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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PACIFIC FISHERIES, INC.,

Plaintiff,

v.

INTERNAL REVENUE SERVICE,

Defendant.

CASE NO. C04-2436JLR

ORDER

This matter comes before the court on Defendant Internal Revenue Service’s (“IRS”) motion for summary judgment (Dkt. # 43) and its supplemental declaration (Dkt. # 55) filed in response to the court’s request in its March 31, 2009 order. Having reviewed the papers, including the supplemental briefing submitted by the parties and heard the argument of counsel, for the reasons that follow, the court GRANTS the motion for summary judgment.

I. BACKGROUND

As the parties are well aware of the facts in this matter, the court incorporates by reference the background section found in its March 31, 2009 order.

II. ANALYSIS

Summary judgment is appropriate if the evidence, when viewed in the light most favorable to the non-moving party, demonstrates there is no genuine issue of material

1 fact. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v.*
2 *County of Los Angeles*, 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the
3 initial burden of showing there is no material factual dispute and he or she is entitled to
4 prevail as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets its
5 burden, the nonmoving party must go beyond the pleadings and identify facts which show
6 a genuine issue for trial. *Cline v. Indus. Maint. Eng'g. & Contracting Co.*, 200 F.3d
7 1223, 1229 (9th Cir. 2000). This court conducts a de novo review of the IRS's response
8 to the Freedom of Information Act ("FOIA") request. 5 U.S.C. § 552(a)(4)(B); *United*
9 *States Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 755
10 (1989). The burden is on the agency to show that its response was adequate. *Reporters*
11 *Comm.*, 489 U.S. at 755.

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13 The court has already evaluated many of Plaintiff Pacific Fisheries Inc.'s ("Pacific
14 Fisheries") arguments in opposition to summary judgment. The court therefore
15 incorporates by reference the analysis section of its March 31, 2009 order. This order
16 deals with two questions: (1) whether the declarations submitted by the IRS are
17 sufficient to exempt documents from disclosure under FOIA on the basis that their release
18 would seriously impair federal tax administration and (2) whether the definition of "tax
19 convention information" is broad enough to encompass information sent from the United
20 States to Russia.

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22 **A. Serious Impairment of Federal Tax Administration**

23 Pacific Fisheries argues that the IRS can release the documents it seeks under 26
24 U.S.C. § 6103(c) which provides:

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26 **Disclosure of returns and return information to designee of taxpayer.**--The
27 Secretary may, subject to such requirements and conditions as he may
28 prescribe by regulations, disclose the return of any taxpayer, or return
information with respect to such taxpayer, to such person or persons as the
taxpayer may designate in a request for or consent to such disclosure, or to any

1 other person at the taxpayer's request to the extent necessary to comply with
2 a request for information or assistance made by the taxpayer to such other
3 person. However, return information shall not be disclosed to such person or
4 persons if the Secretary determines that such disclosure would seriously impair
5 Federal tax administration.

6 Pacific Fisheries has obtained the consent of the taxpayer to receive his return
7 information. (*See* Declaration of Douglas W. O'Donnell ("O'Donnell Decl.") (Dkt. # 43-
8 2), Ex. B.) The IRS responds that it has made a determination that disclosing the
9 requested information would "seriously impair Federal Tax administration."

10 After the court declined to grant summary judgment based on Mr. O'Donnell's¹
11 conclusory first declaration regarding serious impairment, the court gave the IRS the
12 opportunity to "file a more detailed declaration explaining why the release of the
13 documents in question would seriously impair federal tax administration." (March 31,
14 2009 Order (Dkt. # 54) at 10.) In response, the IRS filed another declaration from Mr.
15 O'Donnell who stated that the purpose of his supplemental declaration was "to further
16 explain my determination that the information withheld in this case pursuant to 26 U.S.C.
17 § 6105 may not be disclosed to [Pacific Fisheries] because such disclosure would harm
18 working relations with Russia and, therefore, would seriously impair federal tax
19 administration within the meaning of 26 U.S.C. § 6103(c)." (Supplemental Declaration
20 of Douglas W. O'Donnell ("Supp. O'Donnell Decl.") (Dkt. # 55) ¶ 2.)

21 Mr. O'Donnell asserts that the United States and Russia "have developed an
22 ongoing and mutually beneficial treaty relationship" and that such "[t]reaty relationships
23 are a critical element of federal tax administration." (Supp. O'Donnell Decl. ¶ 3.) Based
24 on Mr. O'Donnell's "knowledge and experience, a high degree of mutual respect and
25 trust between treaty partners is necessary for an ongoing and mutually beneficial
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28 ¹Mr. O'Donnell is the Director, Treaty Administration and International
Coordination, Large and Mid-Size Business Division, IRS. (*See* O'Donnell Decl. ¶ 1.)

1 relationship under an income tax treaty” and therefore “maintaining a high degree of
2 mutual respect and trust with the Russian government is a significant concern of the
3 United States Competent Authority” under the tax convention. (Supp. O’Donnell Decl. ¶
4 4.) Mr. O’Donnell contends that IRS policy guidelines require that he refrain from
5 disclosing information to a taxpayer when the treaty partner has requested that the
6 information not be disclosed to the taxpayer. (Supp. O’Donnell Decl. ¶ 6.) Mr.
7 O’Donnell states that “the Russian government confirmed to my office in 2005 its
8 expectation of confidentiality with respect to information received from the Russian
9 government” and “specifically requested that such information not be disclosed to
10 [Pacific Fisheries].” (Supp. O’Donnell Decl. ¶ 7.) In a letter dated December 20, 2008,
11 the “Russian tax authorities . . . reconfirmed this request” (*Id.*) Mr. O’Donnell
12 believes “that failure to honor Russia’s expectations of confidentiality would disrupt the
13 Russian government’s confidence in the exchange-of-information process and would chill
14 future cooperation by Russia” which “would make it less likely the Russian government
15 would provide exchange-of-information assistance under the treaty for U.S. tax cases,
16 thereby interfering with the administration of U.S. civil and criminal tax investigations.”
17 (Supp. O’Donnell Decl. ¶ 8.) United States confidence in the future cooperation of the
18 Russian government would be diminished and would result in fewer requests under the
19 tax convention, “materially impair[ing] the effectiveness of this treaty.” (*Id.*) Mr.
20 O’Donnell also expressed concern that treaty relations with countries who have similar
21 treaties with the United States “could be negatively affected if the United States in this
22 case were found unable to honor its commitment to Russia on confidentiality.” (*Id.*)
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26 Pacific Fisheries contends that Mr. O’Donnell’s declaration “is self serving
27 speculation and cites no facts which permit the Court to make an independent
28 determination that release of the information would seriously impair federal tax

1 administration.” (Resp. to Decl. (Dkt. # 57) at 2.) Pacific Fisheries also attacks Mr.
2 O’Donnell’s reliance on IRS policy guidelines as well as his failure to attach the letters
3 from the Russian government and to explain why information exchanged over eight years
4 ago has the ability to impair federal tax administration.

5
6 It does not appear that the parties disagree that the Ninth Circuit standard for
7 review of a serious impairment decision is de novo. *See Long v. Internal Revenue Serv.*,
8 742 F.2d 1173, 1182 (9th Cir. 1984). The IRS has not argued that *Long* does not
9 represent a correct statement of the law in this Circuit. The court concludes that *Long*
10 correctly states the law in this Circuit and relies on it in its analysis of this case. The
11 *Long* court held: “[W]e think that the Commissioner’s determination is entitled to
12 deference, we emphasize that the district court’s review is still de novo and that the court
13 must satisfy itself, on the basis of detailed and nonconclusory affidavits, that the
14 Commissioner is correct in his belief that disclosure of [the requested information] by
15 these plaintiffs would pose a substantial risk of impairing the collection, assessment, or
16 enforcement of the tax laws.” *Id.* at 1182-83. The IRS bears the burden of proof on this
17 issue. *Id.* The *Long* court also noted that: “We do not mean to imply that the
18 Commissioner’s determination is to count for nothing. In particularly sensitive areas such
19 as national security cases and cases involving investigatory records of law enforcement
20 agencies, courts have accorded special deference to an agency’s detailed affidavits.” *Id.*
21 at 1182.

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23 The court disagrees with Pacific Fisheries’ characterization of Mr. O’Donnell’s
24 declaration as “self-serving” speculation. First, the court likens this case, which involves
25 foreign policy, to those involving sensitive areas like national security. In the national
26 security context, courts have held that declarations are entitled to deference but they
27 “must still describe the justifications for nondisclosure with reasonably specific detail,
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1 demonstrate that the information withheld logically falls within the claimed exemptions,
2 and show that the justifications are not controverted by contrary evidence in the record or
3 by evidence of [] bad faith.” *Berman v. Cent. Intelligence Agency*, 501 F.3d 1136, 1140
4 (9th Cir. 2007). The court acknowledges that cases involving national security issues and
5 those involving foreign affairs are not entirely analogous. The court expects the level of
6 detail in an affidavit in the foreign affairs context to be higher than the level of detail
7 required in the national security context. Nevertheless, the court finds that the national
8 security cases provide a sound framework for an analysis of the issues. Here, Mr.
9 O’Donnell has provided specific justifications for why release of the material at issue
10 would seriously impair federal tax administration. What Pacific Fisheries terms
11 speculation is Mr. O’Donnell’s opinion based on his experience as the Director of Treaty
12 Administration, as an IRS employee and from his discussions with others involved with
13 this FOIA request. The court determines that Mr. O’Donnell’s declaration is well-
14 grounded in experience rather than speculation and that it provides specific, legitimate
15 reasoning behind the ultimate conclusion that federal tax administration would be
16 impaired.² The court further determines that Mr. O’Donnell’s conclusions are entitled to
17 some deference as the court is not in a position to independently determine what actions
18 on the part of the United States government would or would not impair treaty relations
19 with another nation. In terms of the other factors, Pacific Fisheries has not brought forth
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25 ²Contrary to Pacific Fisheries’ arguments, the declaration clearly explains why release of
26 information exchanged eight years ago has the ability to impair federal tax administration. As Mr.
27 O’Donnell states, release of such information would cause a disruption to the Russian
28 government’s confidence in the exchange-of-information process and could have implications
reaching far beyond the relationship between Russia and the United States. (*See* Supp. O’Donnell
Decl. ¶ 8.)

1 contrary evidence controverting Mr. O’Donnell’s justifications or suggesting that there is
2 any bad faith on the part of the IRS.

3 Pacific Fisheries also attacks Mr. O’Donnell’s reliance on Internal Revenue
4 Manual 11.3.25.2(8) which generally provides for release of information received from a
5 foreign tax authority pursuant to a tax treaty, except where, “the IRS or the foreign tax
6 authority providing the information objects to disclosure or if disclosure would seriously
7 impair Federal tax administration.” (Supp. O’Donnell Decl., Ex. A.) Pacific Fisheries is
8 correct that the policy can be read to favor disclosure of the information; however, here,
9 the IRS has determined that disclosure would seriously impair federal tax administration.
10 Having determined that the IRS’s decision to withhold the documents based on serious
11 impairment rests on sound footing, the court need not address whether Russia did or did
12 not object to the disclosure of the documents. The record, however, does indicate that the
13 Russian authorities have stated their “desire,” “expectation” and reaffirmed their “original
14 wish” that the documents at issue remain confidential. (O’Donnell Decl. ¶¶ 6-7; Supp.
15 O’Donnell Decl. ¶ 7.)³ Although Pacific Fisheries argues to the contrary, the court finds
16 that these communications by the Russian government were appropriate for Mr.
17 O’Donnell to consider and rely upon when making his ultimate determination that
18 disclosure of the documents would seriously impair federal tax administration.
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21 After a review of the declaration and Pacific Fisheries’ objections to it, the court
22 determines that Mr. O’Donnell has provided detailed justifications that demonstrate that
23 federal tax administration would be seriously impaired if the documents at issue were
24 released. The court further determines that Mr. O’Donnell’s determination regarding
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26 ³Relatedly Pacific Fisheries contends that the IRS should have attached the letters from the
27 Russian authorities discussed by Mr. O’Donnell in his declaration. The court accepts the IRS’s
28 explanation that it would have been improper for Mr. O’Donnell to attach the letters because they
contain tax convention information.

1 serious impairment is entitled to deference based on the foreign policy interests at stake in
2 this case. The court is satisfied that the IRS's conclusion that federal tax administration
3 would be seriously impaired by release of the documents is correct.

4 **B. Information Provided by the United States to Russia**

5 In the alternative, Pacific Fisheries argues that "at a minimum" it is entitled to
6 disclosure of information provided by the United States to Russian authorities even if it is
7 not entitled to information provided by the Russians to the United States.⁴ It contends
8 that the IRS takes too broad a view of the term "tax convention information" as including
9 information that relates to and/or reflects on information that it received from Russia.
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11 Pacific Fisheries believes that "the government interprets the scope of legally protected
12 information beyond that allowed by law and views its power to determine what will be
13 disclosed without boundary, so long as it asserts that federal tax administration will be
14 seriously impaired." (Resp. to Decl. at 7.) The IRS responds that the definition of "tax
15 convention information" in the statute is broad enough to cover information relating to
16 and reflecting on information it received from Russia. The court agrees with the IRS.
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18 "Tax convention information" is defined in relevant part as any "other information
19 exchanged pursuant to a tax convention which is treated as confidential or secret under
20 the tax convention." 26 U.S.C. § 6105(c)(1)(E). The IRS also points to the legislative
21 history underlying § 6105 which expresses Congress's intent that "tax convention
22 information" be defined broadly: "The conferees intend that tax convention information
23 would include documents and any other information that reflects tax convention
24 information, including the association of a particular treaty partner with a specific issue
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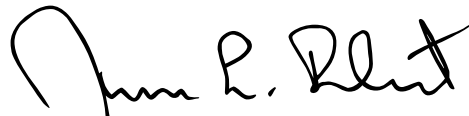
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27 ⁴The court granted leave for Pacific Fisheries to brief only issues regarding the sufficiency
28 of additional declarations from the IRS. (See March 31, 2009 Order at 10.) Although Pacific
Fisheries' arguments exceed this scope, the court will briefly address and resolve this argument.

1 or matter.” H.R. Conf. Rep. 106-1033 at 1011 (2000). Here, from the statutory
2 definition and legislative history it is clear that communications that relate to and reflect
3 on information received from Russia are encompassed within the definition of tax
4 convention information. Pacific Fisheries’ bare assertion, without citation to authority,
5 that the definition of “tax convention information” does not include documents relating to
6 and reflecting on information received from a treaty partner, is not enough to overcome
7 the plain meaning found in the definition of “tax convention information” in the statute.
8 The court determines that documents withheld on this basis are properly withheld under
9 26 U.S.C. § 6105(a) and 5 U.S.C. §552(b)(3).
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11 **III. CONCLUSION**

12 For the foregoing reasons, as well as the reasons articulated in the court’s March
13 31, 2009 order, the court GRANTS the IRS’s motion for summary judgment.
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15 Dated this 6th day of May, 2009.

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JAMES L. ROBART
19 United States District Judge
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