

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

Citizens for a Strong  
New Hampshire, Inc.

v.

Civil No. 14-cv-487-LM

Internal Revenue Service

O R D E R

This Freedom of Information Act ("FOIA") dispute stems from the so-called "targeting" scandal that embroiled the Internal Revenue Service ("IRS") in 2013. The allegations involve the sufficiency and timeliness of a records search conducted by the IRS following a FOIA request made by the plaintiff, Citizens for a Strong New Hampshire, Inc. ("Citizens"). It also involves the ongoing refusal by the IRS to disclose a total of 51 pages of documents which are responsive to Citizens's request, but which the IRS claims are subject to a FOIA exemption which prohibits their disclosure.

The parties have filed cross motions for summary judgment. Citizens has asked the court to conduct an in camera review of the 51 pages of documents in order to determine the applicability of the IRS's claimed exemption. For the reasons that follow, the court believes it necessary to conduct an in

camera review of the documents before resolving the cross motions for summary judgment.

## **I. Background**

The court rehearses the facts only to the extent necessary to resolve Citizens's request for in camera review. In 2014, Citizens submitted a FOIA request to the IRS, seeking the disclosure of any correspondence between New Hampshire Senator Jeanne Shaheen or New Hampshire Congresswoman Carol Shea-Porter, and three high-ranking IRS officials.

The IRS conducted a search of an electronic database, and produced a total of 96 pages of responsive documents. The IRS disclosed 41 of these pages in full, disclosed four pages in partially-redacted form, and withheld the remaining 51 pages. In this lawsuit, Citizens alleges that the IRS violated FOIA by: (1) conducting an inadequate search; (2) significantly delaying its disclosure; and (3) continuing to withhold the 51 responsive but purportedly exempt pages.

## **II. In Camera Review Under FOIA**

FOIA's "basic purpose is to ensure an informed citizenry, vital to the functioning of a democratic society, or, stated more specifically, to open agency action to the light of public scrutiny." [Church of Scientology Int'l v. U.S. Dep't of Justice](#), 30 F.3d 224, 228 (1st Cir. 1994) (citations omitted)

(internal quotation marks omitted). FOIA requires governmental agencies to disclose their records to the public upon request, unless at least one of several enumerated exemptions applies.

5 U.S.C. §§ 552(a)(3) and 552(b).

In this case, the IRS claims that the 51 pages of documents are exempt from disclosure pursuant to 5 U.S.C. § 552(b)(3), which provides that FOIA's disclosure requirements "do[] not apply to matters that are specifically exempted from disclosure by statute . . . ." The applicable statute, the IRS contends, is 26 U.S.C. § 6103(a), which provides that a citizen's tax return (or information contained therein) "shall be confidential . . . and no officer or employee of the United States . . . shall disclose any return or return information obtained by him in any manner . . . ."

The IRS has submitted to the court two declarations by A.M. Gulas, a Senior Counsel at the IRS who was involved in responding to Citizens's FOIA request. See Decls. of A.M. Gulas (doc. nos. 12-3 and 22-1). Ms. Gulas has represented in these declarations that the 51 pages of material being withheld pursuant to Section 552(b)(3) are correspondence between Senator Shaheen's office and the IRS regarding the personal tax liability of individual taxpayers. More specifically, Ms. Gulas has represented that Senator Shaheen transmitted letters to the IRS on behalf of five New Hampshire residents "seeking

information about, or assistance with, the constituent's own tax matter." See Decl. of A.M. Gulas (doc. no. 12-3) ¶ 13.

Citizens contends that Ms. Gulas's description of the documents is unsatisfactory, and has requested in camera review to determine whether some of these documents should be disclosed (in whole or in part).<sup>1</sup>

An agency seeking to withhold materials requested under FOIA bears the burden of proving that those materials are exempt from disclosure. Orion Research Inc. v. EPA, 615 F.2d 551, 553 (1st Cir. 1980) (citing 5 U.S.C. § 552(a)(4)(B)). Normally, a district court's review of an agency's claimed exemption is de novo. Church of Scientology, 30 F.3d at 228. Where, as here, however, the agency's claimed exemption is under Section 552(b)(3), "de novo review normally ends" and "further review must take place under more deferential, administrative law standards." Aronson v. IRS, 973 F.2d 962, 967 (1st Cir. 1992).

Although FOIA authorizes courts to conduct in camera review of challenged documents, "[t]he legislative history indicates that, before in camera inspection is ordered, an agency should be given the opportunity to demonstrate by affidavit or testimony that the documents are clearly exempt from disclosure,

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<sup>1</sup> As noted previously, in addition to withholding 51 pages of responsive documents, the IRS also partially redacted four separate pages before disclosing them. Citizens does not take issue with this action, and does not seek in camera review of these four pages.

and that the court is expected to accord substantial weight to the agency's affidavit." [Bell v. U.S.](#), 563 F.2d 484, 487 (1st Cir. 1977) (citations omitted) (internal quotation marks omitted). To satisfy its burden without submitting undisclosed records for in camera review, the agency "must furnish a detailed description of the contents of the withheld material and of the reasons for nondisclosure, correlating specific FOIA exemptions with relevant portions of the withheld material." [Orion Research](#), 615 F.2d at 553. The agency's justification for the withholding must be sufficient to give the requester a "meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." [Church of Scientology](#), 30 F.3d at 231 (citations omitted) (internal quotation marks omitted). Often, the written explanation will be accompanied by a so-called "Vaughn index," listing each document the government seeks to preclude from disclosure, along with a specific explanation for the withholding.<sup>2</sup> See [N.H. Right to Life v. U.S. Dep't of Health & Human Servs.](#), 778 F.3d 43, 48 n.3 (1st Cir. 2015).

For several reasons, the court believes that in camera review is appropriate in this case. As an initial matter, the IRS does not vigorously oppose it. The IRS takes the position

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<sup>2</sup> The term derives from the oft-cited FOIA case, [Vaughn v. Rosen](#), 484 F.2d 820 (D.C. Cir. 1973).

that Ms. Gulas's declarations provide adequate grounds to withhold the material, but the IRS acknowledges that the court has discretion to order in camera review, and has indicated that it is willing to produce the documents upon request.

Second, while a close call, the court finds that Ms. Gulas's description of the challenged documents is somewhat inadequate. While Ms. Gulas describes the documents broadly as consisting of five separate sets of correspondence related to individual taxpayer returns, she does not individually list the documents, or provide more specific details about the contents. Notably, her declarations are not accompanied by a Vaughn index. What is more, it is not entirely clear based on Ms. Gulas's declarations whether any of the five documents might be subject to disclosure in redacted form.

Third and finally, the relatively modest volume of paper at issue (51 pages) ensures that the court can conduct an in camera review without the risk of squandering finite judicial resources. Cf. Bell, 563 F.2d at 486 (affirming the denial of in camera review where the district found that it had neither the time nor the expertise to review some 500,000 documents).

### **III. Conclusion**

The court's in camera review may well confirm the contents of Ms. Gulas's declarations. Nevertheless, for the reasons

described, and to eliminate any possibility that Citizens will be denied access to materials to which it is entitled under FOIA, the court believes that in camera review is appropriate.

The IRS is ordered, within 30 days of the date of this order, to transmit copies of the 51 pages of challenged material to the court. The documents should be hand delivered, or otherwise securely transmitted.

The court reserves its ruling on the cross motions for summary judgment until after its in camera review is completed.<sup>3</sup>

SO ORDERED.



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Landya McCafferty  
United States District Judge

June 8, 2015

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<sup>3</sup> Along with its request for in camera review, Citizens urges the court to grant limited discovery on the nature of the search undertaken by the IRS, and asks the court for an order directing the IRS to undertake a second, more thorough search. These issues pertain to the adequacy of the search process, rather than the applicability of a FOIA exemption, and the court will consider them in connection with the cross motions for summary judgment after the completion of its in camera review.