UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

AMERICAN MARINE, LLC,
Plaintiff,
v.
UNITED STATES INTERNAL REVENUE SERVICE,
Defendant.

Case No.: 15-cv-0455-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 contend they submitted their requests after the IRS filed a series of liens against

[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.

them between 2011 and 2013 holding them liable for payroll tax liabilities of other corporations under alter ego and/or successor liability theories.

Plaintiff American Marine, LLC ("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 4,723 pages in full, and 1,192 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.

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 Service, 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.; see 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 the 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. (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).

The IRS submits the declaration of Delphine Thomas in support of its contention that it conducted an adequate search for records. (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 the disclosure specialists initially assigned to respond to Plaintiff's FOIA are now "unavailable to declare in this case." Id. ¶¶ 3, 6. To familiarize herself with the case, she reviewed the case notes of the previously-assigned disclosure specialists. Id. From her review, she determined that on June 23, 2014, the IRS received a written FOIA request from Plaintiff, seeking "'a complete copy of the administrative file'" for Plaintiff "for tax forms 940, 941, 1120 and 1065 for years 2007-2014." Id. ¶ 4.[2]

Thomas states disclosure specialist Athena Amparano 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. ¶¶ 7-9. Amparano reportedly learned from IDRS that there was collection activity related to Plaintiff, and that "Revenue Officer John Black (RO Black) was assigned to the collection matter."

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[2] Although Thomas indicates a copy of the FOIA request is Exhibit A to her declaration, the exhibit was not attached. See Thomas Decl. ¶ 4.

Id. ¶ 10. The Disclosure Office "learned from RO Black that documents responsive to plaintiff's FOIA request would be located within the commingled file maintained by RO Black on the Smart-Tek entities and over twenty (20) related entities." Id. ¶ 11. RO Black had initiated "a collection proceeding on one of the Smart-Tek entities and, as he progressed, he realized that all the entities were related." Id. He "communicated with other Revenue Officers working the related cases and had all the case files he identified transferred to him" and then "started working the case files as one large case file." Id. As RO Black "received or created" new documents, "he added them to the commingled file in chronological order, not based on a particular entity," and as a result, "the files for plaintiff and all the other entities were all mixed together." Id. ¶ 12. The commingled files totaled 65 boxes containing "around 141,000 pages." Id. ¶¶ 12-13.

Disclosure Specialist Ed Pullman "phoned plaintiff's representative to confirm that her request was for the administrative file maintained by Collection personnel." Id. ¶ 14. Amparano and Pullman, later joined by Thomas, attorneys and law clerks in the Office of Chief Counsel, worked from late 2014 through fall 2015 to "search for responsive documents within the commingled file of the Smart-Tek entities…." Id. ¶¶ 15-16, 21. "As part of my review, I noted which documents were responsive to Plaintiff's FOIA request and which documents were responsive to the other related entities' FOIA requests." Id. ¶ 22. Thomas states she has "been informed that … my colleagues and I located 5,960 pages of documents responsive to [Plaintiff's] request," id. ¶ 22, and concludes, "[t]o my knowledge, there are no other records responsive to this request," id. ¶ 23.

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 provided no explanation how it interpreted Plaintiff's FOIA request, nor has it described the scope of documents it sought out in response. 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 a description of the categories of documents the IRS determined were responsive to the request—that is, what records the IRS was searching for—the Court has no context for evaluating the reasonableness of the methods it used to find them.

Second, Thomas's declaration fails to give sufficient information about the IRS's review of the 65 boxes of documents. The IRS spent months reviewing the boxes and removing particular documents, but it has not explained what documents the document review team was looking for and pulling out of the boxes, including the criteria or search parameters the team used to determine which documents to remove for production. 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 information regarding the document review to determine whether the IRS's search of the 65 boxes 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").

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 the 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 all, or portions of, 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)(6) ("Exemption 6")

The IRS withheld responsive information pursuant to FOIA Exemptions 3 and 6.

Under Exemption 3, matters "specifically exempted by statute" are deemed exempted under FOIA "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 is 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 that contained information of "taxpayers other than plaintiff" as well as Plaintiff's "owners." Queener Decl. ¶¶ 15-16.

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). Under Exemption 6, the IRS withheld information relating to taxpayers and persons other than Plaintiff. Queener Decl. ¶¶ 23-25.

At this stage, the Court will reserve ruling on the validity of the IRS's withholding of information under Exemptions 3 and 6. Plaintiff's essential contention in this case is that the IRS's response to its FOIA request was inadequate because it failed to produce information 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 "owners" of Plaintiff, and unidentified taxpayers other than Plaintiff, some of which 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 eight pages of documents on the ground they contain information protected by the attorney-client privilege. "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 Jacqueline Kay Queener, an attorney in the IRS's Office of Chief Counsel, in support of its privilege claim. She indicates the withheld documents are "pages in an electronic history transcript documenting RO Black's collection activities," and that the withheld information contains his "record of legal advice he received from Chief Counsel Mindy Meigs concerning alter-ego/successor entity status" in the course of confidential communications

with Meigs. Queener Decl. ¶¶ 17-19. Queener states she is familiar with FOIA's segregation requirements, and that the IRS complied with such requirements in withholding the referenced information. Id. ¶ 14.

The Court finds the Queener declaration sufficiently detailed and non-conclusory to support the conclusion that the withheld information falls within the scope of the privilege, because it reflects RO Black's confidential communications with agency lawyers for the purpose of obtaining legal advice. Ruehle, 583 F.3d at 607. The Court also finds the IRS complied with its duty to produce reasonably segregable portions of documents containing such information.

Accordingly, the Court grants the IRS's motion for summary judgment as to its determination that the foregoing documents contained attorney-client privileged information and were exempt from disclosure pursuant to Exemption 5.

b) Deliberative Process Privilege

The IRS withheld five pages of documents in part pursuant to Exemption 5 on grounds they are covered by 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 Queener declaration in support of its privilege claim.

Queener Decl. ¶¶ 20-22. She states that the withheld information consists of a case activity record entered by an IRS Officer that "contains a deliberative discussion concerning the status of efforts to collect the outstanding tax liabilities of plaintiff and several related entities, and possible future courses of action" (¶ 22(a)); copies of an email exchange between RO Black and another revenue officers "concerning an entity potentially related to plaintiff and several other entities (¶ 22(b)); and a memo prepared by a revenue officer "that contains a deliberative discussion concerning alternative courses of action, and suggesting that plaintiff's and several related entities' cases all be assigned to the same employee to promote effective tax administration" (¶ 22(c)). She indicates the withheld information "reflect the deliberations of the Service with respect to collection activities" and "reflect opinions or recommendations … that precede the final decisions concerning the collection actions pursued by the Service." Id. ¶ 22.

The Court finds this evidence sufficient to support the IRS's privilege claim. The withheld documents are both predecisional and deliberative in the sense that they are actually related to the IRS's ongoing efforts to determine how to proceed with its enforcement action. Fernandez, 231 F.3d at 1246. The Court also finds the IRS has shown it complied with its duty to reasonably segregate and produce non-exempt information. Accordingly, the Court grants the IRS's motion for summary judgment as to its withholding of information on this ground.

3. 5 U.S.C. § 552(b)(7)(A) ("Exemption 7(A)")

Exemption 7(A) applies 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 information or 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,

1 1272-73 (8th Cir. 1980). For purposes of Exemption 7(A), the IRS is a law
2 enforcement agency, Shannahan v. Internal Revenue Serv., 680 F. Supp. 2d 1270,
3 1281 (W.D. Wash. 2010), and civil tax enforcement proceedings are "enforcement
4 proceedings," Barney, 618 F.2d at 1273. "The IRS need only make a general
5 showing that disclosure of its investigatory records would interfere with its
6 enforcement proceedings." Lewis v. Internal Revenue Serv., 823 F.2d 375, 380
7 (9th Cir. 1987). "[D]isclosure of such records as witness statements, documentary
8 evidence, agent's work papers and internal agency memoranda, prior to the
9 institution of civil or criminal tax enforcement proceedings, would necessarily
10 interfere with such proceedings by prematurely revealing the government's case."
11 Barney, 618 F.2d at 1273; see NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214,
12 236-37 (1978).
13 The IRS submits the declaration of Rosanna Savala, a Supervisory Revenue
14 Officer, in support of its decision to withhold all or part of nine pages of documents
15 under Exemption 7(A). Savala Decl. ¶¶ 14-20. She indicates the withheld
16 information consists of "part of an email exchange between RO Black and another
17 revenue officer "discussing ongoing efforts to collect plaintiff's outstanding tax
18 liabilities" (¶¶ 15, 16); a "Sensitive Report," a document created by RO Black for
19 field collection management that reported on case activity, potential next steps,
20 potential barriers to resolution of the case, and other sensitive information (¶¶ 17,
21 18); portions of a memo from a revenue officer to a collections group manager that
22 concern "prior and possible future actions or secondary investigations the Service
23 could elect to pursue" against plaintiff (¶ 19); and an email sent to an assistant
24 United States Attorney (AUSA) concerning potentially criminal tax liability, which
25 the AUSA forwarded to IRS for possible investigation (¶ 20). She states disclosure
26 of the information could "compromise the Service's on-going efforts to collect
27 plaintiff's outstanding tax liabilities" because it would "allow plaintiff to determine
28 the nature, direction, scope and limits of other courses of action the Service may

elect to pursue Id. ¶ 15.

The Court finds this evidence sufficient to show disclosure of the referenced information would interfere with its enforcement proceedings such that it fell within the scope of Exemption 7(A), and further finds the IRS complied with its duty to reasonably segregate and produce all non-exempt information. See Queener Decl. ¶ 14. Accordingly, the IRS's motion for summary judgment is granted as to its decision to withhold responsive information pursuant to Exemption 7(A).

4. 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.

The IRS withheld 26 pages of documents in full or in part under Exemption 7(D). The IRS relies on the declaration of Ms. Queener, who states that the

referenced documents "contain either the identity, or sufficient information from which the identity could readily be discerned, of sources of information that furnished information 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." Queener Decl. ¶ 28.

The Court finds this evidence sufficient to show the withheld information relates to the identity of a confidential source, such that it falls within Exemption 7(D), Landano, 508 U.S. at 174, and further finds the IRS has sufficiently demonstrated it complied with its duty to reasonably segregate and produce non-exempt information, see Queener Decl. ¶ 14.

Accordingly, the Court grants the IRS's motion for summary judgment as to the validity of its withholding of the foregoing information under Exemption 7(D).

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

Exemption 7(E) protects information compiled for law enforcement purposes from disclosure to the extent it "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). To establish this exemption, "the Government must show that the technique that would be disclosed under the FOIA request is a technique unknown to the general public." Pully v. Internal Revenue Serv., 939 F. Supp. 429, 438 (E.D. Va. 1996) (citing Malloy v. Dep't of Justice, 457 F. Supp. 543, 545 (D.D.C. 1978)).

The IRS withheld two pages in part pursuant to Exemption 7(E). Queener Decl. ¶ 29. The IRS relies on the declaration of Ms. Queener, who states the redacted information relates to Plaintiff's "Risk Score," "which reflects the Service's assessment of the priority of having the taxpayer's account assigned to a dedicated collection specialist to actively pursue collection of the taxpayer's outstanding liabilities." Id. However, her declaration does not address whether

the Risk Score is a "technique unknown to the general public." Pully, 939 F. Supp. at 438. Accordingly, the evidence is insufficient to support withholding under Exemption 7(E), and the Court will deny summary judgment without prejudice as to this exemption.

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 the 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 Ms. 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. ¶¶ 6-13. She determined that the same documents, and portions of documents, identified and withheld pursuant to Exemption 7(A), are also subject to withholding under § 6103(e)(7). Compare id. ¶¶ 6-13 with ¶¶ 14-20. She indicates all of the withheld information would, if disclosed, "allow plaintiff to determine the nature, direction, scope and limits of other courses of

action the Service may elect to pursue in order to collect plaintiff's outstanding tax liabilities," id. ¶ 8, and "allow plaintiff to circumvent the law" or "compromise future actions that the Service may pursue," id. ¶¶ 12, 13.

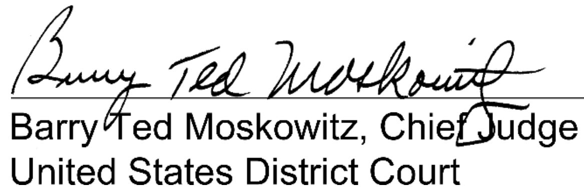
The Court finds the IRS's evidence sufficient to show disclosure of the withheld information access would impair tax administration so as to justify its withholding under § 6103(e)(7). The Court further finds the IRS complied with its duty to reasonably segregate and produce non-exempt information. See Queener Decl. ¶ 14. Accordingly, the Court grants the IRS's motion for summary judgment as to this exemption.

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 26, 2017



Barry Ted Moskowitz, Chief Judge
United States District Court