

Court upholds Freedom of Information Act exemption for IRS

The U.S. Court of Appeals for the Federal Circuit recently handed down its decision in *Agrama v. U.S.* The case focused on whether the IRS satisfied its Freedom of Information Act (FOIA) burden of showing that it had conducted an adequate search for the documents that the taxpayer sought related to her alleged failure to properly report an ownership interest in a foreign corporation.

To satisfy its burden and withhold records under exemption 7(A), the agency must establish that 1) the documents were investigatory records compiled for law enforcement purposes, and 2) production of the documents would interfere with pending enforcement proceedings.

Facts of the case

In October 2015, the taxpayer received two IRS notices asserting that, for the 1982 through 2004 tax years, she'd failed to properly report her ownership interest in a foreign corporation by filing Forms 5471. The Internal Revenue Code requires U.S. persons to furnish information with respect to any foreign business entity that that person controls on IRS Form 5471, "Information Return of U.S. Persons With Respect to Certain Foreign Corporations." A \$10,000 penalty is imposed on a taxpayer who fails to timely furnish information required under Section 6038(a)(1) for any foreign corporation or partnership it controls for each annual accounting period for which the failure exists.

In *Agrama*, the taxpayer disputed that she in fact had such an interest and, in February 2016, she filed a FOIA request seeking "each and every document ... contained in the administrative files of the Internal Revenue Service relating to proposed Form 5471 penalty liabilities" for her case.

The IRS searched her IRS files and provided some responsive documents, but also withheld some documents, asserting that they fell under FOIA Exemption 7(A) because their disclosure would interfere with an ongoing investigation. Under this exemption, records or information compiled for law enforcement purposes may be withheld by an agency in response to a FOIA request, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings.

In April 2016, the taxpayer filed suit in district court, challenging the IRS's decision to withhold responsive documents. After the suit was filed, more responsive documents were discovered, and the IRS produced some of the pages that had previously been withheld — including a translated copy of an 83-page report prepared for the Italian government by an Italian investigator.

Relying on both the public and ex parte (that is, where only one party was present) declarations, the district court granted the IRS's motion for summary judgment and denied the taxpayer's cross-motion for summary judgment. It concluded that the IRS's search for responsive files was adequate and that the withheld documents were exempt from disclosure under FOIA.

The Federal Circuit affirmed the district court, granting the IRS's motion for summary judgment and denying the taxpayer's cross-motion for summary judgment.

Ex parte acceptable

One issue the Federal Circuit looked at was the taxpayer's argument that the district court had abused its discretion in allowing the IRS to submit materials *ex parte*, rather than reviewing the actual documents withheld. The Federal Circuit found that the district court had acted within its discretion in concluding that there was good cause for permitting *ex parte* submissions, and that requiring the IRS to produce further public justification would threaten to reveal the very information for which a FOIA exemption was claimed.

The Federal Circuit reasoned that it was true that FOIA only expressly authorizes district courts to conduct *in camera* (that is, by the court in private) review of withheld documents. But courts have held that federal courts in FOIA cases have the inherent authority to accept other kinds of materials *ex parte*.

Ultimately, the Federal Circuit concluded, a district court has broad discretion to accept submissions *ex parte* when the district judge believes that such a filing is needed to make a responsible *de novo* determination on the claims of exemption. Here, the district court had acted within its discretion in concluding that there was good cause for permitting *ex parte* submissions.

Adequacy, not perfection

The appellate court further found that the IRS search for the sought-after documents was adequate. To demonstrate adequacy, an agency must show that it made a good faith effort to conduct a search for the requested records using methods that could be reasonably expected to produce the information requested.

The IRS met its burden of showing such by a reasonably detailed affidavit, which set forth the search terms and the type of search performed and asserted that all files likely to contain responsive materials (if such records existed) were searched.

The taxpayer didn't dispute that the IRS had acted in good faith but rather argued that the agency had failed to follow through on obvious leads to discover requested documents. Specifically, she argued that the IRS should have searched the files of the IRS's Tax Attaché in Italy, which was charged with receiving tax records from the Italian government.

She speculated that, because the Italian investigator's report was originally produced by the Italian government, the IRS office in Italy charged with requesting documents from the Italian government might have documents that explained how the report was received by the IRS. However, the Federal Circuit concluded that agencies weren't required to speculate about potential leads.

Here, based on detailed public and *ex parte* declarations that described the scope and nature of the IRS's search for responsive documents, the court was satisfied that the agency had made its search in "good faith" and "using methods which could be reasonably expected to produce the

information requested.” The Federal Circuit determined that no more was required; adequacy — not perfection — was the standard that the FOIA imposed.

Closing rejections

Finally, the court rejected the taxpayer’s argument that the district court had erred in holding that the IRS had properly withheld four responsive documents under FOIA Exemption 7(A). The taxpayer claimed that the IRS had failed to meet its burden to demonstrate how disclosure of the withheld records would interfere with law enforcement proceedings. While conceding that the IRS’s public disclosures on this matter was cursory, the court determined that this was one of those occasions where extensive public justification would threaten to reveal the very information for which a FOIA exemption was claimed.

Based on the IRS’s public and ex parte disclosures, the Federal Circuit was satisfied that the IRS had met its burden of demonstrating that disclosure of the withheld records might reveal the scope and direction of the investigation and could allow the target to destroy or alter evidence, fabricate fraudulent alibis or intimidate witnesses.

The court found that the taxpayer’s contention that the IRS notices asserting her interest in a foreign corporation were evidence that the agency had completed its investigation were without merit. The court reasoned that, even if the investigation had progressed to the point that the IRS could assert the taxpayer needed to file Form 5471, this did nothing to rebut or undermine the IRS’s declaration that the investigation remained active.

Exemptions exist

The FOIA can be a great boon to U.S. citizens seeking hard-to-find information from federal agencies. But, as this case demonstrates, a variety of exemptions exist — including the one cited in *Agrama*. •