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1987]

ADMINISTRATIVE LAW—FREEDOM OF INFORMATION ACT—
TAXPAYER'S REQUEST FOR DISCLOSURE OF RETURN INFORMATION IS
GOVERNED BY THE FREEDOM OF INFORMATION ACT RATHER
THAN THE INTERNAL REVENUE CODE

Grasso v. Internal Revenue Service (1986)

The federal courts are divided as to which standard a court should apply when determining whether the Internal Revenue Service (IRS) made an appropriate decision to disclose income tax return information to a taxpayer.¹ The courts disagree whether the Freedom of Informa-

1. See I.R.C. § 6103(b)(2) (1982). The Internal Revenue Code (IRC) defines return information as:

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over-assessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, or liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110, but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

Id.

Some federal courts have decided that the Internal Revenue Code governs an Internal Revenue Service decision not to disclose return information. See *White v. IRS*, 707 F.2d 897, 900 (6th Cir. 1983) (IRC's section 6103 controls disclosure of tax returns); *King v. IRS*, 688 F.2d 488, 495 (7th Cir. 1982) (section 6103 governs release of return information).

Other federal courts have concluded that the Freedom of Information Act (FOIA) governs an IRS decision not to disclose return information. See *Church of Scientology v. IRS*, 792 F.2d 146 (D.C. Cir. 1986) (FOIA provides standards for disclosure of return information), *cert. granted*, 107 S. Ct. 947 (1987); *Long v. IRS*, 742 F.2d 1173, 1178 (9th Cir. 1984) (section 6103 does not preempt FOIA); *Linstead v. IRS*, 729 F.2d 998, 1003 (5th Cir. 1984) (IRS denial of disclosure is reviewable under FOIA); *Currie v. IRS*, 704 F.2d 523, 527-28 (11th Cir. 1983) (section 6103 operates within procedures of FOIA).

For a further discussion of *Scientology*, see *infra* note 28. For a further discussion of *Long*, see *infra* notes 39-42 and accompanying text. For a further discussion of *Currie*, see *infra* note 88 and accompanying text.

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tion Act (FOIA)² or the Internal Revenue Code (IRC)³ should govern a taxpayer's request for disclosure of return information.⁴ The disagree-

2. 5 U.S.C. § 552 (1982). The FOIA provides in pertinent part:

(a) Each agency shall make available to the public information as follows: . . . any request for records which (A) reasonably describes such records and (B) as made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. § 552(a)(3) (1982).

Congress enacted the FOIA in 1966 to make documents of the executive department and agencies generally available to the public. FOIA, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified at 5 U.S.C. § 552 (1982)). In 1976, Congress amended the exemption provisions of the FOIA to restrict the discretion that agencies had over nondisclosure statutes. See *Government in the Sunshine Act*, § 3, 5 U.S.C. § 552(b)(3) (1982); see also H.R. REP. NO. 880, 94th Cong., 2d Sess. 22-23, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 2183, 2204-05 (expressing concern over agency discretion in withholding of information). Prior to the amendment, the IRS could disclose return information at the discretion of the Commissioner of Internal Revenue (Commissioner) under its nondisclosure statute. See I.R.C. § 6013(e)(7) (1982). Under the amended exemption, Congress gave effect only to those nondisclosure statutes which contain no delegation of discretion or which specifically establish criteria for withholding documents. *Long v. IRS*, 742 F.2d 1173, 1181 (1984); see 5 U.S.C. § 552(b)(3) (1982). For the text of section 552(b)(3), see *infra* note 12. For the text of the nondisclosure section of the IRC, section 6103(e)(7), see *infra* note 5.

3. I.R.C. § 6103 (1982). The IRC provides in pertinent part:

(a) Returns and return information shall be confidential, and except as authorized by the title—

(1) no officer or employee of the United States, (2) no officer or employee of any State or of any local child support enforcement agency who has or had access to returns or return information under this section, and (3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (2) or (4)(B) of subsection (m), or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such as an officer or any employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

Id. § 6103(a).

4. The United States Courts of Appeals for the Sixth and Seventh Circuits, as well as several district courts, have determined that section 6103 of the IRC is the sole determinator of whether the IRS must disclose return information. See *White v. IRS*, 707 F.2d 897, 900 (6th Cir. 1983) (section 6103 is detailed and specific statutory scheme which controls disclosure of return information); *King v. IRS*, 688 F.2d 488, 495 (7th Cir. 1982) (for court to decide whether generalized structures of FOIA take precedence over the subsequently enacted, particularized disclosure scheme of section 6103, would render tax reform provision an exercise in legislative futility); *Green v. IRS*, 556 F. Supp. 79, 82 (N.D. Ind. 1982) (section 6103 regulates the disclosure of tax return information and this antidisclosure statute takes precedence over FOIA), *aff'd*, 734 F.2d 18 (7th Cir. 1984); *Watson v. IRS*, 538 F. Supp. 817, 818 (S.D. Tex. 1982) (when section 6103 is asserted as defense to disclosure, it takes precedence over FOIA); *Zale Corp. v. IRS*, 481 F. Supp. 486, 489 (D.D.C. 1979) (section 6103 is elaborate and detailed scheme for releasing return information to identified parties and

ment centers on whether the specific nondisclosure section of the IRC⁵ supersedes the more general disclosure section of the FOIA.⁶ In *Grasso v. Internal Revenue Service*,⁷ the United States Court of Appeals for the Third Circuit held that the FOIA is the applicable statute to govern a taxpayer's request for the disclosure of return information.⁸

In *Grasso*, two IRS agents interviewed Paul Grasso during an investigation to determine whether Grasso had any civil or criminal tax liability.⁹ Two months after the interview, Grasso filed a FOIA request for a report of the interview.¹⁰ The IRS gave Grasso a memorandum of the

there is no evidence in section 6103's legislative history to indicate Congress intended FOIA to frustrate clear purpose of section 6103). For a discussion of *Zale*, see *infra* notes 27-31 and accompanying text.

Four courts of appeals have determined that section 6103 operates within the guidelines of the FOIA. See *Church of Scientology v. IRS*, 792 F.2d 146, 149 (D.C. Cir. 1986) (FOIA and section 6103 operate harmoniously in that FOIA establishes procedures IRS must follow in asserting section 6103 exemption), *cert. granted*, 107 S. Ct. 947 (1987); *Long v. IRS*, 742 F.2d 1173, 1177 (9th Cir. 1984) (neither section 6103 nor its legislative history contains any language indicating that section 6103 should operate independently of FOIA); *Linsteadt v. IRS*, 729 F.2d 998, 1001-02 (5th Cir. 1984) (section 6103 provides criteria for disclosure but IRS bears burden of demonstrating that one of specific exemptions of FOIA justifies nondisclosure); *Currie v. IRS*, 704 F.2d 523, 527-28 (11th Cir. 1983) (section 6103 does not supersede FOIA). For a further discussion of *Long*, see *infra* notes 39-42 and accompanying text. For a further discussion of *Linsteadt*, see *infra* notes 48-51 and 78-81 and accompanying text. For a further discussion of *Currie*, see *infra* note 88 and accompanying text.

5. I.R.C. § 6103(e)(7) (1982). The IRC's nondisclosure section, section 6103, provides in pertinent part:

Return 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.

Id. For a further discussion of the legislative history of section 6103, see *infra* notes 33 and 62-66 and accompanying text.

6. 5 U.S.C. § 552(a)(3) (1982). For the text of section 552(a)(3), see *supra* note 2. For a further discussion of the FOIA's policy of disclosure to the general public, see *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 221 (1978) (unless requested material falls within one of statutory exemptions, this section, which is broadly conceived and provides basic policy of disclosure, requires records of federal agencies be made available to any member of general public); *Cox v. United States Dep't of Justice*, 576 F.2d 1302, 1304 (8th Cir. 1978) (this section directing agencies to disclose records is to be interpreted broadly to achieve goal of full disclosure); *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971) (policy of act requires that disclosure requirements be construed broadly and exemptions narrowly).

7. 785 F.2d 70 (3d Cir. 1986). For a discussion of the facts of *Grasso*, see *infra* notes 9-21 and accompanying text.

8. *Id.* at 75. For a discussion of the Third Circuit's reasoning in *Grasso*, see *infra* notes 33-43 and accompanying text.

9. 785 F.2d at 72. The agents interviewed Paul Grasso in January, 1984. *Id.*

10. *Id.* Grasso made the request in compliance with the FOIA. *Id.*; see 5 U.S.C. § 552(a)(3) (1982). The FOIA provides in pertinent part: "[E]ach agency, upon any request for records which (A) reasonably describes such

interview but excluded significant portions of the interview.¹¹ In a letter accompanying the memorandum, the IRS claimed the excluded portions were exempt from disclosure under the exemptions in sections 552(b)(3) and (b)(7)(A) of the FOIA (Exemptions 3 and 7(A)).¹² Grasso appealed to the Commissioner of Internal Revenue to have the excluded portions disclosed.¹³ However, the Commissioner took no action within the statutory period of time allowed for a response to the appeal.¹⁴

After exhausting his administrative remedies,¹⁵ Grasso filed an ac-

records and (B) is made in accordance with published rules . . . shall make the records promptly available to any person." *Id.* The IRS has published regulations which must be followed when making a request pursuant to section 552(a)(3) of the FOIA. *See* 26 C.F.R. § 601.702(c) (1985).

11. *Grasso*, 785 F.2d at 72. The district court noted that the document, although not a verbatim statement of what Grasso said, contained no evaluations by the interviewing agent. *Id.* (citing Appellant's Appendix at 51a). The IRS claimed release of the excluded portions would indicate what evidence the IRS might rely on in future proceedings against Grasso. *Id.* at 76. The IRS also claimed that disclosure would reveal the names of witnesses or potential witnesses and transactions being investigated. *Id.*

12. *Id.* at 72; *see* 5 U.S.C. § 552(b)(3) and (b)(7)(A) (1982). The FOIA contains nine exemptions from its general requirement of full disclosure of information. *See* 5 U.S.C. § 552(b) (1982). The FOIA provides in pertinent part:

(b) This section does not apply to matters that are:

...

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

...

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings.

Id. § 552(b)(3) and (b)(7)(A).

13. *Grasso*, 785 F.2d at 72. The FOIA requires that an agency determine within ten days after receipt of a request whether they will comply with the request and notify the person making the request of their right to appeal the decision to the head of the agency. 5 U.S.C. § 552(a)(6)(A)(i) (1982).

14. *Grasso*, 785 F.2d at 72. The IRS acknowledged Grasso's appeal but failed to respond within the required twenty day period pursuant to the FOIA. *Id.* (citing 5 U.S.C. § 552(a)(6)(A)(ii) (1982)). The FOIA provides in pertinent part:

Each agency, upon any request for records . . . shall—

... (ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

5 U.S.C. § 552(a)(6)(A)(ii) (1982).

15. The FOIA requires exhaustion of administrative remedies by one making a request under the Act:

Any person making a request to any agency for records under paragraph (1), (2), or (3) of the subsection shall be deemed to have ex-

tion alleging that the IRS acted unlawfully by withholding portions of the memorandum of the interview.¹⁶ In response to Grasso's complaint, the IRS answered that section 6103 of the Internal Revenue Code of 1954, rather than the FOIA, governs the disclosure of return information.¹⁷ In the alternative, the IRS argued that the information withheld was exempt from disclosure under Exemptions 3 and 7(A) of the FOIA.¹⁸ After an *in camera* inspection of the document,¹⁹ the district court ordered the IRS to disclose the requested information.²⁰ Follow-

hausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.

5 U.S.C. § 552(a)(6)(C) (1982). Once these administrative remedies are exhausted, the individual seeking information can file a complaint in district court. The statute provides in pertinent part:

On complaint, the district court of the United States in the district in which complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

5 U.S.C. § 552(a)(4)(B) (1982); *see Joffess v. Secretary, Dep't of Health, Education and Welfare*, 393 F. Supp. 626, 629 (S.D.N.Y. 1975) (relief under FOIA is unavailable until administrative remedies are exhausted); *see also Television Wis., Inc. v. NLRB*, 410 F. Supp. 999, 1001 (W.D. Wis. 1976) (one element of proper complaint under FOIA is exhaustion of administrative remedies).

16. *Grasso*, 785 F.2d at 72. Grasso initiated the action in the United States District Court for the District of New Jersey. *Id.* at 70. Grasso claimed that the IRS' actions were unsupported by any section of the FOIA. *Id.* at 72.

17. *Id.* The IRS claimed that the FOIA was inapplicable as to the disclosure of return information and that section 6103(e)(7) of the IRC governs the disclosure of return information. *Id.* at 73; *see I.R.C. § 6103(e)(7)* (1982). For the complete text of section 6103(e)(7), *see supra* note 5.

18. *Grasso*, 785 F.2d at 72. The IRS had originally argued that the information withheld was exempt from disclosure under sections 552(b)(3), (b)(7)(A) and (b)(7)(C) of the FOIA. *Id.* However, on appeal, the IRS did not pursue its argument under the exemption in section 552(b)(7)(C) as it was clearly inapplicable. *Id.* The exemption contained in section (b)(7)(C) prohibits the disclosure of investigatory records if such a disclosure would constitute an unwarranted invasion of privacy. *See* 5 U.S.C. § 552(b)(7)(C) (1982); *see also Cohen v. EPA*, 575 F. Supp. 425, 429 (D.D.C. 1983) (privacy interests include: marital status, legitimacy of children, identity of father of children, medical condition, welfare payments and alcoholic consumption).

19. *Grasso*, 785 F.2d at 72. Congress has left the use of *in camera* inspection to the discretion of the district courts. *See Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978). The ultimate criterion is whether a district judge believes an *in camera* inspection is needed to make a responsible de novo determination on the claims of exemption. *Id.* The use of *in camera* inspection of documents is not the preferred method of determining whether a government agency's decision to withhold information is appropriate when the information sought is extensive and the claimed exemptions are many. *See Currie v. IRS*, 704 F.2d 523, 530 (11th Cir. 1983). However, in those cases where the disputed documents are relatively brief, few in number and there are a few claimed exemptions, the court's use of *in camera* procedure would be appropriate. *Id.* at 531.

20. *Grasso*, 785 F.2d at 72. The district court noted that Grasso would get

ing the district court's determination, the IRS appealed to the United States Court of Appeals for the Third Circuit.²¹

The Third Circuit, with Judge Sloviter writing for a unanimous panel,²² began its analysis by addressing the IRS's assertion that section 6103 of the IRC supersedes the FOIA.²³ The IRS asserted that section 6103 deals specifically with disclosure of return information²⁴ and that the FOIA is a general disclosure statute.²⁵ The IRS argued that under the basic principles of statutory construction, specific statutes, like section 6103, take precedence over general statutes, like the FOIA.²⁶

The Third Circuit recognized that the argument that section 6103

the statement if he was prosecuted. *Id.* The court further stated that tax administration would not be impaired if the IRS released to an individual the same information that person gave to the IRS. *Id.*

21. *Id.* The district court stayed its order pending the appeal to the Third Circuit. *Id.*

22. *Id.* The case was argued before Circuit Judges Adams, Sloviter, and Mansmann. *Id.* Judge Adams wrote a concurring opinion. *Id.* at 78. For a discussion of Judge Adams' concurring opinion, see *infra* notes 58-60 and accompanying text.

23. 785 F.2d at 73. The district court did not decide this issue because the IRS did not assert in the lower court that the standard by which Grasso's request for disclosure should be governed is section 6103 rather than the FOIA. *Id.* The IRS initially relied on the FOIA's exemptions for withholding portions of the interview. *Id.* The Third Circuit noted that the principal result in finding that section 6103 governs disclosure of return information is the greater deference reviewing courts must give an IRS decision not to disclose information under section 6103. *Id.* If section 6103 supersedes the FOIA, the provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 706 (1982), will govern the procedures of a reviewing court. *Id.* Under the APA, the reviewing court must only decide if the agency's action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. *Id.* (citing 5 U.S.C. § 706(2)(A) (1982)). However, if the FOIA governs the disclosure of return information, the reviewing court must determine the matter *de novo* and the agency must justify nondisclosure. *Id.* (citing 5 U.S.C. § 552(a)(4)(B) (1982)). For a further discussion of agency discretion under the APA, see Rogers, *A Fresh Look At Agency "Discretion,"* 57 TUL. L. REV. 776 (1983).

24. 785 F.2d at 74. The IRS argued specifically that, since Grasso was requesting return information, section 6103(e)(7) was the applicable statute to govern Grasso's request. *Id.* The legislative history of section 6103 states "returns and return information should generally be treated as confidential and not subject to disclosure except in those limited situations delineated in the newly amended section 6103." S. REP. NO. 938, 94th Cong., 2d Sess. 318, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 3439, 3747. For the text of section 6103(e)(7), see *supra* note 5.

25. *Grasso*, 785 F.2d at 74. For a discussion of the FOIA, see *supra* note 6.

26. *Grasso*, 785 F.2d at 74; see *Bullova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) (it is familiar law that specific statute controls over general one without regard to priority of enactment). For a discussion of statutory construction, see Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983); Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982); Sneed, *The Art of Statutory Interpretation*, 62 TEX. L. REV. 665 (1983).

of the IRC supersedes the FOIA was accepted in *Zale Corp. v. IRS*,²⁷ a case in which a corporation made a FOIA request to the IRS for the disclosure of income tax return information.²⁸ The *Zale* court determined that section 6103 is a "comprehensive scheme for releasing information to discrete, identified requesting parties."²⁹ The court found no indication in section 6103's statutory language that Congress intended to promote disclosure of tax return information when it enacted section 6103.³⁰ Furthermore, the *Zale* court uncovered nothing in section 6103's legislative history to indicate that Congress intended the FOIA to negate or alter the clear purpose of section 6103.³¹

27. 481 F. Supp. 486 (D.D.C. 1979).

28. *Grasso*, 785 F.2d at 74. In *Zale*, Zale Corporation, a large retailer, made a series of FOIA requests to the IRS to obtain investigative materials, computations, witness statements and theories concerning an IRS investigation of possible civil and criminal violations of the tax laws by Zale Corporation. 481 F. Supp. at 487. The requested material included over 500,000 pages of documents and 350,000 computer cards. *Id.* After negotiations between the parties, the IRS released 55,000 pages of documents and Zale Corporation withdrew many of its previous requests. *Id.* Over 4,000 pages of tax return information remained in dispute including an IRS agent's report. *Id.* The IRS claimed the disputed documents were exempt from disclosure under FOIA Exemptions 3 or 7(A). *Id.* The IRS did not argue that section 6103 of the Internal Revenue Code superseded the FOIA. *Id.* In its analysis, the district court raised the question of whether section 6103 superseded the FOIA. *Id.* at 488. The *Zale* court concluded that section 6103 takes precedence over the generalized provisions of the FOIA. *Id.* at 489; see Comment, *Applying the Freedom of Information Acts to Tax Return Information*, 69 GEO. L.J. 1283 (1981) (concluding that *Zale* court misconstrued both section 6103 and congressional intent as Congress probably did not intend section 6103 to preempt applicability of FOIA procedures to release of tax return information).

The United States Court of Appeals for the District of Columbia, however, subsequently overruled *Zale*. See *Church of Scientology v. IRS*, 792 F.2d 146 (D.C. Cir. 1986), cert. granted, 107 S. Ct. 947 (1987). In *Scientology*, the D.C. Circuit found the FOIA and section 6103 entirely harmonious. *Id.* at 149. The court concluded that section 6103 prohibits the disclosure of certain IRS information and the FOIA establishes the procedures the IRS must follow in asserting the section 6103 exemption. *Id.* The D.C. Circuit thus held that section 6103 does not supersede the FOIA but rather gives rise to an exemption under the FOIA's Exemption 3 which specifically excludes from disclosure documents specifically exempted from disclosure by other statutes. *Id.* at 150.

29. 481 F. Supp. at 489. The *Zale* court stated that section 6103 explicitly identifies what groups can receive income tax return information. *Id.* The court noted that this differs significantly from the FOIA which allows for the release of information to the general public. *Id.*

30. *Id.* The *Zale* court noted that Congress enacted section 6103 for the purpose of carving out a special protection for return information which the court described as a "unique and highly sensitive type of information." *Id.* The court explained that section 6103 represents Congress' intent to balance a taxpayer's right of privacy with the government's need to effectively administer the tax laws. *Id.*

31. *Id.* The *Zale* court stated that Congress was aware of the FOIA while it was amending section 6103. *Id.* The court found that section 6103's express purpose of protecting return information is at odds with the FOIA's preference for disclosure to the general public. *Id.* The court further stated that for a court

The Third Circuit, however, rejected the district court's reasoning in *Zale*.³² Instead, after its own examination of section 6103's legislative history, the court found nothing to indicate that Congress had intended section 6103 to operate independently of the FOIA.³³ The Third Circuit noted that, at the same time Congress amended section 6103, Congress enacted section 6110 of the IRC and expressly provided for it to operate independently of the FOIA.³⁴ The court found it significant

to rule that the FOIA takes precedence over the elaborate disclosure guidelines in section 6103 would render the tax reform provision an exercise in legislative futility. *Id.*

Both the United States Courts of Appeals for the Sixth and Seventh Circuits subsequently adopted the *Zale* court's reasoning. See *White v. IRS*, 707 F.2d 897, 900 (6th Cir. 1983) (finding section 6103 to be detailed and specific statutory scheme which essentially controls disclosure of tax returns); *King v. IRS*, 688 F.2d 488, 495 (7th Cir. 1982) (stating that "we are persuaded by the *Zale* court's analysis that any other construction would indeed render enactment of section 6103 a legislative futility").

32. *Grasso*, 785 F.2d at 74, 75. The Third Circuit previously noted that the *Zale* court's holding was interesting because it "preclude[d] a taxpayer from employing a [FOIA] request to obtain information by an end run around the restrictive discovery conditions for tax cases." *Id.* at 74 n.6 (quoting *United States v. National State Bank of N.J.*, 616 F.2d 668, 672 n.6 (3d Cir.), *cert. denied*, 447 U.S. 905 (1980)). Other courts had construed this statement to mean that the Third Circuit had approved of the *Zale* rationale. See *White v. IRS*, 707 F.2d 897, 900 (6th Cir. 1983) (*Zale* referred to with approval); *Green v. IRS*, 556 F. Supp. 79, 83 (N.D. Ind. 1982) (*Zale* cited with approval), *aff'd*, 734 F.2d 18 (7th Cir. 1984). However, the Third Circuit in *Grasso* rejected the IRS's contention that the dictum in *National State Bank* represented a holding that *Zale* was correctly decided since the FOIA was not before the *National State Bank* court. 785 F.2d at 74 n.3. For a discussion of the Third Circuit's basis for rejecting *Zale*, see *infra* notes 33-43 and accompanying text.

33. *Grasso*, 785 F.2d at 75. The Third Circuit further stated that in *United States v. Bachelier*, it explained that Congress amended section 6103 in an attempt to discourage the use of return information for political purposes. *Id.* (citing *United States v. Bachelier*, 611 F.2d 443, 446 (3d Cir. 1979)). In *Bachelier*, the court explained that return information was being used in connection with "enemies lists and groups targeted for harassment through the Internal Revenue Service." *Bachelier*, 611 F.2d at 446 (citing *Confidentiality of Tax Return Information: Hearing Before the House Committee on Ways and Means*, 94th Cong., 1st Sess. 15 (1976) (statement of Donald C. Alexander, then Commissioner of the Internal Revenue Service)). In *Bachelier*, the Third Circuit explained that by amending section 6103 Congress intended to balance a taxpayer's right to privacy concerning his return information and the legitimate need of federal and state agencies to access the information. 611 F.2d at 446 (citing S. REP. NO. 938, 94th Cong. 2d Sess. 318, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 3439, 3747). For a further discussion of section 6103's legislative history, see *infra* notes 62-66 and accompanying text.

34. *Grasso*, 785 F.2d at 75. Section 6110 of the IRC deals with the disclosure of IRS written determinations. *Id.* Section 6110 provides in pertinent part: (l) Exclusive remedy.—Except as otherwise provided in this title, or with respect to a discovery order made in connection with a judicial proceeding, the Secretary shall not be required by any Court to make any written determination or background file document open or available to pulic inspection, or to refrain from disclosure of any such documents.

that Congress did not include any similar provision in section 6103 for it, too, to operate independently of the FOIA.³⁵ Furthermore, the court found Exemption 3 to be an adequate exception from disclosure for materials protected under other statutes.³⁶ Therefore, the Third Circuit rejected the IRS's argument that section 6103 preempts the FOIA.³⁷

The Third Circuit next reconciled section 6103 with the FOIA.³⁸ The court first examined the opinion of the United States Court of Appeals for the Ninth Circuit in *Long v. IRS*.³⁹ Confronted with the question of whether section 6103 and the FOIA could be reconciled, the Ninth Circuit explained in *Long* that the FOIA's Exemption 3 was designed to include nondisclosure statutes such as section 6103.⁴⁰ The

I.R.C. § 6110(l) (1982).

35. *Grasso*, 785 F.2d at 75. The court further noted that section 6110 contains specific procedures for disclosure while section 6103 provides only a substantive standard. *Id.* Therefore, the court stated that section 6103 can easily be viewed as falling within the scope of the FOIA and its disclosure procedures. *Id.*

36. *Id.* Exemption 3 exempts from disclosure matters which are specifically exempted by other statutes, provided that such statute establishes criteria for withholding or refers to particular matters to be withheld. For the text of Exemption 3, see *supra* note 12. For a further discussion of Exemption 3, see *infra* notes 71-76 and accompanying text.

37. *Id.* The court stated it was evident that section 6103 was not designed to displace the FOIA. *Id.*

38. *Id.* The court noted that three other courts of appeals had reconciled the FOIA and section 6103. 785 F.2d at 74 (citing *Long v. IRS*, 742 F.2d 1173 (9th Cir. 1984); *Linsteadt v. IRS*, 729 F.2d 998 (5th Cir. 1984); *Currie v. IRS*, 704 F.2d 523 (11th Cir. 1983); *Chamberlain v. Kurtz*, 589 F.2d 827 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979)). For a further discussion of the Third Circuit's reconciliation of section 6103 with the FOIA, see *infra* notes 68-72 and accompanying text. For a further discussion of *Long*, see *infra* notes 39-42 and accompanying text. For a further discussion of *Linsteadt*, see *infra* notes 51 and 78-81 and accompanying text. For a further discussion of *Currie*, see *infra* note 88 and accompanying text.

39. 742 F.2d 1173 (9th Cir. 1984). In *Long*, the Longs requested the IRS to disclose data concerning the Taxpayer Compliance Measurement Program (TCMP). *Id.* at 1175. The TCMP is a series of statistical studies that measure the level of taxpayer compliance with the tax laws. *Id.* From data generated by the TCMP, the IRS identifies individual and corporate tax returns for audit. *Id.* The IRS argued that section 6103 operates independently of the FOIA, therefore, rendering the FOIA's requirement of de novo review inapplicable. *Id.* at 1177. The Ninth Circuit in *Long* found nothing in section 6103's legislative history to indicate that section 6103 should operate independently of the FOIA. *Id.* at 1177-78.

40. *Id.* at 1178. The *Long* court determined that Congress designed the FOIA's Exemption 3(B) to include statutes that limit agency discretion by establishing specific classes of items to be withheld or by establishing guidelines for exercising discretion when determining whether to disclose information. *Id.* at 1179 (citing *Lee Pharmaceuticals v. Kreps*, 577 F.2d 610, 615 (9th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979)); see *Chamberlain v. Kurtz*, 589 F.2d 827, 839 (5th Cir.) (section 6103(e)(7) (then 6103(e)(6)) establishes particular criteria for withholding information and refers to particular types of matter to be withheld; therefore section 6103 satisfies both tests of Exemption 3(B)), *cert. denied*, 444 U.S. 842 (1979); see also Note, *The Effect of the 1976 Amendments to Exemption Three*

Long court stated that if a nondisclosure statute's purpose were determinative of whether such statutes operate independently of the FOIA, then all such statutes would have to be treated as independent of the FOIA, a result clearly not intended by the FOIA.⁴¹ Therefore, the *Long* court held that section 6103 qualifies as a nondisclosure statute within the scope of the FOIA's Exemption 3.⁴² The Third Circuit agreed with the *Long* court's simultaneous construction of section 6103 of the IRC and the FOIA.⁴³ The Third Circuit stated that reconciling section 6103 with the FOIA through Exemption 3 better effectuates the result intended by Congress as reflected in the statutory language of the FOIA and its legislative history.⁴⁴ Therefore, the court held that section 6103 does not preempt the FOIA and, therefore, that the FOIA was the appropriate statute to govern Grasso's request for the disclosure of his income tax return information.⁴⁵

Having determined that the FOIA was the applicable statute to govern Grasso's request, the Third Circuit examined whether the memorandum was exempt from disclosure under Exemption 7(A) of the FOIA.⁴⁶ The standard for disclosure under Exemption 7(A) is whether disclosure of the memorandum would "interfere with enforcement proceed-

of the Freedom of Information Act, 76 COLUM. L. REV. 1029 (1976); Annot. 47 A.L.R. FED. 439 (1980) (discussing type of nondisclosure statutes to which FOIA's Exemption 3 was designed to give effect).

41. *Long*, 742 F.2d at 1178. The court noted that like all nondisclosure statutes, section 6103's purpose of confidentiality is not the same as the FOIA's purpose of making information available to the public. *Id.* However, the *Long* court refused to hold that section 6103 preempts the FOIA. *Id.*

42. *Id.* at 1177. The Ninth Circuit noted that in one of its prior decisions it had held that section 6103 qualifies under the FOIA's Exemption 3. *Id.*; see *Willemette Indus. v. IRS*, 689 F.2d 865, 867-68 (9th Cir. 1982) (section 6103 qualifies as Exemption 3 statute), *cert. denied*, 460 U.S. 1052 (1983).

43. *Grasso*, 785 F.2d at 74.

44. *Id.* at 75. The court noted that the restrictive nondisclosure policies of section 6103 could be reconciled with the FOIA through Exemption 3 which incorporates the criteria of the nondisclosure statute in determining when it is appropriate to withhold information. *Id.* at 74 (citing *Long v. IRS*, 742 F.2d 1173, 1178 (9th Cir. 1984)).

For other courts' more thorough discussion of the reconciliation of section 6103 and the FOIA, see *Linstead v. IRS*, 729 F.2d 998, 1001-03 (5th Cir. 1984); *Currie v. IRS*, 704 F.2d 523, 527 (11th Cir. 1983); *Chamberlain v. Kurtz*, 589 F.2d 827, 835-40 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979).

45. *Grasso*, 785 F.2d at 75. The Third Circuit joined the Ninth, Fifth, Eleventh and District of Columbia Circuits in ruling that section 6103 and the FOIA operate harmoniously through Exemption 3. For a discussion of the other circuits' decisions concerning whether the FOIA or section 6103 controls the disclosure of tax return information, see *supra* note 4.

46. *Grasso*, 785 F.2d at 75. For the text of Exemption 7(A), see *supra* note 12. For a discussion of what records must be made available pursuant to a request for disclosure under the FOIA, see Annot., 50 A.L.R. FED. 336 (1980) (records which must be made available include: reports prepared to fulfill agency's function, computer tapes, letter rulings and technical advice memoranda of IRS grant applications).

ings."⁴⁷ As an argument that disclosure of the memorandum to Grasso would interfere with enforcement proceedings, the IRS stated that disclosure of the document would allow Grasso to harass or intimidate witnesses.⁴⁸ The court recognized that witnesses' statements may be exempt from disclosure under the FOIA in order to protect witnesses and potential witnesses.⁴⁹ However, in the present case, the Third Circuit determined that the IRS's concern was unwarranted since Grasso was seeking disclosure of his own statements rather than disclosure of statements made by third party witnesses.⁵⁰ Therefore, the court concluded that Exemption 7(A) did not apply to the memorandum containing Grasso's interview with the IRS agents.⁵¹

47. *Grasso*, 785 F.2d at 75; see *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978) (purpose of Exemption 7 is to prevent agencies from being placed at disadvantage in court by excluding certain records from disclosure).

48. *Grasso*, 785 F.2d at 76 (citing Appellants Appendix at 27a-28a, 31a). The IRS also claimed that disclosure of the memorandum would refresh Grasso's memory as to potential witnesses, transactions being investigated and pieces of evidence the IRS plans to rely on in future proceedings. *Id.* In support of this argument, the IRS relied upon the Fifth Circuit's holding in *Linsteadt v. IRS* which upheld the IRS' withholding of factual summary of a taxpayer's statements. *Id.* at 77 (citing *Linsteadt v. IRS*, 729 F.2d 998 (5th Cir. 1984)). In *Linsteadt*, the Linsteadts were seeking disclosure of a memorandum that contained factual statements made by the Linsteadts during an interview with an IRS agent. 729 F.2d at 999. The Linsteadts were the subject of a joint criminal and civil tax investigation for the 1978, 1979 and 1980 tax years. *Id.* at 1003. The disputed document contained only a factual summary of the Linsteadts' statements and did not include any conclusions or opinions of the interviewing agent. *Id.* at 1004. Following an *in camera* inspection, the district court upheld the IRS' nondisclosure of the document. *Id.* However, in a dissenting opinion, Judge Tate did not agree that the IRS met its burden of justifying nondisclosure. *Id.* at 1005 (Tate, J., dissenting). Judge Tate concluded that disclosure would not reveal any information about the scope, nature or direction of the IRS investigation. *Id.* (Tate, J., dissenting).

49. *Grasso*, 785 F.2d at 76; *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-40 (1978) (reason for nondisclosure is to reduce risk of witness intimidation and to ensure witness confidentiality); *J.P. Stevens & Co., Inc. v. Perry*, 710 F.2d 136, 143 (4th Cir. 1983) (premature disclosure of witness identity could discourage potential witnesses from coming forward).

50. *Grasso*, 785 F.2d at 77. The Third Circuit referred to an analogous situation in *Campbell v. Department of Health and Human Services*, 682 F.2d 256 (D.C. Cir. 1982). In *Campbell*, a third party was seeking disclosure under the FOIA of statements which a corporation made regarding an FDA investigation. 682 F.2d at 256. The FDA claimed that disclosure of the documents could aid the defending corporation in determining the scope, focus and direction of the investigation. *Id.* at 206. The *Campbell* court questioned how information submitted by the corporation could reveal the direction of the investigation or alert the corporation to anything it did not already know. *Id.*

51. *Grasso*, 785 F.2d at 77. The Third Circuit noted that in some situations a memorandum of a person's own statements may be exempt from disclosure. *Id.* As an example, the court cited situations where disclosure might reveal the direction of the investigation. *Id.* The Third Circuit also noted that in *Linsteadt v. IRS*, the Fifth Circuit concluded that a district judge's finding of fact following an *in camera* inspection was entitled to deference and should not be second-guessed absent manifest error. *Id.* at 76 (citing *Linsteadt v. IRS*, 729 F.2d 998,

The Third Circuit next considered the IRS's argument that the memorandum is exempt from disclosure under Exemption 3(B) of the FOIA.⁵² The Third Circuit explained that this provision exempts from disclosure matters which are "specifically exempted from disclosure by statute . . . provided that such statute . . . establishes particular criteria for withholding or refers to a particular matter to be withheld."⁵³ The court noted that section 6103 qualifies as an exemption statute under the FOIA's Exemption 3(B).⁵⁴ The standard for disclosure of return information which is provided in section 6103 is whether disclosure of such information would "seriously impair Federal tax administration."⁵⁵ The Third Circuit stated that although the analysis of Exemptions 3(B) and 7(A) will not always be the same, in the present case the analysis of Exemption 3(B) does not differ significantly from the analysis of Exemption 7(A).⁵⁶ The court reasoned that if disclosure does not "interfere with enforcement proceedings" under the tax laws, it would not "seriously impair the administration of those laws."⁵⁷ Therefore, since the court did not find that nondisclosure was acceptable under Exemption 7(A), it did not find nondisclosure acceptable under Exemption 3(B). After determining that Exemptions 3 and 7 were inapplicable, the Third Circuit upheld the district court's determination that the IRS must disclose the memorandum.⁵⁸

1004 (5th Cir. 1984)). The Third Circuit stated that in the present case, the trial judge found that the IRS had not shown that disclosure would interfere with enforcement proceedings. *Id.* at 76.

52. *Id.* at 77. For the text of the FOIA's Exemption 3, see *supra* note 12.

53. 5 U.S.C. § 552(b)(3)(B) (1982).

54. *Grasso*, 785 F.2d at 77; see *Church of Scientology v. IRS*, 792 F.2d 146, 150 (D.C. Cir. 1986) (section 6103 gives rise to an exemption under Exemption 3), *cert. granted*, 107 S. Ct. 947 (1987); *Long*, 742 F.2d at 1177 (section 6103 qualifies as exemption statute under Exemption 3); *Linstead v. IRS*, 729 F.2d 998, 1003 (5th Cir. 1984) (section 6103 provides criteria under Exemption 3); *Chamberlain v. Kurtz*, 589 F.2d 827, 840 (5th Cir.) (section 6103 satisfies requirements of Exemption 3), *cert. denied*, 444 U.S. 842 (1979).

55. *Grasso*, 785 F.2d at 77; see I.R.C. § 6103(e)(7) (1982). For the text of section 6103(e)(7), see *supra* note 5.

56. *Grasso*, 785 F.2d at 77. The court noted that there are situations where Exemptions 3(B) and 7(A) would not be coextensive. *Id.* As an example, the court cited *J.P. Stevens & Co., Inc. v. Perry*, 710 F.2d 136 (4th Cir. 1983). *Id.* In *J.P. Stevens*, the Fourth Circuit held that witness' statements, interviews with charging parties and affidavits submitted by witnesses and parties were exempt from disclosure under Exemption 7(A) while an employment discrimination investigation is proceeding. 710 F.2d at 143. The court also held that Exemption 3 does not prevent disclosure of the document to parties involved in the investigation. *Id.* at 139.

57. *Grasso*, 785 F.2d at 77.

58. *Id.* The Third Circuit stated it was satisfied that the district court's finding was not erroneous. *Id.*; see *Stephenson v. IRS*, 629 F.2d 1140, 1144 (5th Cir. 1980) (appellate court reviewing determinations under FOIA must determine whether district court had adequate factual basis for its decision and whether decision reached was clearly erroneous).

In a separate opinion, Judge Adams concurred in the court's holding that the FOIA controls judicial review of IRS decisions concerning disclosure of return information.⁵⁹ Judge Adams, however, expressed concern that the result achieved by the majority opinion may result in a greater disclosure of return information than Congress intended.⁶⁰ Despite his concern, Judge Adams concluded that the majority opinion satisfied the Third Circuit's responsibility of giving meaning to all Congressional pronouncements.⁶¹

It is submitted that the Third Circuit properly concluded that the legislative history of section 6103 does not support the IRS's argument that section 6103 supersedes the FOIA.⁶² Congress amended section 6103 when it enacted the Tax Reform Act of 1976.⁶³ The legislative history of section 6103 indicates that Congress was concerned that tax return information was being used improperly for purposes other than tax administration.⁶⁴ In the legislative history of section 6103, Congress specified that return information should be treated as confidential ex-

59. *Grasso*, 785 F.2d at 78. Judge Adams noted that section 6103 contains no provisions for judicial review. *Id.* Judge Adams contrasted section 6103 with the FOIA which allows provisions for judicial review in other statutes to work harmoniously with the FOIA procedures through Exemption 3. *Id.* Additionally, Judge Adams found it persuasive that section 6110 of the IRC, which Congress enacted at the same time as section 6103, sets forth its own procedures for the disclosure of written determinations. *Id.*

60. *Id.* Judge Adams was troubled that individuals can use disclosure statutes such as the FOIA to inquire into the progress of an ongoing criminal investigation. *Id.* Judge Adams noted that if Congress disagrees with the result that the Third Circuit reached, a simple amendment could clarify congressional intent. *Id.*

61. *Id.* Judge Adams commented that the courts are not at liberty to choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. *Id.* (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

62. *Id.* at 75. For a further discussion of the Third Circuit's discussion of section 6103's legislative history, see *supra* notes 33-37 and accompanying text.

63. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1202, 90 Stat. 1520, 1667-85 (1976) (codified in 26 U.S.C. § 6103 (1982)).

64. S. REP. NO. 938, 94th Cong., 2d Sess. 318, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 3439, 3747. Congress questioned the IRS practice of providing the White House with information concerning well known individuals. *Id.* at 318, 321-22, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 3747, 3751. In addition, Congress stated that the IRS was providing return information to state and local governments as well as to other federal agencies. *Id.* at 318, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 3746-47.

See *Chamberlain v. Kurtz*, 589 F.2d 827, 835 (5th Cir.) (new section 6103 was enacted primarily to regulate and restrict access to return information by many government bodies and agencies that had access to such information under former section 6103), *cert. denied*, 444 U.S. 842 (1979); *Britt v. IRS*, 547 F. Supp. 808, 812 (D.D.C. 1982) (section 6103 is concerned with availability of tax return information to government agencies).

cept as outlined in the new section 6103.⁶⁵ However, nothing in section 6103's legislative history or statutory language indicates that Congress intended for section 6103 to operate independently of the FOIA.⁶⁶ Instead, by amending section 6103 Congress intended to protect citizens' right of privacy concerning their tax return information.⁶⁷ Therefore, it is submitted that if the IRS were to disclose to a taxpayer his own return information following a FOIA request, that taxpayer's right of privacy would not be interfered with in any manner and such disclosure would not offend the congressional intent of protecting a taxpayer's right of privacy.

Furthermore, as the Third Circuit explained, the language of section 6103 does not include any procedures concerning the disclosure of return information.⁶⁸ In contrast, section 6110, which was enacted at the same time as section 6103 and deals with IRS written determinations, provides procedures that govern disclosure of written determinations.⁶⁹ In addition, section 6110 contains a provision which expressly

65. S. REP. NO. 938, 94th Cong., 2d Sess. 319, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 3439, 3747.

66. *See, e.g., Long*, 742 F.2d at 1177 (neither section 6103 nor its legislative history contains any language indicating that section 6103 should operate independently of FOIA); *Britt v. IRS*, 547 F. Supp. 808, 811 (D.D.C. 1982) (language and legislative history of section 6103 weigh against it being viewed as provision acting independently of FOIA).

67. S. REP. NO. 938, 94th Cong., 2d Sess. at 319, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 3439, 3747. Questions have been raised concerning whether the present extent of disclosure of return information to other agencies breaches a reasonable expectation of privacy on the part of citizens. *Id.* at 318, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 3747. Subsequently, questions have been raised as to whether this possible abuse of privacy would seriously impair the effectiveness of our country's voluntary assessment system of the federal tax system. *Id.*, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 3747.

68. *Grasso*, 785 F.2d at 75. For the Third Circuit's view of section 6103 as providing only a substantive standard concerning disclosure, see *supra* note 35 and accompanying text.

69. I.R.C. § 6110(g) & (h) (1982). The statute provides in pertinent part:

(g) Time for disclosure.—

(1) In general

Except as otherwise provided in this section, the text of any written determination or any background file document (as modified under subsection (c)) shall be open or available to public inspection—

(A) no earlier than 75 days, and no later than 90 days, after the notice provided in subsection (f)(1) is mailed, or, if later,

(B) within 30 days after the date on which a court decision under subsection (f)(3) becomes final

(h) Disclosure of prior written determinations and related background files.—

(1) In general

Except as otherwise provided in this subsection, a written determination issued pursuant to a request made before November 1, 1976, and any background file documents relating to such written determina-

states it is the exclusive remedy concerning the disclosure of written determinations⁷⁰ and, thus, it operates independently of the FOIA.⁷¹ Therefore, it is likely that Congress was aware of the FOIA when it amended section 6103. Based on that awareness, it is suggested that if Congress had intended for section 6103 to supersede the FOIA, it would have included provisions in the statute similar to those in section 6110 to indicate that section 6103 was to operate independently of the FOIA.

It is also submitted that the Third Circuit properly found that the FOIA and section 6103 operate harmoniously through Exemption 3.⁷² The FOIA's Exemption 3(B) was designed to exempt from disclosure matters that are specifically exempted by another statute "provided that such a statute . . . establishes particular criteria for withholding or refers

tion shall be open or available to public inspection in accordance with this section.

(2) Time for disclosure

In the case of any written determination or background file document which is to be made open or available to inspection under paragraph (1)—

(A) subsection (g) shall not apply, but

(B) such written determination or background file document shall be made open or available to public inspection at the earliest practicable date after funds for that purpose have been appropriated and made available to the Internal Revenue Service.

Id. A written determination and a background file document are defined as follows:

(1) Written determination

The term "written determination" means a ruling, determination letter, or technical advice memorandum.

(2) Background file document

The term "background file document" with respect to a written determination includes the request for that written determination, any written material submitted in support of the request, and any communication (written or otherwise) between the Internal Revenue Service and persons outside the Internal Revenue Service in connection with such written determination (other than any communication between the Department of Justice and the Internal Revenue Service relating to a pending civil or criminal case or investigation) received before issuance of the written determination.

Id. §§ 110(b)(1) & (2).

70. *See id.* § 6110(1). For the text of section 6110(1), see *supra* note 34.

71. *See, e.g., Church of Scientology v. IRS*, 792 F.2d 146, 149 (D.C. Cir. 1986) (section 6110 specifies it is exclusive means of obtaining disclosure of written determinations), *cert. granted*, 107 S. Ct. 947 (1987); *Long*, 742 F.2d at 1178 (Congress specifically made known its intention to exclude section 6110 from FOIA); *Britt v. IRS*, 547 F. Supp. 808, 811 (D.C. Cir. 1982) (Congress excluded section 6110 from FOIA).

72. The *Grasso* court stated: "We believe that FOIA and section 6103 can be viewed harmoniously through the operation of Exemption 3." 785 F.2d at 75. For a further discussion of the Third Circuit's reconciling the FOIA with section 6103, see *supra* notes 38-45 and accompanying text.

to particular types of matters to be withheld.”⁷³ Return information, defined in section 6103,⁷⁴ is a particular type of matter to be withheld.⁷⁵ Furthermore, the “seriously impair Federal tax administration” standard in section 6103 sets forth the “particular criteri[on]” for withholding return information.⁷⁶ Therefore, it is submitted that section 6103 is the type of exemption statute that Congress intended to incorporate into the FOIA by enacting Exemption 3(B).⁷⁷

Although the Third Circuit correctly reconciled section 6103 and the FOIA, its conclusion that disclosure would not interfere with enforcement proceedings or impair tax administration may be criticized.⁷⁸ In a case presenting facts similar to *Grasso*, the United States Court of Appeals for the Fifth Circuit found in *Linsteadt v. IRS*⁷⁹ that disclosure of taxpayer’s own statements would seriously impair the administration of the tax laws and interfere with enforcement proceedings.⁸⁰ In *Linsteadt*, the IRS argued successfully that disclosure of a memorandum which contained statements made by the taxpayers during an interview

73. 5 U.S.C. § 552(b)(3)(B) (1982). For the text of Exemption 3(B), see *supra* note 12.

74. I.R.C. § 6103(b)(2) (1982). For the definition of return information, see *supra* note 1. See also *Neufeld v. IRS*, 646 F.2d 661, 665 (D.C. Cir. 1981) (return information includes only information that directly or indirectly identifies taxpayer).

75. See *Chamberlain v. Kurtz*, 589 F.2d 827, 839 (5th Cir.) (return information, which is carefully defined by statute, refers to particular type of matter to be withheld), *cert. denied*, 444 U.S. 842 (1979).

76. See *Linsteadt v. IRS*, 729 F.2d 998, 1003 (5th Cir. 1984) (section 6103 provides criteria for nondisclosure under Exemption 3 of FOIA); *Chamberlain v. Kurtz*, 589 F.2d 827, 839 (5th Cir.) (section 6103 sets forth criteria for withholding under Exemption 3 as to whether disclosure would “seriously impair Federal tax administration”), *cert. denied*, 444 U.S. 842 (1979).

77. See *Church of Scientology v. IRS*, 792 F.2d 146, 149 (D.C. Cir. 1986) (section 6103 and FOIA seem quite literally made for each other), *cert. granted*, 107 S. Ct. 947 (1987); *Long*, 722 F.2d at 1178 (9th Cir. 1984) (Exemption 3 was designed to give effect to statutes such as section 6103).

78. *Grasso*, 785 F.2d at 77. For a discussion of the court’s conclusion that the memorandum must be disclosed, see *supra* notes 45-57 and accompanying text.

79. 729 F.2d 998 (5th Cir. 1984).

80. *Id.* at 1005. The *Linsteadt* court held that deference must be given to a district court’s determination that disclosure would interfere with enforcement proceedings. *Id.* For a discussion of *Linsteadt*, see *supra* note 48. See also *Willard v. IRS*, 776 F.2d 100 (4th Cir. 1985). In *Willard*, IRS agents interviewed defendants Jackson, Lester and Willard during an investigation of the tax returns of Jackson, Lester and their corporations. *Id.* at 101. Willard, an accountant, prepared the tax returns. *Id.* All three filed FOIA requests for the disclosure of the interviews. *Id.* The IRS claimed release of the information would allow the taxpayers to fabricate excuses or evidence. *Id.* at 103. The information requested included agents notations of answers they considered relevant to the investigation. *Id.* The Fourth Circuit agreed with the district court that disclosure would provide clues concerning the nature and scope of the investigation. *Id.* Therefore, the Fourth Circuit affirmed the district court’s determination that nondisclosure was appropriate. *Id.* at 104.

with an IRS agent would allow the taxpayers to prepare excuses or evidence to frustrate the IRS's investigation.⁸¹ This concern, it is suggested, has merit. If a taxpayer's previous answers were false, the IRS, by disclosing those statements, would provide the taxpayer with an opportunity to prepare a strategy to justify those answers. This would weaken the government's case in any subsequent proceedings.⁸² Supportive of the *Linsteadt* posture, the Supreme Court explained in *NLRB v. Robbins Tire Co.*⁸³ that foremost among the purposes of the FOIA's Exemption 7(A) is to prevent harm to the government's case in court.⁸⁴ The Court's concern with potential harm to the government's case in court seems applicable to the situation in *Grasso*. However, when reviewing a determination by a district court, an appellate court must only determine whether the lower court had an adequate factual basis for its decision and whether the decision reached was clearly erroneous.⁸⁵ In *Grasso*, the Third Circuit was satisfied that the district court's decision was not clearly erroneous.⁸⁶

It should also be noted that disclosure of return information is inappropriate to the extent that the documents requested by the taxpayer contain only selected answers an agent deemed relevant to the investigation, conclusions or mental impressions of the agent, working papers prepared by IRS personnel or information provided by third parties.⁸⁷

81. *Linsteadt*, 729 F.2d at 1004 (citing appellant's brief). The IRS claimed disclosure would also prematurely reveal evidence and the scope of limits of the investigation. *Id.* at 1004 n.10.

82. *Id.* at 1005.

83. 437 U.S. 214 (1978).

84. *Id.* at 224. In *Robbins Tire*, the Supreme Court ruled that witnesses' statements were exempt from disclosure under Exemption 7(A). *Id.* at 243. The Court stated that prehearing disclosure of witnesses' statements would result in the type of harm Congress constituted as an "interference." *Id.* at 241; see *Willard v. IRS*, 776 F.2d 100 (4th Cir. 1985). In *Willard*, the Fourth Circuit explained that the scope of *Robbins Tire* extends beyond the question of whether witnesses' statements must be disclosed prior to enforcement proceedings. *Id.* at 103 (citing *J.P. Stevens & Co. v. Perry*, 710 F.2d 136, 141 (4th Cir. 1983)). The court stated that there is more than one way to interfere with an enforcement proceeding. *Willard*, 776 F.2d 100, 103 (4th Cir. 1985).

85. See *Stephenson v. IRS*, 629 F.2d 1140, 1144 (5th Cir. 1980) (appellate court reviewing determinations under FOIA must determine whether district court had adequate factual basis for its decision and whether decision reached was clearly erroneous).

86. *Grasso*, 785 F.2d at 77.

87. See *Willard v. IRS*, 776 F.2d 100, 103 (4th Cir. 1985) (documents requested contained agents' notations of answers they considered relevant to investigation and disclosure would provide clues concerning scope of investigation); *Currie v. IRS*, 704 F.2d 523, 531 (11th Cir. 1983) (documents at issue included internal agency memoranda reflecting direction and scope of investigation, memoranda of interviews with witnesses and IRS personnel notes); *King v. IRS*, 688 F.2d 488, 490 (7th Cir. 1982) (requested form stated specific taxpayer's liability, two taxpayer protests of IRS agent's audit reports and adjustments to taxpayer's return and reasons therefore).

The United States Courts of Appeals for the Fourth and Eleventh Circuits in *Willard v. IRS*⁸⁸ and *Currie v. IRS*⁸⁹ have found that disclosure of this type of information would frustrate an investigation.⁹⁰ With this exception to disclosure, it is submitted that an interviewing agent may avoid disclosure entirely by recording only selected answers the agent considers relevant to the investigation. Thus, the IRS could avoid the results reached by the Third Circuit in *Grasso* which requires the IRS to disclose a memorandum of the taxpayer's interview with the IRS agent.

Despite these concerns as to the harm that disclosure of certain return information might cause the IRS's case against a taxpayer, taxpayers of the Third Circuit will have greater access to return information as a result of the court's decision in *Grasso*. The standard of judicial review under the FOIA places a greater burden of proof on the IRS to justify nondisclosure of return information than the limited standard of review under section 6103.⁹¹ Thus, as a result of its decision in *Grasso*, the Third Circuit has limited the discretionary power of the IRS to make nondisclosure decisions.

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88. 776 F.2d 100 (4th Cir. 1985). For a discussion of *Willard*, see *supra* note 79.

89. 704 F.2d 523 (11th Cir. 1983). In *Currie*, the IRS was conducting an investigation into the tax liability of Ralph Currie and Carpets by Ralph Currie, Inc. *Id.* at 525. Currie filed a FOIA request seeking documents containing work papers of IRS personnel, correspondence between IRS personnel and third parties, interviews and third parties and internal agency memoranda. *Id.* at 525 n.1. The *Currie* court held that the documents were exempt from disclosure under the FOIA's Exemption 3. *Id.* at 532.

90. *Willard*, 776 F.2d at 103 (court understood IRS's concern that disclosure of the agent's notes would harm its investigation); *Currie*, 704 F.2d at 432 (court noted that disclosure would reveal government's case prematurely, could result in witness intimidation and effectively thwart IRS' duty to enforce revenue laws).

91. For a discussion of the standard of judicial review under the FOIA and section 6103, see *supra* note 23.