges it sent a written FOIA request to the IRS on May 12, 2014. Compl. (ECF No. 1) ¶ 10. Under 5 U.S.C. § 552(a)(6)(A)(i), an agency has 20 business days following receipt of a FOIA request to determine whether to comply with the request and must "immediately" notify the requester of its determination. 5 U.S.C. § 552(a)(6)(A)(i). On June 26, 2014, the IRS allegedly sent a response to Plaintiff in which it acknowledged receipt of the request but "failed to make any determination about the request." Compl. ¶ 11. On February 27, 2015, having received no further response from the IRS, Plaintiff initiated this action.

On October 7, 2016, the IRS filed the instant motion. It indicates it has now completed its search for records and released 14,544 pages in full, and 3,479 pages in part, of non-exempt documents responsive to Plaintiff's FOIA request. It seeks summary judgment on the ground that it has fully discharged its obligations under 5 U.S.C. § 552. Plaintiff opposes the motion. (ECF No. 31.)

II. DISCUSSION

A. FOIA Summary Judgment Standard

Summary judgment is appropriate if the evidence, when viewed in the light most favorable to the non-moving party, demonstrates "there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a); see Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of showing there is no material factual dispute and he or she is entitled to prevail as a matter of law. Celotex, 477 U.S. at 323. If the moving party meets its burden, the nonmoving party must go beyond the pleadings and identify specific facts which show a genuine issue for trial. Id. at 324.

District courts are directed to conduct a *de novo* review of the adequacy of

an agency's response to a FOIA request. 5 U.S.C. § 552(a)(4)(B); U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 755 (1989). Because FOIA cases rarely involve material factual disputes, they "are typically and appropriately decided on motions for summary judgment." Defenders of Wildlife v. U.S. Border Patrol, 623 F. Supp. 2d 83, 97 (D.D.C. 2009); see Shannahan v. Internal Revenue Serv., 637 F. Supp. 2d 902, 912 (W.D. Wash. 2009). Courts "follow a two-step inquiry when presented with a motion for summary judgment in a FOIA case." Shannahan, 637 F. Supp. 2d at 912.

First, the district court must determine whether the agency has established that it fully discharged its obligation under FOIA to conduct an adequate search for responsive records. Zemansky v. U.S. Envtl. Prot. Agency, 767 F.2d 569, 571 (9th Cir. 1985). To meet this burden, the agency must:

> demonstrate that it has conducted a "search reasonably calculated to uncover all relevant documents." Further, the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate. The adequacy of the search, in turn, is judged by a standard of reasonableness and depends, not surprisingly, upon the facts of each case. In demonstrating the adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith.

Id. (quoting Weisberg v. U.S. Dep't of Justice ("Weisberg II"), 745 F.2d 1476, 1485 (D.C. Cir. 1984)).

If the agency satisfies its initial burden, the court proceeds to the second step and considers "'whether the agency has proven that the information that it did not disclose falls within one of nine FOIA exemptions.'" Shannahan, 637 F. Supp. 2d at 912 (quoting Los Angeles Times Commc'ns, LLC v. Dep't of the Army, 442 F. Supp. 2d 880, 894 (C.D. Cal. 2006)). Agencies seeking to withhold documents pursuant to a FOIA exemption "have been required to supply the opposing party and the court with a '*Vaughn* index,' identifying each document withheld, the

statutory exemption claimed, and a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption." Wiener v. Fed. Bureau of Investigation, 943 F.2d 972, 977 (9th Cir. 1991); see Vaughn v. Rosen, 484 F.2d 820, 823-25 (D.C. Cir. 1973). "The purpose of a *Vaughn* index 'is … to afford the requester an opportunity to intelligently advocate release of the withheld documents and to afford the court the opportunity to intelligently judge the contest.'" Shannahan, 637 F. Supp. 2d at 912 (quoting Wiener, 943 F.2d at 979).

Finally, "even if the agency satisfies the two-part test, it generally must still disclose any reasonably segregable portions of the withheld documents." Id.; 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."). "'The burden is on the agency to establish that all reasonably segregable portions of a document have been segregated and disclosed.'" Id. (quoting Pac. Fisheries Inc. v. United States, 539 F.3d 1143, 1148 (9th Cir. 2008).

B. Reasonableness of Search

The IRS contends it has conducted an adequate search for records responsive to Plaintiff's FOIA request. To fulfill its obligations under FOIA, "the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990). The agency must show "[w]hat records were searched, by whom, and through what process." Steinberg v. U.S. Dep't of Justice, 23 F.3d 548, 552 (D.C. Cir. 1994). An agency can meet its burden by submitting a "reasonably detailed, nonconclusory" affidavit "in good faith." Id. at 551 (quoting Weisberg II, 745 F.2d at 1485). Agency affidavits that "do not denote which files were searched or by whom, do not reflect any systematic approach to document location, and do

not provide information specific enough to allow the plaintiff to challenge the procedures utilized" are insufficient to fulfill the agency's burden. Weisberg v. U.S. Dep't of Justice, 627 F.2d 365, 371 (D.C. Cir. 1980). In determining whether an agency has met its burden to prove an adequate search, "the facts must be viewed in the light most favorable to the requestor." Zemansky, 767 F.2d at 571 (citing Weisberg II, 745 F.2d at 1485).

Here, the IRS submits the declaration of Delphine Thomas to support its contention that it conducted an adequate search for records in response to Plaintiff's FOIA request. (ECF No. 26-5.) Thomas is a Senior Disclosure Specialist whose duties include responding to FOIA requests for IRS records, which requires her to "have knowledge of the types of documents created and maintained by the various divisions and functions of the Service and an understanding of the provisions of the FOIA." Thomas Decl. ¶ 1.

Thomas states that Ed Pullman, the disclosure specialist initially assigned to process Plaintiff's FOIA request, now has a different role with the IRS and is "unavailable to declare in this case." Id. ¶ 3. She was assigned to respond to Plaintiff's request on October 17, 2014, and thereafter familiarized herself with the search conducted before she was involved by talking to Pullman and reviewing his case file. Id. ¶ 4.

Thomas states that the IRS Disclosure Office received a written FOIA request from Plaintiff on May 29, 2014, seeking "'a complete copy of the administrative file'" for Plaintiff. Id. ¶ 6.[2] Pullman found the request overbroad, so he contacted Plaintiff's representative and suggested narrowing its scope. Id. ¶ 7. Plaintiff's representative thereafter left Pullman a voicemail "clarifying that the request was for the administrative files for the tax forms 940, 941, and 1120 for tax

[2] Although Thomas indicates a copy of the FOIA request is attached as Exhibit A to her declaration, the exhibit was not actually attached. See Thomas Decl. ¶ 7.

years 2007-2014." Id. ¶ 8.

According to Thomas, Pullman thereafter searched for "files" using the IRS's Integrated Data Retrieval System ("IDRS"), an electronic system that "manages data that has been retrieved from the Master File System" which is "the Service's nation-wide electronic information system containing permanent taxpayer account information." Id. ¶¶ 9-12. His IDRS search showed there was collection activity related to Plaintiff, and he thereafter learned from Tax Law Specialist Athena Amparano that the collection matter was assigned to Revenue Officer John Black ("RO Black") Id. ¶ 13.

Thomas indicates that on July 16, 2014, "the Disclosure Office learned from RO Black that documents responsive to [Plaintiff's] requests would be located within the commingled files maintained by RO Black on these entities and over twenty (20) related entities." Id. ¶ 15. RO Black had "started a collection proceeding on one of the entities and, as he progressed, realized that all the entities were related," had the other entities' files transferred to him and "started working the case as one large case." Id. As he received new documents, "he added them to the boxes in chronological order, not based on any particular entity," so as a result, "the files were all mixed together." Id. ¶ 16. The commingled files totaled 65 boxes containing "around 141,000 pages." Id.

On or about July 25, 2014, "Plaintiff's representative confirmed via fax that the request was for the entire administrative file maintained by Collection…." Id. ¶ 19. Thomas, Pullman, and Amparano, later joined by attorneys and law clerks in the Office of Chief Counsel, thereafter worked from late 2014 through fall 2015 to "search for documents responsive to Plaintiff's FOIA request within the commingled administrative file of the Smart-Tek entities…." Id. ¶¶ 23, 27. Thomas says that her review consisted of "not[ing] which documents were responsive to Plaintiff's FOIA request and which documents were responsive to the other related entities' FOIA requests." Id. ¶ 27. She concludes, "[t]o my knowledge, there are

no other records responsive to Plaintiff's request." Id. ¶ 28.

Plaintiff argues this evidence is insufficient to demonstrate the adequacy of the IRS's search, because it fails to explain what documents the commingled files contained, the methodology used to review the 65 boxes of documents, criteria for selecting responsive documents, and because it does not identify the entities whose records were in the commingled file. Pl.'s Opp. at 6-7.

The Court agrees with Plaintiff in part. To sustain its burden, the IRS must show "[w]hat records were searched, by whom, and through what process." Steinberg, 23 F.3d at 552. Although a "reasonably detailed, nonconclusory" affidavit submitted "in good faith" will generally meet this burden, id. at 551 (quoting Weisberg II, 745 F.2d at 1485), in key respects, Thomas's declaration is too conclusory to suffice.

First, the IRS has not explained how it interpreted Plaintiff's FOIA request (as initially submitted, or as subsequently clarified), nor does it explain what scope of documents it determined were responsive to the request. Federal agencies responding to FOIA requests are required to use search methods that can reasonably be expected to yield the requested information. Lane v. Dep't of Interior, 523 F.3d 1128, 1139 (9th Cir. 2008). Without knowing what documents the IRS was searching for in response to Plaintiff's request, the Court has no context for evaluating the reasonableness of the IRS's search methods

Second, Thomas's declaration fails to provide sufficient information about the process by which the IRS reviewed the 65 boxes of documents. The IRS spent months reviewing the boxes and removing particular documents, but it has not explained what criteria the review team used to determine which documents to remove. Although an agency need only prove its search was "reasonably calculated to uncover all relevant documents," Zemansky, 767 F.2d at 571, to evaluate the adequacy of the IRS's search, the Court needs to know what the search of the 65 boxes entailed to determine whether it was reasonable. See

County of Santa Cruz v. Ctrs. for Medicare and Medicaid Servs., No. C-07-2889 MMC, 2009 WL 816633, at *2 (N.D. Cal. Mar. 26, 2009) (holding IRS failed to demonstrate reasonableness of search where supporting declarations reported that searches of various files located no responsive documents, without explaining "the process used to conduct [the IRS's] search"). Thomas states the search for responsive records involved "not[ing] which documents were responsive to Plaintiff's FOIA request," Thomas Decl. ¶ 24, which does not give the Court an adequate understanding what the responsive records consisted of. See, e.g., Kean v. Nat'l Aeronautics & Space Admin., 480 F. Supp. 2d 150, 156-57 (D.D.C. 2007) (finding descriptions of searches "inadequate" where they "[did] not contain any details regarding which databases or records were searched, and what methodology or search terms were used"). The IRS must provide additional detail regarding the search paramaters the review team used to determine what documents to remove from the 65 boxes as responsive, or potentially responsive, to Plaintiff's FOIA request.

Also, Plaintiff indicates in opposition to the IRS's motion that it has received two productions of documents from the IRS, including one that was produced on August 1, 2016 that encompassed "several thousand more pages of documents" in connection with which the IRS stated it was continuing to search for responsive records. Bonar Decl. ¶ 8. The IRS responds that its subsequent release of additional records does not render its entire search unreasonable. Reply at 4. Perhaps not, but the Court agrees with Plaintiff that the IRS's failure to address the subsequent release of documents in its motion means it has failed to demonstrate the reasonableness of the entirety of its search.

Next, the Court turns to Plaintiff's argument that the IRS cannot establish the reasonableness of its search without identifying the other entities whose records were in the 65-box commingled file. The IRS did not address this argument in its reply brief.

Two countervailing principles bear upon Plaintiff's contention. On the one hand, the Court must make a de novo determination of the adequacy of IRS's response to Plaintiff's FOIA request, Reporters Comm. for Freedom of Press, 489 U.S. at 755, and it must be able to "intelligently judge the contest" to perform this role. Wiener, 943 F.2d at 977. On the other hand, withholding information relating to return information of another taxpayer or taxpayers, including the identity of third-party taxpayers, is authorized under 5 U.S.C. § 552(b)(3), in conjunction with 26 U.S.C. § 6103(a), and 5 U.S.C. § 552 (b)(7)(C). See Johnson v. Comm'r of Internal Revenue, 239 F. Supp. 2d 1125, 1128-29 (W.D. Wash. 2002).

Setting aside the merits of Plaintiff's argument, as a threshold issue, it seems likely that the alleged alter egos' identities have already been disclosed. "[O]nce tax return information is made a part of the public domain, the taxpayer may no longer claim a right of privacy in that information" and "'§ 6103's directive to keep return information confidential is moot.'" Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988) (quoting Figur v. United States, 662 F. Supp. 515, 517 (N.D. Cal. 1987). Bonar is Plaintiff's president, and he indicates in a declaration submitted in support of Plaintiff's opposition that Plaintiff issued its FOIA request after being served with an IRS lien based on "payroll tax liabilities of unrelated corporations." Decl. Brian Bonar ¶ 2. Presumably the alleged alter egos were identified in the IRS lien. Such a presumption seems supported by Bonar's declaration; he describes the entities as "unrelated corporations," and his characterization of the corporations as "unrelated" implies he knows who they are. Also, in researching the relevant legal issues, the Court encountered the district court's opinion in Goldberg v. United States, No. 13-61528-CIV, 2015 U.S. Dist. LEXIS 104815, at *3-4 n.2 (S.D. Fla. Aug. 5, 2015). The Goldberg litigation apparently arose from the same investigation of RO Black, and the district court's order appears to have disclosed the names of the entities involved. See id. If so, under Lampert, disclosing their names in this litigation would appear not to run

afoul of § 6103(a).

The fact that any privilege pertaining to the identities of the alter egos may have been dispelled does not necessarily mean the identity of every entity whose files were in the 65 boxes has to be disclosed to establish the reasonableness of the IRS's search. At this stage, the record regarding the search the IRS undertook is not yet complete, and the Court will reserve ruling on the merits of Plaintiff's argument until the record is more fully developed.

Based on the foregoing, the Court finds the IRS has failed to carry its burden to demonstrate the adequacy of its search. Its motion for summary judgment will be denied without prejudice.

C. Withholding of Responsive Documents Pursuant to FOIA Exemptions

The IRS indicates it withheld, in full or in part, responsive documents pursuant to FOIA exemptions.

1. 5 U.S.C. § 552(b)(3) ("Exemption 3") in Conjunction with 26 U.S.C. § 6103(a), 5 U.S.C. § 552(b)(7)(C) ("Exemption 7(C)")

The IRS withheld responsive information pursuant to FOIA Exemption 3. Exemption 3 protects from disclosure matters "specifically exempted by statute" "if that statute—(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld…." 5 U.S.C. § 552(b)(3)(A). 26 U.S.C. § 6103 has been determined to be an Exemption 3 statute. Long v. United States, 742 F.2d 1173, 1178 (9th Cir. 1984). Section 6103(a) provides that taxpayer "returns and return information shall be confidential." 26 U.S.C. § 6103(a). "Return information" is defined to include, among other things, "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, … whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data … with respect to a return….." 26

U.S.C. § 6103(b)(2).

Pursuant to Exemption 3 and § 6103(a), the IRS withheld documents because they contained information of "third party taxpayers" and other "entities" other than plaintiff. Maher Decl. ¶¶ 11-12.

Exemption 7(C) requires withholding of records or information compiled for law enforcement purposes, but only to the extent the production of such information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Pursuant to Exemption 7(C), the IRS withheld information consisting of "bank account numbers of business entities" and "contracts between other businesses and plaintiff" as well as checks written to plaintiff by third-party businesses.

At this stage, the Court will reserve ruling on the validity of the IRS's withholding of information under Exemptions 3 (in conjunction with § 6103(a)) and 7(C). Plaintiff's essential dispute is that the IRS has wrongfully refused to produce documents pertaining to alter ego entities whose tax liability was the basis for the lien against Plaintiff. The information withheld on the basis of the foregoing exemptions relates to unidentified taxpayers and entities other than Plaintiff. Some of the taxpayers or entities may be the alter ego entities whose documents Plaintiff seeks. The IRS disputes whether Plaintiff can obtain tax information relating to Plaintiff's alter egos without an authorization from the alter ego. Plaintiff cannot obtain such an authorization, however, without knowing which entities' records have been withheld. Although the IRS claims even the names of the alter egos are protected from disclosure, if those names have already been published such that any related privacy interest has been lost, there would appear to be no impediment to identifying, in subsequent briefing, any alter ego taxpayers whose records were withheld. If the IRS can disclose those names in subsequent proffers, Plaintiff will have the opportunity to more intelligently advocate for disclosure of the withheld information. Wiener, 943 F.2d at 977.

The Court will therefore reserve ruling on these issues until the record has been more fully developed.

2. 5 U.S.C. § 552(b)(5) ("Exemption 5")

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency…." 5 U.S.C. § 552(b)(5). "This exemption entitles an agency to withhold . . . documents which a private party could not discover in litigation with the agency." Pac. Fisheries, 539 F.3d at 1148 (quoting Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1089, 1092 (9th Cir. 1997). "Exemption 5 thus covers the attorney-client privilege, the attorney work-product privilege, and the executive 'deliberative process' privilege." Maricopa, 108 F.3d at 1092.

a) Attorney-Client Privilege

Pursuant to Exemption 5, the IRS withheld portions of six pages of documents because they contain attorney-client privileged information. "The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice, ... as well as an attorney's advice in response to such disclosures." United States v. Ruehle, 583 F.3d 600, 607 (9th Cir. 2009) (internal quotation and citation omitted).

The IRS submits the declaration of Joseph T. Maher Jr., an attorney in the IRS's Office of Associate Chief Counsel, in support of its privilege claim. Maher indicates the withheld information consisted of case history transcripts containing "notes about advice from counsel on issues in the case." Maher Decl. ¶ 17.

Maher's declaration contains no indication who the "counsel" providing the advice was, including whether the attorney was employed by the IRS Office of Chief Counsel, or any other agency, so as to make it an inter-agency or intra-agency communication covered by Exemption 5. See 5 U.S.C. § 552(b). There is also no representation that the communications reflected in the notes were

confidential. See Ruehle, 583 F.3d at 607. On this record, the Court cannot determine whether the withheld information fell within the attorney-client privilege or Exemption 5. Accordingly, the Court denies the IRS's motion for summary judgment without prejudice on this ground.

b) Deliberative Process Privilege

The IRS withheld two pages of documents in full and 17 pages in part pursuant to Exemption 5 and the deliberative process privilege. "In order to be protected by the deliberative process privilege, a document must be both (1) 'predecisional' or 'antecedent to the adoption of agency policy' and (2) 'deliberative,' meaning 'it must actually be related to the process by which policies are formulated.'" United States v. Fernandez, 231 F.3d 1240, 1246 (9th Cir. 2000) (quoting Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1117 (9th Cir. 1988) (additional citation and internal quotation marks omitted)) (holding death penalty evaluation form completed by U.S. Attorney and submitted before final decision whether to seek the death penalty fell within deliberative process privilege). Shielding such documents from production is meant to encourage forthright and candid discussions of ideas and improve the decision-making process. Id. (citing Assembly of the State of Cal. v. U.S. Dep't of Commerce, 968 F.2d 916, 920 (9th Cir.1992)).

The IRS relies on the Maher declaration to support its decision to withhold all or parts of responsive documents pursuant to the deliberative process privilege. Maher Decl. ¶¶ 18-21. He states the withheld information consists of "notes which contain predecisional and deliberative recommendations and analysis of the case, along with some notes about advice from counsel on issues in the case" (¶ 21(a)) and a "memorandum from one Service employee to another" that contained material that "is both predecisional and deliberative" (¶ 21(b)). This information is "predecisional and deliberative as they contain assumptions or recommendations reflecting 'the give-and-take' of the agency's deliberative processes and release of

this information would reveal predecisional thoughts and analysis of Service employees…." Id. ¶ 18.

The Court finds the Maher declaration insufficient to support the IRS's privilege claim. In particular, although he describes deliberative materials in the abstract, Maher fails to indicate in non-conclusory fashion how the withheld information was "actually related" to the IRS's effort to decide how to proceed with the collection action in this case. Fernandez, 231 F.3d at 1246 (to be "deliberative," information "must actually be related to the process by which policies are formulated") (emphasis added). Accordingly, the Court will deny the IRS's motion on this ground without prejudice.

3. 5 U.S.C. § 552(b)(6) ("Exemption 6")

Exemption 6 restricts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). To determine whether information has been properly withheld under Exemption 6 requires a court to "balance the privacy interests or personal nature of the information sought against the public interest that would be served by disclosure." Chamberlain v. Kurtz, 589 F.2d 827, 841-42 (5th Cir. 1979); see Horowitz v. Peace Corps, 428 F.3d 271, 278 (D.C. Cir. 2005).

The IRS relies on the declaration of Maher in support of its withholding of information under Exemption 6. He describes the information withheld under Exemption 6 as "personal guaranty and signature sections of contracts between other businesses and the plaintiff" that "contain the home addresses and social security numbers of individuals" (Maher Decl. ¶ 23(a)); portions of documents containing the social security numbers, email addresses, and phone numbers of individuals (¶¶ 23(b)-(f)); and copies of checks written to plaintiff by third-party individuals (¶ 23(g)).

The Court finds the referenced information was properly withheld under Exemption 6, because it consists of personal information of individuals that falls

within the ambit of information typically subject to privacy protection, and the privacy interests of the individuals involved outweigh any public interest that might be served by disclosure. Chamberlain, 589 F.2d at 841-42. The Court also finds the IRS has complied with its duty to disclose any reasonably segregable portions of the affected documents. See Maher Decl. ¶ 9. Accordingly, the Court grants the IRS's motion for summary judgment as to its withholding of information pursuant to Exemption 6.

4. 5 U.S.C. § 552(b)(7)(A) ("Exemption 7(A)")

Exemption 7(A) relates to "records or information compiled for law enforcement purposes" to the extent production of such information "could reasonably be expected to interfere with enforcement proceedings…." 5 U.S.C. § 552(b)(7)(A). To support withholding documents under Exemption 7(A), an agency "must establish only that they were investigatory records compiled for law enforcement purposes and that production would interfere with pending enforcement proceedings." Barney v. Internal Revenue Service, 618 F.2d 1268, 1272-73 (8th Cir. 1980). For purposes of Exemption 7(A), the IRS is a law enforcement agency, Shannahan v. Internal Revenue Serv., 680 F. Supp. 2d 1270, 1281 (W.D. Wash. 2010), and civil tax enforcement proceedings are "enforcement proceedings," Barney, 618 F.2d at 1273. "The IRS need only make a general showing that disclosure of its investigatory records would interfere with its enforcement proceedings." Lewis v. Internal Revenue Serv., 823 F.2d 375, 380 (9th Cir. 1987). "[D]isclosure of such records as witness statements, documentary evidence, agent's work papers and internal agency memoranda, prior to the institution of civil or criminal tax enforcement proceedings, would necessarily interfere with such proceedings by prematurely revealing the government's case." Barney, 618 F.2d at 1273; see NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 236-37 (1978).

The IRS submits the declaration of Rosanna Savala, a Supervisory Revenue

Officer, in support of its decision to withhold 45 pages in full, and 106 pages in part, of responsive documents under Exemption 7(A). Savala Decl. ¶¶ 10-12. She describes the withheld information as "case history transcripts and notes that contain information about the case that if released would provide plaintiff with earlier and greater access to information about the IRS's investigation than it would otherwise be entitled to receive" (¶ 12(a)); emails and memoranda that "reveal the specific items and transactions that are the focus of an ongoing law enforcement investigation" that reveal "the nature, direction, scope, and limits of the investigation" (¶ 12(b)); notes of a meeting with a confidential informant that contain information about plaintiff's case (¶ 12(c)); and notes of meetings between IRS employees "that contain information that if released would provide plaintiff with earlier and greater access to information about the IRS's investigation than it would otherwise be entitled to receive" (¶ 12(d)). She indicates that disclosure of the withheld information would give plaintiff the opportunity to tamper with or conceal evidence, or construct explanations and defenses to the IRS's theories, thus interfering with the IRS's law enforcement proceedings. Id. ¶ 12(a)-(d).

The Court finds the IRS's evidence sufficient to show disclosure of the referenced information would interfere with its enforcement proceedings pursuant to Exemption 7(A), and that the IRS complied with its duty to reasonably segregate and produce non-exempt information. Maher Decl. ¶ 9. Accordingly, the IRS's motion for summary judgment is granted as to this exemption.

5. 5 U.S.C. § 552(b)(7)(D) ("Exemption 7(D)")

Exemption 7(D) protects information compiled for law enforcement purposes from disclosure to the extent it:

> could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an

> agency conducting a lawful national security intelligence investigation, information furnished by a confidential source[.]

5 U.S.C. § 552(b)(7)(D). Exemption 7(D) "has long been recognized as affording the most comprehensive protection of all of FOIA's law enforcement exemptions." Billington v. U.S. Dep't of Justice, 301 F. Supp. 2d 15, 22 (D.D.C. 2004). To invoke its protections, an agency must show the particular source "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." U.S. Dep't of Justice v. Landano, 508 U.S. 165, 172 (1993). "A source should be deemed confidential if the source furnished information with the understanding that the [agency] would not divulge the communication except to the extent [it] thought necessary for law enforcement purposes." Id. at 174.

Pursuant to Exemption 7(D), the IRS withheld 28 pages in full, and one page in part, of documents responsive to Plaintiff's request. Maher Decl. ¶ 14. Maher declares the withheld records contain information provided by a source who "obtained implicit assurance of confidentiality" the release of which would disclose the source's identity. Id.

The Court finds Maher's declaration insufficient to carry the burden of demonstrating the withheld information is exempted from disclosure. Exemption 7(D) applies where there is an "express assurance of confidentiality" or "circumstances from which such an assurance could be reasonably inferred." Landano, 508 U.S. at 172. Here, Maher says only that the source received an "implicit assurance of confidentiality," which is not an "express assurance of confidentiality," and since Maher does not explain what he means by an "implicit assurance of confidentiality" the Court cannot determine whether the circumstance he is referring to was one "from which such an assurance could be reasonably inferred." Id. Maher's declaration in this case is less robust than the declarations the IRS submitted to the Court in two of the cases related to this one, Case Nos.

15-cv-447 and 15-cv-452, which the Court found were sufficient to establish that Exemption 7(D) applied. See Trucept, Inc., fka Smart Tek Solutions, Inc. v. IRS, Case No. 15-cv-447-BTM-JMA, Queener Decl. (ECF No. 25-3) at ¶¶ 24-25 (stating the withheld information "reveals a confidential source who/that received assurance of confidentiality from the Service" and "was provided to the Service with the understanding that it would only be divulged to the extent necessary to facilitate ongoing efforts by the Service to enforce the Federal tax laws as applied to plaintiff"); Smart-Tek Service Solutions Corp. v. IRS, Valvardi Decl. (ECF No. 29-5) at ¶ 25 (stating that the withheld information disclosed information or identities of confidential sources who "have been assured confidentiality by the Service"). Nor does the Maher declaration indicate whether the confidential source he is referring to is the same one discussed in the declarations the IRS submitted in the other cases. Thus, on this record, the Court cannot determine whether the withheld information meets the standard for withholding under Exemption 7(D).

Accordingly, the Court will deny the IRS's motion for summary judgment on this ground without prejudice.

6. Exemption 3 in Conjunction with 26 U.S.C. § 6103(e)(7)

The IRS withheld parts of documents pursuant to 26 U.S.C. § 6103(e)(7), which is an Exemption 3 statute. Chamberlain v. Kurtz, 589 F.2d 827, 839-40 & n.26 (5th Cir. 1979) (referring to § 6103(e)(7) under its then-applicable statutory designation, § 6103(e)(6)). Pursuant to § 6103(e)(7), "[r]eturn information with respect to any taxpayer may be open to inspection by or disclosure to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair Federal tax administration." 26 U.S.C. § 6103(e)(7). Section 6103(e)(7) gives a taxpayer "unrestricted access to his own returns, but as to other information or materials collected by the IRS in the course of determining tax liability" availability of the returns "is conditioned on the Secretary's determination that such access would

not impair tax administration." Chamberlain, 589 F.2d at 837. Documents reflecting information "prepared or collected by the Secretary with respect to determining the existence of liability for a tax or penalty" is subject to withholding under § 6103(e)(7). Id. at 840.

The IRS relies on the declaration of Savala, who states she is authorized by Treasury Department Order No. 150-10 and related authority to determine under § 6103(e)(7) whether disclosure of return information would impair tax administration. Savala Decl. ¶¶ 6-9. She determined that 45 pages of documents in full, and 106 pages in part, should be withheld because they would have such an impairing effect. The withheld documents are the same as the ones identified and withheld pursuant to Exemption 7(A). See id. ¶ 9(a)-(d); ¶ 12(a)-(d). Savala indicates the withheld information would, if disclosed, give plaintiff an unfair advantage "in the midst of an ongoing investigation" and allow it to prematurely craft explanations and defenses based on the information, which would "reasonably be expected to impair the Service's ability to determine the correct application of the Federal tax laws." Id. ¶ 9(a)-(d).

The Court finds the IRS's evidence sufficient to show disclosure of the withheld information access would impair tax administration, such that it is subject to withholding under § 6103(e)(7). The Court further finds the IRS complied with its duty to reasonably segregate and produce non-exempt information. See Maher Decl. ¶ 9. Accordingly, the Court grants the IRS's motion for summary judgment as to this exemption.

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III. CONCLUSION AND ORDER

For the reasons discussed above, the IRS's motion for summary judgment is GRANTED IN PART and DENIED WITHOUT PREJUDICE IN PART.

IT IS SO ORDERED.

Dated: July 20, 2017

Barry Ted Moskowitz, Chief Judge
United States District Court