

# How to Make a FOIA Request to the IRS and Why

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# The Freedom of Information Act (FOIA)

- The Freedom of Information Act (FOIA) gives any person the right to access federal agency records or information. 5 U.S.C. § 552
- FOIA is based on the presumption that the government and its information belong to the people and the people should know what their government is up to.
- Several exemptions allow agencies to withhold records and information under FOIA; the exemptions are found in Section 552(b). For instance, the government can withhold information and documents containing classified information (b)(1), criminal investigative techniques (b)(7), third party information protected by 26 U.S.C. Section 6103 or the Privacy Act (b)(3) & (6) (i.e., for information related to a person for whom you do not have Power of Attorney, Form 2848).

# What Can you Get from the IRS Without A FOIA Request?

- Ask your client. But, unless they are unusually organized and keep copies of everything they have sent to the IRS, you may need to make a FOIA request. There is so much more information you may want within the IRS files.
- If you have a Power of Attorney, Form 2848, you can request the following without using FOIA:
  - Transcripts through E-Services (TDS) or information and transcripts from Practitioner Priority Line (PPS)
  - From an IRS employee: “If you are working directly with an IRS employee on an open tax case, you can request information from the file directly from them.”  
<https://www.irs.gov/privacy-disclosure/irs-freedom-of-information>.
  - In a docketed Tax Court case, you **must** ask for information and documents informally before you can use the formal discovery methods. Informal discovery is usually requested by letter to opposing counsel. T.C. Rules 70(a), 90(a); *Branerton Corp. v. Commissioner*, 61 T.C. 691 (1974).

# IRS FOIA Library

<https://www.irs.gov/privacy-disclosure/foia-library>

- Published Tax Guidance: Regs and IRS Publications and Notices
- Admin Manuals & Instructions: Internal Revenue Manual, Chief Counsel Notices, Guidance Memos for Various Divisions (SBSE, LB&I)
- Program Plans & Reports: IRS Strategic Plan, Priority Guidance Plan, Report to Joint Committee On Taxation
- Non-Precedential Rulings & Advice: Actions on Decisions, Appeals Settlement Guidelines, IRS Written Determinations
- Training & Reference Materials: Audit Technique Guides, Chief Counsel Advice
- Frequently Requested Documents: IRS Transaction Code pocket guide

# Transcripts Available (thru E-services and PPS)

- Tax return transcripts - show most line items from returns and schedules filed for past 3 years
- Account transcripts – adjustments your client or IRS made after return filed, including payment and refund history, history of all actions on the account, including codes identifying notices sent
- Record of Account transcript – combines the previous two (tax return transcript and account transcript)
- Wage and income transcript – Information returns - W2s, 1099s, 1098s reported to IRS; 10 years
- Verification of non-filing letters – no record of return filed.

# When Should You Consider a FOIA Request?

- When a transcript is not enough
- If you are not first representative or taxpayer has been unrepresented during tax enforcement activity
- When asking an IRS employee nicely gets you nothing
- When there is no IRS employee who is actively working on the case
- If you need policy information not posted on [www.irs.gov](http://www.irs.gov)
- If you need statistical information not posted on [www.irs.gov](http://www.irs.gov)

# Info That Can Be Obtained Through FOIA

- Exam (audit) and collection files, agent activity logs, supervisor comments, review notes, appeals office case memo, emails, fraud referral, manager approval of certain penalties;
- Transcripts, waiver and extension forms submitted by taxpayer, documents related to levies, liens, seizures and sales, ACS transcripts, previously filed forms 433 (financial statements) and other client statements and documents, list of third party contacts, third party statements (including bank records obtained by IRS, letters, affidavits of witnesses interviewed);
- Returns – you can request them, but IRS usually insists on a separate Form 4506 with \$50 per return payment.

# Examples of How a FOIA Request Can Help

- Even when there are redactions, information from a FOIA request is usually quite useful.
- E.g., documents from a prior audit resulting in no changes or penalties may help in a current audit involving the same forms or issues.
- E.g., if an eggshell audit goes criminal, you can request the audit file, including the fraud referral form and revenue agent activity logs reflecting conversations with other IRS employees including fraud technical advisors.



# How to Make a FOIA Request: Informal Letter

- No specific form is required for a FOIA request; an informal letter is adequate, but it must contain certain “required” information.
- **Best practice is to be as specific as possible.** If you know what you want: 3 items you absolutely need, name them in the letter request. You will likely get a response in under a month. If you know where the file is, for example, with a specific Revenue Agent or Revenue Officer in a specific local office, include that information in the FOIA request.
- If it does not contain certain info, or is overly broad, agency can return as not processable.
  - **Do not request every document the IRS has related to your taxpayer; overly broad and not processable.**

# FOIA Request - Required Information

A FOIA request must be made in **writing** and must:

1. State the request is made under the FOIA;
2. Specifically identify the records being sought;
3. Include *the name and address of the requester, along with a copy of the requestor's driver's license or a sworn or notarized statement swearing to or affirming their identity* if the request involves the tax records of an individual or a business. In this case, the authority of the requester to receive such records must be established; and

Note: If the POA is asking for the records reference the POA and attach a copy]

4. Make a firm commitment to pay any fees which may apply.

# FOIA Request Must Reasonably Describe Records

- It is the FOIA requestor's burden to reasonably describe the documents being sought. 5 U.S.C. § 552(a)(3)(A). This requirement is generally satisfied if the request provides "the name, taxpayer identification number (e.g., social security number or employer identification number), subject matter, location, and years at issue, of the requested records." Treas. Reg. § 601.702(c)(5)(i).
- **Practice tip:** if you want records for joint filers (MFJ), clearly ask for them and send your POA for both taxpayers with the request.

# FOIA Request - Optional Information

1. The requestor's telephone number. Your number as a representative is on your POA. The disclosure office needs your phone number in case they need to clarify what you are seeking.
2. A limitation amount for the maximum fees you are willing to pay.
3. A request for a waiver or reduction of fees.
4. Form or format (paper, CD-ROM) preferred for responsive documents.
5. Request, and reason for, an expedited request.

# Where to Send FOIA Request

- Submit Requests by Fax or use the [FOIA Portal](#) for faster processing. You need not mail FOIA request.
- For personal or business taxpayer records, **fax requests to 877-891-6035**. The letter should be addressed to:
  - Internal Revenue Service  
Central Processing Unit  
Stop 93A  
Post Office Box 621506  
Atlanta, GA 30362
- For IRS policies and procedures not found in the [FOIA Library](#), fax requests to 877-807-9215. The letter should be addressed to:
  - Internal Revenue Service  
Central Processing Unit  
Stop 211  
PO Box 621506  
Atlanta, GA 30362-3006

# FOIA Sample Letter: part 1

**[Date]**

**VIA FACSIMILE TO: 877-891-6035**

Internal Revenue Service  
Central Processing Unit  
Stop 93A  
P.O. Box 621506  
Atlanta, GA 30362-3006

Re: Freedom of Information Act Request  
[Taxpayer Name and SSN]

Dear Sir/Madam:

With regard to the above-referenced taxpayer, enclosed for your convenience is a copy of IRS Form 2848, "Power of Attorney and Declaration of Representative," already on file with the Service.

Pursuant to the Privacy Act of 1974, 5 U.S.C. §552A, and the Freedom of Information Act, 5 U.S.C. §552, please provide the undersigned representatives with the following:

1. The entire Examination Division Administrative File for tax years 2009 and 2010 and all papers and dividers included therein, including but not limited to all documents, reports, revenue agent work papers, activity or work logs, transcripts, notes, investigative histories, schedules, reports of interviews, memoranda of interviews, information received from third parties, memoranda, telephone call slips, or notes, and all other similar type papers prepared or accumulated relative to this examination which for any reason are not otherwise included in the administrative file;

# FOIA Sample Letter: part 2

2. The entire Collection Division Administrative File relating to the collection of tax liabilities for tax years 2009 and 2010 including but not limited to all documents, reports, work papers, transcripts, notes, investigative histories, work logs, schedules, reports of interviews, memoranda of interviews, information received from third parties, memoranda, telephone call slips, or notes, and all other similar type papers prepared or accumulated relative to the collection on these liabilities; and
3. The entire file relating to the tax returns filed for tax years 2009 and 2010 including but not limited to all returns, documents, notices, reports, work papers, transcripts, notes, schedules, information received from third parties, and all similar type papers prepared or accumulated.

We agree to pay reasonable charges in locating and copying the requested documents, not to exceed \$100. If your fees will exceed this amount, please contact one of the undersigned for further authorization.

# FOIA Sample Letter: part 3

If you determine that any portion of a requested record is exempt, please provide the non-exempt portion. With respect to those records (or portions thereof) to which you believe an exemption from disclosure applies, please provide a list which identifies each record, the number of pages withheld, and the specific exemption which you believe justifies non-disclosure of the information.

Please direct all questions, notices and correspondence regarding this request to the undersigned at the telephone number and address listed on the enclosed Form 2848.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury of the laws of the United States of America, that I am [name], the same [attorney, accountant, representative, law student intern] who appears on the enclosed Form 2848, Power of Attorney, and am authorized by the IRS and the above-referenced taxpayer, \_\_\_\_\_, to represent [him/her] in this matter and to request access to the within requested tax records.

Sincerely,

[Name of Representative]

Enclosure: Form 2848



# FOIA Timeframes/Delays Due to Pandemic

- IRS is required to determine within 20 days (excluding Saturdays, Sunday and legal public holidays) of receipt whether to process your FOIA request.
- The IRS must provide the reasons why the request is denied in whole or in part and include info about the right to administratively appeal the denial.
- Regs at § 601.702(c)(11)(i)(A)(1)-(4): Allows IRS to take 10 more days to collect records from field locations, review large numbers of records, and consult with other agencies.
- FOIA and Privacy Act requests during COVID19 pandemic: EXPECT DELAYS

# FOIA Processing Fees

## Three Types of Fees

1. Copying costs
2. Search fees
3. Review fees (for commercial requestors only)
  - Most Common Fee: \$25 for a CD-ROM
  - Small Requests (release of 100 copies or less pages and less than two hours of search) = FREE! (except for commercial requestors).

# FOIA Fee Waivers

- Indigence or inability to pay does not automatically qualify you for a waiver.
- In order to obtain a waiver of fees, the requestor must show that the disclosure of information requested:
  - Would be in the public interest;
  - Would likely contribute significantly to the public's understanding of the operations or activities of the IRS; and
  - Would not be primarily in the commercial interest of the requester.

See IRM 11.3.5.6.2.

# IRS Can Withhold Information Under FOIA Exemptions

- IRS can withhold document or part of document if exempt from disclosure. Certain records are also “excluded” from disclosure under FOIA so that the IRS can also refuse to confirm or deny that certain records exist, if they relate to criminal investigations, confidential informants and foreign intelligence.
- Exemptions are found in 5 U.S.C. 552(b) and include: (1) classified/national security info, (2) internal personnel rules, (3) protected by other laws, (4) trade secrets and confidential commercial or financial info, (5) attorney- client, work **product** and **deliberative process** **privileges**, (6) **personal privacy (i.e., third parties)**, (7) **law enforcement** (if criminal investigation is pending), (8) financial institution info, (9) geological info.

# Strategies for Overcoming Exemptions

- Is working with disclosure officer enough?
- What about with appeals?

# Reasons to Appeal a FOIA

- Withholding a document or a redaction that you don't believe is supported by exemption and disclosure officer will not budge
- Failure of IRS to conduct an adequate search
- Denial of a fee waiver request
- Any other type of adverse action
- Treasury Regulation 601.702 (c)(10) governs FOIA administrative appeals.

Note: Lack of a timely response may NOT be appealed. But, if the IRS does not respond to a FOIA request, you may commence an action in U.S. District Court for force it to respond.

# What Constitutes an “Adequate Search?”

- The IRS must demonstrate that it has conducted a search “reasonably calculated to uncover all relevant documents” responsive to the FOIA request. See *Smart-Tek Services, Inc. v. IRS*, Docket No. 18-56560 (9<sup>th</sup> Cir. Nov. 5, 2020) (unpub.) (holding search was adequate and the IRS properly withheld documents about “alter ego” companies under exemption (b)(3) because they were not requested).
- The adequate search inquiry is focused not on whether additional responsive documents may exist, but whether the search for responsive documents was “reasonable” in light of the facts and circumstances. *Id.*

# FOIA Administrative Appeals

Appeal in writing:

1. Envelope should be marked in the lower left-hand corner with “Freedom of Information Act Appeal”.
2. Identify the FOIA request being appealed, including the IRS assigned FOIA request number and the name and address of the requestor.
3. Address your appeal to:

IRS Appeals  
Attn: FOIA Appeals  
5045 E. Butler Avenue  
M/Stop 55201  
Fresno, CA 93727-5136



# FOIA Administrative Appeals – 90 Day Deadline

- Appeal in writing must be postmarked within 90 days of the date of the date of the letter denying access to the requested materials or withholding of information pursuant to FOIA exemptions.
  - An administrative appeal may be undertaken upon either, the denial of an initial FOIA request, or an agency's failure to issue a determination within the statutory 20-day time deadline. 5 U.S.C. §§ 552(a)(6)(A)(i), 552(a)(6)(C).
- IRS is required to make decision on appeal within 20 weekdays (excluding legal holidays) after the date of receipt of the appeal. IRS may extend deadline by an additional 10 days under unusual circumstances (Treas. Reg. 601-702(c)(11)(i)).

# Judicial Review of FOIA Denials/Exemptions

- If federal agency does not respond to FOIA request within statutory timeframe or the administrative appeal is denied, requestor is deemed to have “exhausted administrative remedies” and can file a complaint in U.S. District Court.
- Usually arguing about denials/exemptions asserted by IRS.
- Burden is on the IRS to justify withholding of docs and information when you file an action in district court. The agency typically must respond with affidavits (sometimes depositions) detailing their search for requested records and the exemptions they are asserting for the information withheld.

# Reimbursing Attorney Fees

A requestor who files a lawsuit and “substantially prevails” may be awarded reasonable attorney fees and litigation costs reasonably incurred.

- A unilateral change in agency position can provide the basis for attorney fees (based on a substantial claim of merit).
- A stipulation approved by the court can be considered a judicial order for this purpose.

# Fee Reimbursement Factors

Assuming the litigant prevailed, the court will decide if they are entitled to reimbursement based on four factors:

1. the public benefit derived from the case – can you show this in a case where it is an individual requesting records pertaining only to him/her and for purpose of challenging tax issue relating only to him/her?
2. the commercial benefit to the complainant;
3. the nature of the complainant's interests in the records sought; and
4. whether the government's withholding had a reasonable basis in law.

The court reviews materials presented and determines the reimbursable amount based on reasonable hours and fees.

Unlike Tax Court fees, which are paid out of the Treasury Claims and Judgment Fund, FOIA attorney fees are paid "only from funds annually appropriated for any authorized purpose for the Federal agency against which a claim or judgment has been rendered."

# Using FOIA to Obtain Your CAF Client Listing

- You can use FOIA to request from the IRS a Centralized Authorization File (CAF) Client Listing.
- Usually done to then do a bulk POA withdrawal through the CAF unit.
- You must attach a valid photo identification, including a signature, to a CAF Client Listing request. The IRS will not accept other methods of establishing identity for these particular requests.

# FOIA Resources

Much more information can be found in:

- IRS FOIA Guide located @

<https://www.irs.gov/privacy-disclosure/freedom-of-information-act-foia-guidelines>

- The FOIA Portal Page located @

<https://www.foia.gov/?id=2f6bdfbe-aa71-4dd6-ac88-3d6587fafa83&type=component>