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IRS CONFIDENTIALITY vs. FREEDOM OF INFORMATION ACT: THE CLASH CONTINUES

Craig J. Langstraat*

Access to taxpayer information is a continuing source of confrontation between private citizens and the Internal Revenue Service. The proper statutory framework for judicial review is also controversial with the Freedom of Information Act (FOIA)¹ and the Tax Information Confidentiality Statute (IRC section 6103)² vying for supremacy. The importance and continuing nature of the dispute is evidenced by several Federal Circuit Court of Appeals decisions over the last seven years.

This article discusses the FOIA and IRC section 6103 as they apply to taxpayer information requests. Existing Federal Circuit Court of Appeals decisions are analyzed to document the current state of the law and the extent of conflicts between the circuits. Finally, a proposed strategy for reconciliation is presented for possible use in statutory amendments or in a United States Supreme Court resolution.

I. THE STATUTES

The FOIA generally requires governmental agencies to make information and records public,³ unless a specific exemption is applicable.⁴ The three most common FOIA exemptions utilized by the government in defending against taxpayer requests for information are as follows:

This section does not apply to matters that are —

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1. 5 U.S.C. § 552 (1982).
2. I.R.C. § 6103 (1982).
3. 5 U.S.C. § 552(a) (1982).
4. 5 U.S.C. § 552(b) (1982).

(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; . . . (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; . . . (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,”⁵

Clearly, the FOIA “other statute” exception⁶ will bring IRC section 6103 into consideration for possible validation under that exception, as IRC section 6103 is a specific non-disclosure statute. IRC section 6103 states a general rule of non-disclosure of returns and return information as follows:

(a) GENERAL RULE — Returns and return information shall be confidential, and except as authorized by this title—(1) no officer or employee of the United States, (2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) 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 an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term “officer employee” includes a former officer or employee.⁷

An exception is provided to this general rule in the case of disclosure to a designee of the taxpayer (in the government’s discretion) as long as the disclosure would not “seriously impair Federal tax administration.”⁸

5. 5 U.S.C. §§ 552(b)(3), 552(b)(5), 552(b)(7) (1982).

6. 5 U.S.C. § 552(b)(3) (1982) [hereinafter Exception 3].

7. I.R.C. § 6103(a) (1982), *amended by* I.R.C. §§ 610(a), 610(a)(1), 610(a)(2) (Supp. III 1985).

8. I.R.C. section 6103(c) states:

(c) DISCLOSURE OF RETURNS AND RETURN INFORMATION TO DESIGNEE OF TAXPAYER

The secretary may, subject to such requirements and conditions as he may prescribe by regulations, disclose the return of any taxpayer, or return informa-

With this elementary statutory background in place, and the connection of these two statutes documented, it is time to turn to an analysis of the several Federal Circuit Court of Appeals decisions on the topic.

II. THE CIRCUIT COURT BATTLES

The first Federal Circuit Court of Appeals decision addressing the interrelationship of the FOIA and IRC section 6103 (in their current statutory form) was a Fifth Circuit case. In *Chamberlain v. Kurtz*,⁹ the taxpayer brought suit under the FOIA to compel the Internal Revenue Service (IRS) to disclose information and documents compiled during criminal and civil fraud investigations of the taxpayer. After many disputes and several compromises, ninety one documents were at issue.¹⁰

The government argued that IRC section 6103 satisfies the requirements of Exception 3 of the FOIA¹¹ ("other statute exception"), thereby allowing non-disclosure if the Secretary of the Treasury determines that such disclosure would seriously impair federal tax administration.¹² In this context, the taxpayer argued that the more stringent test of IRC section 6103(h)(4)¹³ was applicable;

tion with respect to such taxpayer, to such person or persons as the taxpayer may designate in a written request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. However, return information shall not be disclosed to such person or persons if the Secretary determines that such disclosure would seriously impair Federal tax administration.

I.R.C. § 6103(c) (1982).

9. 589 F.2d 827 (5th Cir. 1979), *cert. denied*, 444 U.S. 842 (1980).

10. *Chamberlain v. Kurtz*, 589 F.2d 827, 832 (5th Cir. 1979).

11. 5 U.S.C. § 552(b)(c)(3) (1982).

12. *Chamberlain*, 589 F.2d at 835-37 (The court stated that it must first determine which provisions of section 6103 govern the immediate facts, second whether those provisions are of the type contemplated by exemption three, and third whether the documents at issue fall within the ambit of section 6103.)

13. I.R.C. section 6103(h)(4), provides:

Disclosure to certain Federal officers and employees for purposes of tax administration, etc.

(4) Disclosure in judicial and administrative tax proceedings.—A return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only

(A) if the taxpayer is a party to such proceeding;

(B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding;

(C) if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer

meaning that the Secretary could only avoid disclosure if the disclosure would "identify a confidential informant or seriously impair a civil or criminal tax investigation."¹⁴ The Fifth Circuit quickly dismissed the argument. The court pointed out that the legislative history clearly identified IRC section 6103(c) as the provision applicable to taxpayers requesting information about their own situations.¹⁵ IRC section 6103(h), however, only applies to disclosure of tax information to federal officers and employees for the purpose of tax administration.¹⁶

The next analysis for the Fifth Circuit was whether the terms of IRC section 6103(c) satisfied the requirement of Exemption 3 of the FOIA. The court considered whether IRC section 6103(c) established "particular criteria for withholding information or referred to particular types of matters to be withheld."¹⁷ After review of the legislative history of both statutes,¹⁸ the court concluded that IRC section 6103(c) qualifies under Exemption 3 of the FOIA.¹⁹

Having adopted the IRC section 6103(c) standard of avoiding disclosure that would "seriously impair Federal tax administration," the court, in a *de novo* review, examined the documents in question²⁰

which directly affects the resolution of an issue in the proceeding; or (D) to the extent required by order of a court pursuant to section 3500 of title 18, United States Code, or rule 16 of the Federal Rules of Criminal Procedure, such court being authorized in the issuance of such order to give due consideration to Congressional policy favoring the confidentiality of returns and return information as set forth in this title.

I.R.C. § 6103(h)(4) (1984).

However, such return or return information shall not be disclosed as provided in subparagraph (A), (B), or (C) if the Secretary determines that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.

14. See *Chamberlain*, 589 F.2d at 837-38. The plaintiff argued subsection (h)(4) applied because the facts involved "a Federal or State judicial or administrative proceeding pertaining to tax administration." *Id.* The court rejected this argument.

15. *Id.* at 838 (subsection 6103(c) and (e)(6) address the taxpayer's right to address their files).

16. *Id.*

17. 5 U.S.C. § 552(b)(3) (1982).

18. The court notes that substantial amendments to both statutes were adopted by Congress within a month of each other in 1976; government in the Sunshine Act (FOIA) and Tax Reform Act of 1976 (section 6103). See *Chamberlain*, 589 F.2d at 840.

19. *Chamberlain*, 589 F.2d at 838-39 (based on the language and Legislative history of Exemption 3, 610(c) and 610(e)(6) are sufficiently specific to satisfy the requirements of part B of Exemption 3 that a statute either establishes particular criteria for withholding information or refers to particular types of matters to be withheld).

20.

[V]arious intra-agency memoranda analyzing and discussing Chamberlain's tax liability, several summaries of the case, memoranda of interviews with witnesses, assorted agency workpapers dealing with the computation of Chamber-

and determined that they were protected from disclosure under this standard. This conclusion was based on the Fifth Circuit's perception that the requested documents would seriously impair the government's attempts to collect back taxes and fraud penalties from the taxpayer.²¹

The Eighth Circuit was the next participant in this FOIA/IRC section 6103 controversy. In *Barney v. IRS*,²² a taxpayer filed a FOIA suit to disclose information accumulated during a pending investigation for failure to file income tax returns (including criminal fraud). The government claimed protection under Exception 7 of the FOIA²³ (interference with law enforcement proceedings) and, alternatively, Exception 3 of the FOIA (through IRC section 6103).

The Eighth Circuit relied on the United States Supreme Court's opinion in *NLRB v. Robbins Tire & Rubber Co.*²⁴ to derive its authority to make a decision under Exception 7 to the FOIA that "with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is still pending would generally 'interfere with enforcement proceedings.'"²⁵ Based on its review of descriptions of requested documents and governmental affidavits,²⁶ the Eighth Circuit held that the documents requested by the taxpayer²⁷ would necessarily interfere with governmental proceedings by prematurely revealing the government's case.²⁸

Having decided for the government on the basis of Exception 7

lain's taxes, reports by different agents who have worked on the case, and letters or memoranda from one IRS official to another dealing with different aspects of the case. These documents include intra-agency communications regarding Chamberlain's tax liability, memoranda of conferences on that subject, various "sensitive case" reports on this case, the testimony of an important witness before a grand jury. . . .

Id. at 840.

21. *Id.* at 841 (since all of the documents sought by plaintiff discussed either facts or law relating to the fraud claim against him, their release would aid the taxpayer's defense of back-taxes claims).

22. 618 F.2d 1268 (8th Cir. 1980).

23. 5 U.S.C. § 552(b)(7) (1982) [hereinafter Exception 7].

24. 437 U.S. 214 (1978).

25. *Barney v. IRS*, 618 F.2d 1268, 1273 (8th Cir. 1980) (quoting *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978)).

26. The court also held on an additional issue that an *in camera* inspection of documents was not necessary for a valid determination. *Id.* at 1272. *Contra* *Stephenson v. IRS*, 688 F.2d 1140 (5th Cir. 1980).

27. "[W]itness statements, documentary evidence, agent's work papers and internal agency memoranda . . ." *Barney*, 618 F.2d at 1273.

28. *Id.*

to the FOIA, the court found it unnecessary to analyze the correlation between the FOIA and IRC section 6103. However, the then recently-decided *Chamberlain*²⁹ case was favorably discussed in a dicta footnote to the Eighth Circuit's opinion.³⁰

The next decision to be discussed in this disclosure controversy was rendered by the Seventh Circuit in *King v. IRS*³¹ While this case did not involve a taxpayer request for his/her own return information, the case does address the FOIA/IRC section 6103 overlap and provides analysis used in subsequent court decisions.

The plaintiff in *King* made FOIA requests for disclosure of certain documents related to previously issued revenue rulings and regulations.³² After spending a large part of the opinion determining that these documents fit the definition of "return information" under IRC section 6103, the Seventh Circuit addressed the issue of whether IRC section 6103 exclusively controlled disclosure, or whether the provisions of the FOIA also applied.

Relying on the analysis of a United States district court decision,³³ the Seventh Circuit held that IRC section 6103 is the exclusive source for determinations regarding disclosure of tax return information.³⁴ The basic reasoning cited is that Congressional enactment of IRC section 6103 with full knowledge of the FOIA, demonstrates an intention to protect tax return information from the public disclosure otherwise mandated by the FOIA.³⁵

The effect of this interpretation is to place a reviewing court in the position of either accepting the government's determination that disclosure of any subject's tax return information "would seriously impair federal tax administration," or merely applying an "arbitrary or capricious" judicial review standard.³⁶ This approach is contrary to the FOIA approach requiring a *de novo* judicial review of any

29. 589 F.2d 827 (5th Cir. 1979).

30. *Barney*, 618 F.2d at 1274 n.15.

31. 688 F.2d 488 (7th Cir. 1982) (holding section 6103 controlled, consequently, since the plaintiff did not fall within any of the categories of persons authorized to receive return information per 6103(e), release of the eight documents sought was improperly ordered by the lower court).

32. *Id.* at 489.

33. *Zale Corp. v. IRS*, 481 F. Supp. 486 (D.D.C. 1979) (specifically rejecting prospective pre-emption by the FOIA and pointing out that IRC section 6103 was enacted after the FOIA, which is framed in general terms).

34. *King v. IRS*, 688 F.2d 488, 495 (7th Cir. 1982). (*Zale Corp.*, was the leading case on whether the FOIA or section 6103 governs the release of return information).

35. *Id.*

36. 5 U.S.C. § 706(2)(A) (1982).

rejected disclosure,³⁷ as utilized in *Chamberlain*, with the government sustaining the burden of non-disclosure.

The Seventh Circuit extended this analysis to a taxpayer request for his own return information in *Cheek v. IRS*³⁸. Here, the taxpayer sued under the FOIA to obtain information from IRS files about his own tax returns. The court summarily dismissed the taxpayer's appeal based on its holding in *King* with a statement that "disclosure of tax return information is governed by section 6103 rather than by the Freedom of Information Act. . . ."³⁹

Then, the recently created Eleventh Circuit⁴⁰ considered this issue in *Currie v. IRS*.⁴¹ The taxpayer's in this case sued under the FOIA to force the disclosure of documents relating to civil and criminal investigations brought against them.⁴² The IRS argued that IRC section 6103 was the sole statutory scheme regulating the disclosure of tax return information.⁴³ The court, however, referring to the *Chamberlain*⁴⁴ case held that while IRC section 6103 does qualify under Exception 3 of the FOIA, the review procedures of the FOIA still apply to a decision reached under the standards of IRC section 6103.⁴⁵

Of interest is the fact that the district court in this case had completed a *de novo* review including some *in camera* inspection of documents.⁴⁶ Based on its review, the district court denied disclo-

37. 5 U.S.C. § 552(a)(4)(B) (1982).

38. 703 F.2d 271 (7th Cir. 1983) (the court supported its analysis with a Senate report indicating Congress intended the Tax Reform Act to override inconsistent prior statutes).

39. *Id.* at 271.

40. Created October 1, 1981 from the Fifth Circuit.

41. 704 F.2d 523, 527 n.8 (11th Cir. 1983).

42. The documents at issue consist of internal agency memoranda reflecting the direction and scope of the investigation of the appellants' tax liability, memoranda of interviews with witnesses and confidential informants, correspondence with a state law enforcement agency and other third parties, information received from third parties relating to financial transactions with the appellants, federal tax returns of third parties, and IRS personnels' notes and work papers concerning the scope and direction of the investigation.

Id. at 531.

43. *Id.* at 526.

44. *Id.* at 527 n.8. The court in *Currie* explained: "The Eleventh Circuit, in the en banc decision of *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), adopted as precedent the decisions of the former Fifth Circuit decided prior to October 1, 1981." *Id.*

45. *Currie v. IRS*, 704 F.2d 523, 527-28 (11th Cir. 1983) (the court explained a non-disclosure decision that could pass the stringent FOIA requirements must have a rational basis).

46. *Id.* at 530 (*in camera* inspection by the court is reviewable only for abuse of discretion).

sure.⁴⁷ Since the Eleventh Circuit agreed with the standard of review used by the district court, its review of the lower court decision was limited by a "clearly erroneous" standard.⁴⁸ The appellate court found that the district court's review was adequate (not clearly erroneous).⁴⁹ So in this case, even though the taxpayer prevailed as to the standard of review (FOIA *de novo* review), the disclosures were still denied.

The Sixth Circuit became involved in the controversy with *White v. IRS*.⁵⁰ The taxpayer again sued the IRS under the FOIA after his request for disclosure of documents relating to his criminal tax investigation was denied.⁵¹ The IRS again adopted the position that IRC section 6103 was the sole standard for determination of proper disclosure, with an alternative argument that the implementation of IRC section 6103 through exemption (b)3 of the FOIA would yield the same non-disclosure decision.⁵²

The district court⁵³ adopted the exclusive IRC section 6103 interpretation and only conducted an "arbitrary or capricious" review.⁵⁴ The Sixth Circuit approved this analysis and agreed with the lower court that disclosure of the subject documents was not required.⁵⁵ The court did continue, however, to analyze the alternative argument that the implementation of IRC section 6103 through Exemption 3 of the FOIA would yield the same non-disclosure decision.⁵⁶ As pointed out in a concurring opinion, this analysis of the alternative argument was unnecessary to the decision.⁵⁷ The majority opinion concluded that the same non-disclosure would be applicable under a FOIA analysis.⁵⁸

The Fifth Circuit reaffirmed its position in the continuing con-

47. *Id.* at 526.

48. *Id.* at 531. Before proceeding to the "clearly erroneous" test, the court first determined that the district court had an adequate factual basis in framing propriety of non-disclosure as an issue.

49. *Id.*

50. 707 F.2d 897 (6th Cir. 1983).

51. *Id.* at 898. The requested information included materials pertaining to alleged underpayment of tax and the method by which the taxpayer was selected for an investigation or audit.

52. *Id.*

53. *White v. IRS*, 528 F. Supp. 119 (N.D. Ohio 1981).

54. *White v. IRS*, 707 F.2d 897, 900 (6th Cir. 1983).

55. *Id.*

56. *Id.*

57. *Id.* at 902.

58. *Id.* at 901 (the court also held that additional detailed *in camera* inspection was not required).

trovsky with *Linsteadt v. IRS*⁵⁹ The court held that the FOIA review and burden standards were applicable to any IRC section 6103 disclosure evaluations.⁶⁰ The disappointing result from a taxpayer perspective, however, is that even under the favorable fact situation of this case, disclosure was not mandated by the court.

The sole document in dispute was part of an interview memorandum which contained only taxpayer statements to an Internal Revenue Agent.⁶¹ The IRS stipulated that the contested memorandum "contained only a factual summary of the Linsteadts' statements, and did not include any conclusions or opinions of the Special Agent who took the statements."⁶²

The IRS argued that the disclosure of the taxpayers' own statements (which could be introduced in any subsequent trial as admissions) would give the taxpayers the opportunity to construct defenses and tamper with evidence, thereby seriously impairing federal tax administration or interfering with law enforcement proceedings.⁶³ A sharply divided Fifth Circuit panel (2 to 1) held that the lower court had not committed "manifest error" in determining that the IRS had met its burden under the FOIA implementing IRC section 6103.⁶⁴ Therefore, the taxpayers were precluded from obtaining an IRS record of their own statements.

The Ninth Circuit's contribution to the controversy is contained in the *Long* cases. The latest *Long* decision describes the history of the prior cases.⁶⁵ The taxpayers sought access to statistical information used to develop computer programs⁶⁶ that selected income tax returns for possible audit.⁶⁷

In *Long v. IRS*⁶⁸ (the original case) the taxpayers sued the IRS to force disclosure of the TCMP statistical data.⁶⁹ The Ninth Circuit

59. 729 F.2d 998 (5th Cir. 1984).

60. *Id.* at 1003.

61. *Id.*

62. *Id.* at 1004 (stipulation made in a hearing on the government's motion for summary judgment).

63. *Id.*

64. *Id.* at 1005 (dissenting judge could not agree that the evils cited by the government to justify non-disclosure reasonably came to pass, given the contents of the withheld document).

65. *Long v. United States*, 742 F.2d 1173 (9th Cir. 1984) (the court briefly summarized its previous treatment of the disclosure issue in *Long v. IRS*, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980)).

66. Discriminate Function (DIF) System. The basis for audit selection under this method is variance of deductions claimed for expected levels calculated from the TCMP information.

67. *Long*, 742 F.2d at 1175.

68. 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980).

69. This is known as the Taxpayer Compliance Measurement Program (TCMP). This

tried to determine whether the TCMP computer tapes were in fact "records" under the existing IRC section 6103, and whether the case should be remanded to the district court for its determination of whether such disclosure would pose a significant risk of indirect identification of taxpayers.⁷⁰

The same taxpayers filed a similar case against the Bureau of Economic Analysis (BEA) seeking to force the BEA to disclose certain TCMP computer tapes in its possession.⁷¹ These tapes had been transferred by the IRS for the BEA's use in estimating the total national income account. The Ninth Circuit held that the tapes were subject to disclosure, but the United States Supreme Court granted a stay pending certiorari.⁷²

As a response in part to these two cases,⁷³ Congress amended IRC section 6103 to its current form, allowing denial of disclosure if in governmental discretion the disclosure would "seriously impair assessment, collection, or enforcement under the internal revenue laws."⁷⁴ The Supreme Court subsequently remanded the *BEA v. Long* case to the Ninth Circuit to be reconsidered in light of the IRC section 6103 amendments.⁷⁵ The Ninth Circuit in turn remanded the case back to the district court for the same reconsideration.⁷⁶ The *BEA* and *IRS* cases were consolidated on remand and are the subject of the latest Ninth Circuit *Long* decision.⁷⁷

The key issue in the latest *Long* decision is the proper standard of review in a FOIA/IRC section 6103 overlap situation. The Ninth Circuit dismissed the IRS argument that IRC section 6103 is the exclusive test for determining disclosure of tax return information, but rather determined that the full FOIA *de novo* review and IRS burden of proof standards apply.⁷⁸ The opinion cites statutory con-

program attempts to measure the level of taxpayer compliance with the tax law.

70. See *Long*, 742 F.2d at 1176.

71. *Long v. BEA*, 646 F.2d 1310 (9th Cir. 1981).

72. *Long*, 742 F.2d at 1176 (the court granted certiorari in light of Congress' addition of the Economic Recovery Tax Act amendment to I.R.C. section 6103).

73. H.R. REP. NO. 201, 97th Cong., 1st Sess. 238-39 (1981).

74. I.R.C. § 6103(b)(2) (1982).

75. *BEA v. Long*, 454 U.S. 934 (1981). The Court in *Long* held "the policies expressed in I.R.C. section 6103 could be reconciled with the FOIA through exemption 3 which incorporates criteria contained in non-disclosure statutes." *Id.* at 974.

76. *Long v. BEA*, 671 F.2d 1229 (9th Cir. 1982).

77. *Long*, 742 F.2d at 1176 (the court raised the issue of whether the federal statute is an exemption statute).

78. *Id.* at 1183 (specifically, the court emphasized the district court's review is still *de novo* and the court must satisfy itself, on the basis of detailed and nonconclusory affidavits, that the Commissioner is correct).

struction, legislative history, and lack of specificity in excluding the FOIA requirements as reasons for its decision.⁷⁹

Even this decision was not the end of the *Long* cases. The cases were again remanded to the district court for a comprehensive *de novo* review, as the district court had restricted its alleged *de novo* review to determining the factual existence of the government's determination of harm, rather than an independent determination of potential harm.⁸⁰

III. THE LAST BATTLE?

The Third Circuit is the most recent participant in the FOIA/IRC section 6103 confrontation in *Grasso v. IRS*.⁸¹ Here, as in the *Linsteadt* case, the taxpayer was suing only to obtain full disclosure of an IRS interview memorandum detailing statements the taxpayer had made to the IRS.⁸² The IRS had provided portions of the memo, but other portions had been deleted.⁸³

The IRS again argued that IRC section 6103 was the sole statutory framework for determining disclosure requirements. The Third Circuit dismissed the IRS's argument based on the statutory analysis articulated by the Ninth Circuit in its latest *Long* decision.⁸⁴ The court held that the *de novo* review requirements contained in the FOIA were applicable to any IRC section 6103 analysis through Exception 3 of the FOIA.⁸⁵

In this case, the district court had performed the required *de novo* review and determined that the government had not met its burden of proof by determining either that the disputed information

79. *Id.* at 1177-78. The court found that section 6103 was reconcilable with the FOIA because prior court decisions held that section 6103 qualified as an exemption statute under 5 U.S.C. § 553(b)(3). Moreover, the court held that neither section 6103 nor its legislative history contain any language supporting its exclusion from the FOIA. In fact, Congress had amended section 6103 by adding 6110 which expressly excluded itself from the FOIA. The court pointed out that Congress' failure to likewise amend section 6103 is "highly persuasive" of an intent not to preempt the procedural provisions of the FOIA as to requests under section 6103.

80. *Id.* at 1184. The district court did not review the Commissioner's determination that disclosure of the specific TCMP data sought by plaintiffs would seriously impair assessment, collection, or enforcement of the tax laws. However, the court held that such a finding by the Commissioner was subject to *de novo* review in an action to compel disclosure under the FOIA.

81. 785 F.2d 70 (3d Cir. 1986).

82. *Id.* at 72.

83. *Id.*

84. *Id.* at 74.

85. *Id.*

would "interfere with enforcement proceedings"⁸⁶ or "seriously impair Federal tax administration."⁸⁷ The Third Circuit sustained the district court's decision,⁸⁸ even though the IRS argued that the disputed information would refresh the taxpayer's recollection, "thereby revealing the names and witnesses or potential witnesses, and transactions being investigated."⁸⁹

IV. THE SCORECARD AND THE GAME PLAN

After several years of litigation at the circuit court of appeals level, the score is as follows. Two circuits (Sixth and Seventh) have held the IRC section 6103 is the exclusive statutory reference to determine whether governmental disclosure of tax return information is required. This means that once the government has made a determination that disclosure is not required, the reviewing court is limited to an examination of whether that determination was arbitrary or an abuse of discretion.

Four circuits (Third, Fifth, Ninth, and Eleventh) have held that the *de novo* review and governmental burden standards of the FOIA apply to any disclosure determination under IRC section 6103. The Eighth Circuit has also favorably cited the Fifth Circuit's *Chamberlain* decision in a dicta footnote.

The time is certainly ripe for a final resolution of the controversy. There are two possible avenues for resolution. The first possibility is the granting of a petition for certiorari by the United States Supreme Court. At this point the Supreme Court has not demonstrated enthusiasm for such action. The only time the Supreme Court became involved in this issue was to grant a stay of disclosure pending certiorari.⁹⁰

The more practical course of action is to bring this issue to the attention of the Congress for resolution. One simple statutory addition could clarify the Congressional intent in these types of situations. Since Congressional intent is not clear, as evidenced by the split of circuits, it is in fact a duty of Congress to clarify its position.

The best clarification would be for Congress to stipulate that the protection of the FOIA apply to a review of disputed tax return information disclosures. The policy of *de novo* review and burden of

86. 5 U.S.C. § 552(b)(7)(A) (1982).

87. I.R.C. § 6103(e)(7) (1982).

88. *Grasso v. IRS*, 785 F.2d 70, 77 (3d Cir. 1976).

89. *Id.* at 76.

90. *See BEA v. Long*, 454 U.S. 934 (1981).

proof for non-disclosure on the government assures independent consideration of governmentally-rejected disclosures. The federal courts are well-equipped to utilize these standards based on their experience with other types of FOIA disputes.

The importance of these protections is best illustrated in the cases where the taxpayers are seeking disclosure of their own statements from the IRS (i.e., *Linsteadt* and *Grasso*). Clearly, fundamental fairness requires an independent *de novo* review to fully protect the rights of taxpayers already in an adversary relationship with the IRS.

V. CONCLUSION

The resolution of the conflict as to whether the review standards of the FOIA apply to disputed tax return information disclosures under IRC section 6103 is long overdue. Litigant and court resources are being wasted by repeated litigation of this issue. Congress should act to clarify its intention, with the best course being to provide FOIA review standards for tax return information disclosure disputes.

