DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

CC:PA:DPL:Br01
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MEMORANDUM FOR EVA WILLIAMS
PROGRAM DIRECTOR FOR USER FEES M:CFO:A:C

FROM: Margo L. Stevens
Acting Assistant Chief Counsel
Disclosure & Privacy Law CC:PA:DPL

SUBJECT: Charging for Exempt Organization Return Compact Disks

This responds to your request for advice regarding the Internal Revenue Service's (Service's or IRS') authority to charge for compact disks (CDs) containing exempt organization annual information returns. Your request, submitted to the Office of Assistant Chief Counsel (General Legal Services), CC:F&M:GLS:EGG, was forwarded to this office for response since it involves matters within our jurisdiction. This document is not to be cited as precedent.

ISSUE(S): Whether the Service may charge for CDs containing exempt organization annual information returns under I.R.C. § 6103(p)(2)(A) or other applicable authority under the Internal Revenue Code (Code), or alternatively, whether only such charges as may be imposed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, apply?

CONCLUSION(S): Only those charges as may be imposed by the FOIA can be charged for CD-ROM reproductions of the material that is available to the public under section 6104(b) of the Code. That reproduction charge is the actual, direct cost of replicating the data and providing it to individual requesters. This would include cost elements such as labor costs incurred in transferring digitized data to a CD (commonly referred to as "burning" a CD), the cost of the blank CD, itself, plus incidental postage and handling charges. When starting with a paper product, the costs of digitizing--"scanning" or "imaging"--that paper product, i.e., converting it to a format that may be transferred to a CD) would also be direct costs of replicating the data.

SUMMARY ANALYSIS: Section 6103 of the Code establishes a general rule that tax returns (including the annual information returns of tax exempt organizations), are confidential and may not be disclosed in any manner except as specifically authorized by some provision of the Code. I.R.C. § 6103(a). Section 6104(b) is a broad carve out from this general rule and provides, instead, that certain information furnished annually

request for advice, that in July 1998, the Service instituted a new process called "imaging" to produce copies of three of the types of annual returns that are subject to section 6104(b) requirements (i.e., Forms 990 PF (Return of Private Foundation), select Forms 990 (Return of Organization Exempt from Income Tax) and Forms 990-EZ (Short Form)). You further state that the Service has begun placing imaged copies of these three types of annual returns on CDs, and that these CDs are being furnished to the public in compliance with the publicity requirements of section 6104(b).

We are advised that although this project was undertaken at the prompting of one particular requester that, pursuant to contract, helped defray certain initial costs of the imaging process, the Service is satisfied that a significant segment of the public is interested in obtaining the information that is available to it under section 6104(b), on CD from the Service. You have confirmed, however, that the Service does not intend that CD-Rom will be the exclusive format in which the Service will furnish copies of exempt organizations' annual information returns to the public. Members of the public may continue to request and receive paper copies of such returns. It is unclear whether the Service intends that bulk requests under section 6104(b), i.e., requests for copies of annual returns filed by multiple exempt organizations, will only be furnished on CDs.

Finally, you indicate that while the CDs initially are being furnished free of charge to requesters, the intention is to institute a fee for them. Accordingly, you have asked whether such fees may be charged under the authority of I.R.C. § 6103(p)(2)(A) and retained by the Service under I.R.C. § 7809(c)(1), rather than charged under the FOIA and deposited into the Treasury General Fund, as the FOIA, in general, would require.[2]

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[1] (...continued)
exempt organizations (other than private foundations or political organizations described in section 527 of the Code), to the extent that information is reported on organizations' annual information returns.

[2] In this regard, we note GLS has opined that new or increased fees collected under authority of the FOIA qualify for retention by IRS as part of a $119,000,000 supplement to annual appropriations granted under Treasury, Postal Service, and Federal Government Appropriations Act, 1995, Pub. L. No. 103-329, Title I, § 3, September 30, 1994. Under this appropriations statute Congress specifically authorized IRS to retain up to $119,000,000 per year in new or increased fees where collection **but not retention** of the fees is authorized by another statute, such as FOIA. Given that IRS already is authorized, under section 7809(c)(1), to retain, without regard to amount, new or increased fees collected under section 6103(p)(2), GLS concluded that such fees, unlike new or increased FOIA fees, do not qualify for retention under the 1994 statute.

By contrast, the "publicity of returns" under section 6104(b) and predecessor provisions has never been predicated on a threshold showing by individual requesters that they, unlike the public at large, are entitled to inspection, which in turn, triggers a statutory basis for them to request and obtain copies for a reasonable fee. Congress took a decidedly different tack in the context of exempt organizations' returns. It simply cast certain information reported by exempt organizations into the public domain where it is "available" to anyone wishing to inspect it.

Publicity of Forms 990

Exempt Organizations were subject to annual information reporting obligations prior to any of that information being made available to the public, beginning in 1950. The original express statutory requirement that exempt organizations file annual information returns was contained in the Revenue Act of 1943, which amended section 54 of the 1939 Code by adding subsection (f) thereto.[5] Section 54(f) merely codified an existing annual information return filing requirement put in place in the exercise of the Commissioner's discretionary authority to ensure efficient administration of the internal revenue laws. The prescribed form that had been developed, and already was in use, for meeting this annual filing requirement was Form 990.[6] However, until 1950, none of the information reported by exempt organizations on Form 990 was available to the public.

The "Publicity of Returns" filed under provisions of the 1939 Code, including Form 990 annual information returns filed under section 54(f), were addressed under section 55, as follows:

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[5] Subsection (f) of section 54, "Records and Special Returns," read, in part, as follows:

> Every organization, except as hereinafter provided, exempt from taxation under section 101 [of the 1939 Code, and subsequently section 501 of the 1954 and 1986 Codes] shall file an annual return, which shall contain or be verified by a written declaration that it is made under the penalties of perjury, stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner, with the approval of the Secretary, may by regulations prescribe ....

Revenue Act of 1943, Pub. L. No. 78-235, § 117, reprinted in Internal Revenue Acts of the United States 1909-1950, Legislative Histories, Laws, and Administrative Documents (Vol. 88) (Bernard D. Reams Jr., ed., William S. Hein & Co., 1979) codified as 26 U.S.C. § 54(f) (1939), and subsequently, as 26 U.S.C. § 6033(a) (1954) (currently I.R.C. § 6033(a) (1986)).

[6] See e.g., T.D. 5125, 1942-1 C.B. 101, 102 ("When an organization has established its right to exemption, it need not thereafter make a return of income ... [but] shall file annually returns of information on Form 990").

> **(3) Whenever a return is open to the inspection of any person a certified copy thereof shall, upon request, be furnished to such person** under rules and regulations prescribed by the Commissioner with the approval of the Secretary. The Commissioner may prescribe a **reasonable fee** for furnishing such copy.[9]

Corporation Tax Provisions of the Internal Revenue Code of 1939, § 55(a)(1), reprinted in Internal Revenue Acts of the United States 1909-1950, supra (Vol. 110) (emphasis added).

In the language of section 55(a)(2), the annual returns that exempt organizations were required to file under section 54(f), were returns filed under "this chapter," i.e., under chapter 1–Income Tax, consisting of sections 2 through 396 of the 1939 Code. However, the executive discretion bestowed under section 55(a)(2) was not exercised to make Forms 990 open to public inspection. As a result, section 55(a)(3) and "rules and regulations" thereunder--IRS' published guidance regarding the cost of, and procedures for requesting, copies of returns that were open to inspection--had no application to Forms 990 until, at the earliest, 1950, when certain Form 990 information first became available for inspection.[10]

By 1950, the tax privileged status of exempt organizations engaging in unrelated business activities and associated allegedly abusive tax avoidance transactions had become a highly contentious and increasingly litigated issue.[11] In response, the

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[9] The language of section 55(a)(3) closely parallels language in corresponding provisions of prior and later law, Revenue Act of 1926, § 257, Art.1091, and section 6103(a) of the 1954 Code, prior to amendment in essentially its present form in 1976.

[10] See e.g., Regulations 12, Art. 80, as amended; T.D. 4929 (Aug. 28, 1939), 1939-2 C.B. 91, in conjunction with T.D. 4945 (Sept. 20, 1939), 1939-2 C.B. 97; Department Circular 591, 1938-2 C.B. 495, superceded by Mimeograph 6727, 1952-1 C.B. 234; and Mimeograph 3512, 1927 C.B. VI-1, 100 (effective February 4, 1927), which prescribed copying fees that were superceded by revised rates published in Mimeograph 6747, 1952-1 C.B. 54 (effective for copies made after February 1, 1952).

[11] See e.g., Message from the President of the United States Transmitting Request for a Revision of the Tax Laws, January 23, 1950 (noting "tax loopholes have also been developed through the abuse of the tax exemption accorded educational and charitable organizations" and that "glaring abuses of the tax-exemption privilege should be stopped"), H.R. Doc. No. 81-451, at 5 (1950), reprinted in Internal Revenue Acts of the United States 1909-1950, Legislative Histories, Laws, and Administrative Documents (Vol. 116), supra; S. Rep. No. 81-2375 at 117 (1950) (noting the "character of litigation which has developed with respect to certain organizations claiming the benefits of [tax exemption] ... (cf. Roche's Beach, Inc. v. Commissioner, [96 F.2d 776 (2d Cir. 1938)]; Universal Oil Products Co. v. Campbell, [181 F.2d 451 (7th Cir. 1950)]; Willingham v. Home Oil Mill, [181 F.2d 9 (5th Cir. 1950)]; C.F. Mueller Co., 14 T.C. [922 (1950)])."

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153(c). The regular Form 990 continued to be used by reporting exempt organizations that were not subject to the additional reporting requirements of section 153(a) and the publicity requirements of section 153(c).[13]

In 1954, section 153(c) of the 1939 Code was redesignated section 6104 of the 1954 Code.[14] Section 6104 contained no material change from existing law.[15] It thus made public, the information furnished annually by section 501(c)(3) organizations, as required by section 6033(b), and the information furnished annually by trusts claiming charitable deductions, as required by section 6034. Those exempt organizations subject to the reporting and disclosure requirements of section 6104 continued to file a Form 990-A, although section 6104 only made public that information furnished on pages 3 and 4 of Form 990-A, not the entire Form 990-A return. Those exempt organizations not subject to the disclosure requirements continued to file the nonpublic Form 990.[16]

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[13] See Regulations 111, §§ 29.101-2 and 29.153-1 through 29.153-3 (Publicity of Returns), as provided by T.D. 5838 (Apr. 21, 1951), 1951-1C.B. 35, which were designed to conform Regulations 111 to section 341 of the Revenue Act of 1950, Pub. L. No. 81-814, approved September 23, 1950. Charitable trusts used Form 1041-A to report the publicly available information required under section 153(b).

[14] With passage of the Revenue Act of 1954, subsection 54(f) of the 1939 Code (requiring that certain exempt organizations file annual information returns) became section 6033(a) of the 1954 Code, and is currently section 6033(a) of the 1986 Code, as amended. Section 153(a) of the 1939 Code (mandating the reporting of specific items of information annually by organizations exempt from taxation under section 501(c)(3), formerly section 101(6)) became section 6033(b) of the 1954 Code, and is currently section 6033(b) of the 1986 Code, as amended. Section 153(b) of the 1939 Code (mandating the reporting of specific items of information annually by certain trusts claiming a charitable deduction) became section 6034 of the 1954 Code, and is currently section 6034 of the 1986 Code, as amended. Section 153(c) of the 1939 Code (providing for public inspection of certain information required to be furnished annually by certain exempt organizations and charitable trusts) became section 6104 of the 1954 Code, and is currently section 6104(b) of the 1986 Code, as amended.

[15] In 1954, section 6104 read as follows:

> The information required to be furnished by section 6033(b) and section 6034, together with the names and addresses of such organizations and trusts, shall be made available to the public at such times and in such places as the Secretary or his delegate may prescribe.

Internal Revenue Code of 1954, Pub. L. No. 83-591, § 6104, reprinted in Internal Revenue Acts of the United States: The Revenue Act of 1954 with Legislative Histories and Congressional Documents (Vol. 11) (Bernard D. Reams Jr., ed., William S. Hein & Co., 1979).

[16] Charitable trusts subject to the reporting and disclosure requirements continued to

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history adds nothing to the language of the statute, itself, regarding the intended mechanisms and procedures for accomplishing publicity under this provision: these were matters to be prescribed by the Secretary. Both the statute and its legislative history are silent regarding the attendant costs of publicity and how or whether these should be recouped by the Service.

The initial regulations implementing the new publicity requirements under section 153(c) were silent on the issues of copying and copying costs, and merely provided as follows:

> Publicity of Returns.–
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> The information furnished on pages 3 and 4 of Form 990-A shall be a matter of public record, and shall be open to public inspection, during regular hours of business, in the office of the Collector for the district in which the forms are filed. The commissioner may use such information for the purposes of making and publishing statistical and other studies.

Regulations 111, § 29.153-3, as provided by T.D. 5838 (Apr. 21, 1951), 1951-1 C.B. 35.

Except for minor, purely technical changes,[21] this regulation remained in place, as originally promulgated, until 1958, when Treasury Regulations implementing the public inspection requirements of section 6104, as amended pursuant to the Technical Amendments Act of 1958, § 75(a), Pub. L. No. 85-866, 72 Stat. 1660,[22] were

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[20] (...continued)
than using their resources to further their tax exempt purposes. The form of redress settled upon by Congress was not a tax on the accumulated investment income of such organizations (as the original House bill had proposed), rather, Congress sought to discourage the practice by imposing the new information reporting and public disclosure requirements specified in section 153. See H.R. Rep. No. 81-2319, at 107-131 (1950), reprinted in Internal Revenue Acts of the United States 1909-1950, supra, (Vol. 116); S. Rep. No. 81-2375, at 26, 27, 33, 34-35, supra, ("It is believed that publishing information about the accumulations of these foundations and trusts will serve two purposes. First, full public information will encourage distributions. Second, it will reveal the extent of the accumulations problem.") See also H.R. Conf. Rep. No. 81-3124, at 36-37, supra.

[21] Effective September 23, 1953, for example, this regulation was redesignated Regulations 118, § 39.153-3 and the language of the second sentence was revised to read "in the office of the district director of internal revenue for the internal revenue district in which the forms are filed." (Emphasis added).

[22] Under this legislation, exempt organizations' applications for recognition of tax exempt status and materials submitted in support of such applications were opened up to public inspection along with the information furnished annually to the Service by certain such organizations that already was available to the public under section

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permit persons who inspect applications under section 6104(a) to make notes about and manual copies of such applications.

You also ask to be furnished relevant information about making photographic reproductions of information open to public inspection. For years the Department provided Congressional committees copies of returns when inspection of such returns was authorized under section 6103(a) or the corresponding provisions of prior law. However, in 1954 the Department was asked to include in an Executive order authorizing a committee of Congress to inspect certain returns a provision expressly authorizing the committee to make photographic reproductions of such returns. In connection with this request, the President sent the chairman of committee a statement setting forth his reasons for not including such a provision in the Executive order. .... In brief, it indicates that the request was not granted for the reason that: "... the use of photographic copies endangers the secrecy of the returns involved to a greater extent than other methods of inspection. ...."

On November 22, 1954, the Washington Post and Times Herald carried an article relating to the problem of providing Congress with copies of income tax returns. .... It indicates that many more returns were being made available to committees of the current Congress than to any previous Congress, and that apparently certain members of Congress were using the information in a questionable manner.

In 1957, the question of permitting a committee of Congress to make photographic reproductions arose again. Mr. Rose prepared a comprehensive memorandum dealing with the Congressional inspection of income tax returns. .... In it, Mr. Rose referred to the Presidential letter of 1954 and again took the position that committees could not be permitted to make photographic reproductions of tax returns. In connection with this same request, the Commissioner's office developed instructions for the guidance of the field offices, and these instructions provided that the committee could not make photographic reproductions. ....

The question of whether to permit the use of photographic equipment in copying information has also arisen in connection with the public inspection of certain information submitted by certain exempt organization. Section 153 was added to the Internal Revenue Code of 1939 for years beginning after 1949. It provided that certain information submitted by certain exempt organizations should be open to public inspection. In connection with this provision the Commissioner was asked by a member of the public whether photographic copies could be made of such information, and by

Code--Regulations 111, § 29.153-3, as amended by Regulations 118, § 39.153-3, effective September 23 1953--but for the addition of rules with respect to copying:

> The proposed regulations under section 6104(b), relating to publicity of information supplied annually by certain exempt organizations and certain trusts, continue in substance the provisions of section 39.153-3 of Regulation 118. There has been added a provision which prescribes rules with respect to copies of material open to inspection under section 6104(b).

The technical memorandum accompanying the proposed regulations explained the proposed public inspection procedures, under section 6104, as follows:

> Paragraph (d) of the proposed regulations in section 301.6104-1 also prohibits the use by any person to whom applications and supporting documents are made available for inspection of photographic equipment for the purpose of obtaining copies of such material. **This prohibition against the use of photographic equipment accords with the current administrative practice of not permitting photographic reproductions to be made by the public of the material available for inspection under section 6104(b) (section 6104 before the amendment), that is, Form 1041-A and the public portions (pages 3 and 4) of Form 990-A.** We would expect in the absence of such a prohibition, that we would receive many requests to permit the use of photographic equipment to make copies of the material opened to public inspection under section 6104(a)(1).
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> We have given consideration to proposing a rule which would permit the photographing of such material by persons inspecting it subject to prescribed conditions designed to provide adequate safeguards against damage to the official files and to prevent undue interference with the normal business of the internal revenue office. However, inasmuch as it is our understanding that the decision not to permit photographing of Forms 1041-A and pages 3 and 4 of Forms 990-A reflects Department policy, the same rule has been extended in the proposed regulations to the exemption applications and supporting documents open to inspection under section 6104(a)(1). (Emphasis added).

These T.D. 6331 materials make clear IRS' past practice, and its position under regulations that took effect October 31, 1958, with respect to copying done manually or photographically by individual members of the public. However, the materials make no mention of what IRS' practice had been, for over eight years, with respect to furnishing copies (whether manually transcribed, typed, photographically reproduced or otherwise made), for a fee or otherwise, to members of the public, upon request. We merely are

> may prescribe **a reasonable fee** for furnishing copies of material available for inspection pursuant to this section. (Emphasis added).[24]

Our research has not identified any clear articulation of the specific statutory authority upon which this discretionary "reasonable fee" language was based. However, given the above-quoted reference in the transmittal memorandum dated July 25, 1961, to the Service's "standard" per page **copying fee of 50 cents**, and the further inference conveyed in that memorandum, that this "standard" fee for copying **"material which [IRS] has on file"** also would be the appropriate charge for copies of the particular subset of that material that is available to the public under section 6104, it would not be unreasonable to conclude that the statutory authority being relied upon, here, was the same statutory authority relied upon by the Service to establish the rates listed in its published schedule of fees for copies of tax returns furnished to persons entitled to inspect such returns. See memorandum dated July 25, 1961, from the Commissioner to the Secretary of the Treasury transmitting proposed T. D. 6565.

In August 1961, when these amendments were made to the section 6104 regulations, the Service' published schedule of copying charges was contained in Mimeograph 6747 (Jan. 3, 1952), 1952-1 C.B. 54, and indeed, the standard per page charge prescribed in Mimeograph 6747 was **50 cents.**[25] The rates prescribed in Mimeograph 6747 superceded rates published in Mimeograph 3512 (Feb. 4, 1927), 1927 C.B. VI-1, 100,[26] effective for all copies of returns or other documents furnished on or after February 1, 1952, except to the extent exiting laws or regulations specifically established the charge for a particular service, e.g., a copy of Record 21, records of seizure and sale of real estate, was $1.00 as specified in Mimeograph 6727, 1952-1 C.B. 234 at 236.

The statute identified in Mimeograph 3512 as authority for the rates prescribed therein was the Revenue Act of 1926, § 257, Art. 1091, which stated:

> .... **Whenever a return is open to the inspection of any person a certified copy thereof shall, upon request, be furnished to such person** under rules and regulations prescribed by the Commissioner **with**

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[24] A parallel amendment to Treas. Reg. § 301.6104-1 permitted the Service to furnish copies, for a reasonable fee, of information that was publicly available under section 6104(a)(1).

[25] Mimeograph 6747 established a general charge of $.50 cents per page for each copy of a return or other document, except that for each copy of a page that was substantially larger than the size of the largest income tax return, the basic rate of $.50 cents per page would be increased proportionately (in multiples of $.25 cents) "to such amount as may appear reasonable under the circumstances."

[26] Mimeograph 3512, had established a fee of $1.00 "for a copy of the bare return" and $.25 cents per page for copies of "any schedule, statement, or other document attached to and made a part of the return." Certifications cost $.50 cents each.

the President. Under authority of law and without action by the President, returns of corporations under Chapter 1 [and specified other returns filed under the Code], are open to inspection by the proper officers of any State; all returns under Chapter 1, and [designated other provisions of the Code] (or copies thereof) are open to inspection by any official, body or commission, lawfully charged with the administration of any State tax law, if the inspection is for the purpose of such administration or for the purpose of obtaining information to be furnished to local taxing authorities; and all returns of corporations are open to inspection by bona fide shareholders of record owning 1 per cent or more of the outstanding stock.

Pursuant to sections 55, 62, 508, 603, 702(a), 1204, 1207, 1604(c) and 3791 of the Internal Revenue Code, the following rules and regulations are hereby prescribed with respect to the use of original, and the furnishing of copies of, returns open to inspection in accordance with Treasury Decision 4929, or otherwise.

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General Provisions

Sec. 463D.5. Furnishing Copies of Returns.–A copy of a return may be furnished to any person who is entitled to inspect such return upon written application therefor and the submission of evidence satisfactory to the Commissioner of his right to receive the same, except that if a return is in the custody of a collector or an internal revenue agent in charge or the head of a field division of the Technical Staff, such collector or agent in charge or head of division may furnish a copy of such return to a United sates attorney or an attorney of the Department of Justice, or to the taxpayer or his duly authorized attorney in fact, in accordance with these regulations. (Emphasis added).

Although authority under section 55(a)(3) was not invoked directly or explicitly in connection with Mimeograph 6747, or Regulations 111, Section 29.55(b)-1, or T.D. 4945, it plainly afforded a Title 26 statutory basis for each of these administrative and procedural actions, since it specifically authorized selective copying of tax returns and the imposition of reasonable copying fees. In exactly the same language as Revenue Act of 1926, § 257, Art. 1091, section 55(a)(3) provided:

Whenever a return is open to the inspection of any person a certified copy thereof shall, upon request, be furnished to such person under rules and regulations prescribed by the Commissioner with the approval of the Secretary. The Commissioner may prescribe a reasonable fee for furnishing such copy. (Emphasis added).

Section 55 was a bare bones statutory framework. Under section 55, Congress gave some broad brush direction as to when publicity of returns filed under other provisions of the Code was appropriate (for example, to certain Congressional Committees, and to state officers, bodies, or commissions under certain circumstances), but otherwise reposed decision making authority in the Executive. Congress left to Executive discretion, not just procedural details such as to time, place, manner, and the costs of inspection and copying, but the actual determination of whether inspection would or would not be permitted. By contrast, Congress' intent in enacting section 153(c) was to get information to the public, in order that the public, informed by the information that was made available to it, could in turn, assist the Service in its oversight of tax exempt organizations and certain trusts claiming charitable deductions.

Further, on the issue of the scope of section 55(a)(3) of the 1939 Code (subsequently, section 6103(a)(3) of the 1954 Code prior to amendment in 1976), as we have observed, literally read, this provision permitted copies to be furnished, for a fee, **"whenever"** a return is open to inspection, not just whenever inspection was available under the section 55 framework (later the pre-1976, section 6103 framework), i.e., by the exercise of Executive discretion, or, as otherwise specifically provided under section 55 (later, section 6103 prior to amendment in 1976). Realistically, however, aside from the unusual case of "inspection" under section 153(c) and corresponding provisions of later law, "inspection" for purposes of triggering copying and fee authority under section 55(a)(3) and successor Code provisions, was tantamount to "inspection" in accordance with the "Publicity of Returns" provisions of section 55 and successor Code provisions.

A major category of returns that were open for inspection (or not), and therefore, to copying for a reasonable fee (or not), under the provisions of section 55, was returns filed under chapter 1 of the 1939 Code. Although section 153(a) was a chapter 1 provision that imposed a filing requirement, inspection of the information furnished under this particular chapter 1 provision was governed, not by section 55, but by section 153, itself. This arrangement was not mirrored under the 1954 Code. Instead, the filing obligations that had been imposed by sections 54(f) and 153(a) of chapter 1 of the 1939 Code, were imposed by sections 6033(a) and (b), respectively, of chapter 61 of the 1954 Code. Section 6103 of the 1954 was silent with respect to publicity of information filed under provisions of Chapter 61.

For the most part, section 6103 continued to address publicity of returns filed under provisions of the 1954 Code corresponding to provisions of the 1939 Code listed in section 55 (including, for example, returns filed under chapter 1). Moreover, literally read, section 6103(a)(3) of the 1954 Code continued to permit the furnishing of copies of returns for a reasonable fee so long as the returns were open to inspection by the individual requester. However, because Form 990 and Form 990-A returns now reported information required under chapter 61--not under chapter 1--section 6103 lacked any nexus to these returns. The pre-1976 publicity provisions of section 6103 did not encompass publicity of returns filed under Chapter 61. Publicity of information furnished by exempt organizations in response to their Chapter 61 reporting obligations

> The first apparent use of the statute to deny information occurred in 1877, [when in response to a request by a newspaperman the] Department of Justice advised President Hayes that Department heads should not open their files to the reporter under the authority of title 5, United States Code, section 22.
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> .... In recent years, as the drive for free access to government records has intensified, title 5, United States Code, section 22, has been cited more regularly. .... When Congress has determined that a specific area of information must be closed from the public, legislation has been enacted accomplishing this purpose. The laws are legion which limit the public's right to know–income-tax laws, for example, ...
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> Where Congress has not acted, the executive officials have gradually moved in over the years. The "housekeeping" statute (5 U.S.C. 22) has become a convenient blanket to hide anything the Congress may have neglected or refused to include under specific secrecy laws.
>
> > "If secrecy and concealment were the objective sought by the statute, that object certainly could have been made clear and unmistakable by draftsmen .... The legislators of 1789 could have inserted, following the words "custody, use and preservation," some such plain word as "and concealment." They did not do so."
>
> ... executive officials have let every file clerk become a censor. The purpose of this bill is to correct that situation.

H.R. Rep. No. 85-1461, at 1 (1958), reprinted in 1958 U.S.C.C.A.N. (Vol. 2) 3352-53.[32]

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[32] In examining the use of 5 U.S.C. § 22 to withhold information from the public, Congress noted the intertwining of this general "housekeeing" statute with section 3 of the Administrative Procedure Act, 5 U.S.C. § 1002, another statute intended to facilitate access to government information that also, according to Congress, actually was relied upon by agencies to deny access:

> The housekeeping statute, title 5, United States Code, section 22, has been intertwined and misinterpreted with a 1946 statute, the Administrative Procedure Act (5 U.S.C. 1002) which is primarily a positive public information law.
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> ***
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> The Treasury Department [in testimony before this Committee on Government Operations] emphasized the intertwining of title 5, United States Code, section 22, and 5 United States Code, section 1002, by

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> furnished to the court only, and on a rule of the court upon the Secretary of the Treasury requesting the same. Exceptions to this rule will be made only on the written order of the Secretary or of an Assistant Secretary.
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> When application is received by a responsible internal revenue officer for a copy of a document or record in his charge and it may, in his opinion, be furnished without violation of law or detriment to the public interest, he shall cause a copy to be carefully prepared and forwarded to the Commissioner of Internal Revenue with a certificate showing it to be a correct copy of the original. He shall also make a report showing the circumstances and indicating why he believes it proper that the copy should be furnished. If he is of the opinion that the copy should not be furnished he shall forward a statement of the facts and his recommendation and the reasons for such recommendation to the commissioner for instructions, whereupon he will be advised whether or not a copy shall be forwarded. If, acting pursuant to his own view or under instructions of the Commissioner, the officer has forwarded a copy to the Commissioner, the Commissioner will, if he deems it advisable, make request of the Secretary for an order permitting the furnishing of the copy. (Emphasis added).

Articles 80 and 81 of Regulations 12, made no mention of fees for furnishing copies in accordance with these provisions. However, Treasury Regulations prescribed "pursuant to authority conferred by section 161, Revised Statutes (U.S.C., 1934 ed., Title 5, section 22)," governing disclosure of official information of the Treasury Department, at the time section 153(c) took effect, expressly stated:

> 4. A reasonable fee may be, in the discretion of the Secretary, the Under Secretary, an Assistant Secretary, or the administrative assistant to the Secretary, be charged for furnishing copies of [official Department of Treasury] instruments or exhibits, or information.

Department Circular 591 (Aug. 15, 1938), 1938-2 C.B. 495 (emphasis added).

These regulations generally proscribed the disclosure of official Department of Treasury information, whether in the form of testimony or documents, but nevertheless provided that, to the extent disclosure was authorized, a reasonable copying fee could be charged for furnishing copies of Treasury instruments, exhibits or information.

Department Circular 591 expressly provided that all "regulations, rules, and orders governing the inspection of tax returns and the disclosure of information contained therein ... shall remain in full force and effect," including Article 80 of Regulations 12, as amended. In 1951, the official cite for the rules governing disclosure of official information of the Bureau of Internal Revenue, a subset of official information

(1) **Inspection of tax returns.**-The inspection of returns is governed by the provisions of the internal revenue laws and rules promulgated by the President or by the Secretary of the Treasury pursuant to such provisions. ....

(2) Public lists of persons making income tax returns.- Lists of persons making income tax returns in each year are **available to public inspection in the offices of collectors of internal revenue.** ....

(3) Public lists of persons paying occupational taxes.–Lists of persons paying occupational taxes under chapter 27 of the Code are **available to public inspection in the offices of collectors of internal revenue.** ....

(4) Record of seizure and sale of real estate.-Record 21, "Record of seizure and sale of real estate" is **open for public inspection in offices of Collectors of Internal revenue and copies are furnished application.**

***

(6) Public lists of employers making returns under the Federal Unemployment Tax Act.-Lists of employers of eight or more making annual returns on Form 940 .... **are available to public inspection in the offices of collectors of internal revenue.** ....

(7) Information returns of certain tax-exempt organizations and certain trusts.–Information returns filed pursuant to section 153 of the Code by certain tax-exempt organizations (Form 990-A) ... **are available for public inspection in the offices of collectors of internal revenue in which they are filed.** See Regulation 111, section 29.153-3 ....

***

(d) Requests.- ....

Whenever it is determined that a matter of official record is available for disclosure in a particular case, a copy of said official record will be furnished the party requesting the same, or the officer passing upon the request may in his discretion allow a personal inspection of the official record in question at the place where the document is normally kept. **A reasonable fee may in the discretion of the determining officer be charged for furnishing copies of official records. (R[evised] S[tatute]161, 5 U.S.C. 22).** .... (Emphasis added).

(1) **Inspection of tax returns.**-The inspection of returns is governed by the provisions of the internal revenue laws and rules promulgated by the President or by the Secretary of the Treasury pursuant to such provisions. ....

(2) Public lists of persons making income tax returns.- Lists of persons making income tax returns in each year are **available to public inspection in the offices of ~~collectors~~ district directors of internal revenue.** ....

(3) Public lists of persons paying occupational taxes.–Lists of persons paying occupational taxes under chapter 27 of the Code are **available to public inspection in the offices of ~~collectors~~ district directors of internal revenue.** ....

(4) Record of seizure and sale of real estate.-Record 21, "Record of seizure and sale of real estate" is open **for public inspection in offices of ~~Collectors~~ district directors of Internal revenue and copies are furnished application.**

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(6) Public lists of employers making returns under the Federal Unemployment Tax Act.-Lists of employers of eight or more making annual returns on Form 940 ... **are available to public inspection in the offices of ~~collectors~~ district directors of internal revenue.** ....

(7) Information returns of certain tax-exempt organizations and certain trusts.–Information returns filed pursuant to sections ~~153~~ 6033 and 6034 of the Code by certain tax-exempt organizations ~~(Form 990-A)~~ **... are available for public inspection in the offices of ~~collectors~~ district directors of internal revenue in which they are filed.** The information returns so available are pages 3 and 4 of Form 990-A (tax exempt organizations). ~~See Regulation 111, section 29.153-3 [26 C.F.R. 29.153-3]~~ section 6104 of the Code.

***

(d) Requests.- ....

(2) Whenever it is determined that a matter of official record is available for disclosure in a particular case, a copy of said official record will be furnished the party requesting the same, or the officer passing upon the ~~request may in his discretion allow a personal inspection of the official~~ record in question at the place where the document is normally kept. **A**

Amendments to Treas. Reg. § 301.6104-2 between 1963 and 1975 did not materially change the copying procedures as promulgated in 1963.[35] Treas. Reg. § 301.6104-2(c), was further amended by T.D. 7350, 1975-1 .B. 370, effective April 3, 1975, to liberalize procedures for inspection and copying of material that was available to the public under section 6104(a)(1) and (b). No reference was made to copying charges or the statutory authority for such charges. As amended, Treas. Reg. § 301.6104-2(c), read, in material part:

> (4) Copies. .... **Copies may be made manually or, if a person provides the equipment, photographically** at the place of inspection, subject to reasonable supervision with regard to the facilities and equipment to be employed. .... (Emphasis added).

Effective July 27, 1981, T.D. 7785, 1981-2 C.B. 233, further liberalized and clarified procedures "required to be followed by members of the public making requests to inspect certain annual information returns and reports filed by exempt organizations," and formally notified the public that copies of exempt organizations' returns and reports were no longer available from the Service on microfilm, as follows:

> Section 301.6104-2(c)(1) currently provides that the public may specify the appropriate section of microfilm file to obtain the returns and reports they wish to inspect. As **this microfilm file no longer exists this** alternative request procedure is being deleted from the regulations.

Effective November 5, 1982, T.D. 7845, 1982-2 C.B. 382, amended the regulations under section 6104(a)(1):

> to conform the regulations under section 6104(a)(1)(A) to section 1201(d) of the Tax Reform At of 1976 (90 Stat. 1667) and the regulations under section 6104(a)(1)(B), (C), and (D) to section 1022(g) of the Employee Retirement Income Security Act of 1974 (ERISA) (88 Stat. 940).

These amendments made only a technical change to the regulations under section 6104(b) predesignating those regulations as § 301.6104(b)-1, instead of § 301.6104-2.

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[35] See T.D. 7122, 1971-2 C.B. 393, 402 (amendments effective June 6, 1971); T.D. 7173, 1972-1 C.B. 383 (this amendment, effective March 16, 1972, made no change to the copying procedures; it was limited to the procedures for requesting inspection set forth in Treas. Reg. § 301.6104-2(c)(1) which were amended to address **"requests for entire sections of the microfilm file"** of returns of exempt organizations); T.D. 7290, 1973-2 C.B. (amendments effective November 16, 1973, were made to regulations under a number of Code sections, including Treas. Reg. § 301.6104-2, to provide for the use and publicity of Forms 990-PF by private foundations, however, no change was made to the provision on copying procedures).

published standard copying rates. Rates established in the exercise of IRS' statutory reasonable fee authority were published in Mimeograph 3512, 1927 C.B. VI-1, 100. Those rates were superceded by revised rates published in Mimeograph 6747, 1952-1 C.B. 54. The revised rates were effective with respect to copies furnished on or after February 1, 1952.

The "reasonable fees" set forth in Mimeograph 6747 were reiterated in Rev. Proc. 62-9, § 15, 1962-1 C.B. 432, at 436. However, by its express terms this Revenue Procedure only applied to copies furnished to requesters whose threshold right of inspection was granted by Executive action under Treas. Regs. §§ 301.6103(a)-1 and 301.6103(a)-2, and not, for example, to a requester entitled to inspect certain information, including pages 3 and 4 of a Form 990-A return, because it was publicly available under section 6104(b).

Notwithstanding that Rev. Proc. 62-9 did not expressly prescribe any particular fee that, in IRS' determination, was reasonable for copies of material available for inspection under section 6104(b), Treasury Regulations interpreting and implementing that particular Code section (as examined above) provided, both that copies of such information were available to requesters, and that a reasonable fee could be charged by the Service for those copies. See Treas. Reg. § 301.6104-2(b) (1961). Such fee might be the same as, or different from, the basic fee established under Rev. Proc. 62-9, so long as any fee charged was a "reasonable" fee.

In 1966, the Service revised the fees set forth in Rev. Proc. 62-9, effective February 1, 1966, in a superceding Revenue Procedure, Rev. Proc. 66-3, 1966-1 C.B. 601, 606. By its express terms, Rev. Proc. 66-3 also appears limited to fees for copies furnished to requesters whose threshold right to inspection was granted by Executive action under Treas. Reg. §§ 301.6103(a)-1 and 301.6103(a)-2, pursuant to section 6103(a) of the Code, rather than under some other Code authority, such as section 6104(b). This conclusion is supported by the fact that Rev. Proc. 66-4, 1966-1 C.B. 607, for example, separately prescribed the procedures for inspection and copying pursuant to the authority granted under section 6103(a) and Treas. Regs. §§ 301.6103(a)-1(d), 301.6103(b)-1 and 301.6106-1 (inspection by State tax officials, bodies, or commissions).

It, therefore, seems clear that during the period after August 1961, when copies of certain exempt organizations' material became available from the Service pursuant to regulations under section 6104, IRS had bifurcated inspection and copying procedures in place: inspection and copying of tax returns (that were available for inspection by action of the Executive under section 6103(a)), was addressed in Revenue Procedures, while separate procedures applicable to "material" available for inspection by the general public under section 6104(a)(1) and (b) were contained in regulations specifically implementing those particular Code requirements.

The Scope of IRS' "Reasonable Fee" Authority under Section 6103(p)(2)(A)

Before turning, at last, to the ultimate question that still remains--whether IRS' fee authority under section 6103(p)(2) of the Code trumps FOIA fee authority with respect to charges for furnishing requesters with copies of IRS records that fall within the ambit of section 6103(p)(2) fee authority, we must address the preliminary question, thus squarely presented: what is the ambit of section 6103(p)(2) fee authority? Leaving aside, for the moment, the question of the reach of FOIA's fee provisions, is section 6103(p)(2)(A) "reasonable fee" authority actually available to the Service--particularly in light of the specific plain language of that fee provision as amended in 1976--as statutory authority for charges imposed for reproductions of information that is available to the public under section 6104(b), or not?

In 1976, section 6103 of the 1954 Code was amended to establish a general rule that returns and return information were confidential, and may be disclosed only as specifically authorized by some provision of Title 26. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 1202. Executive discretion was eliminated as a basis upon which inspection of tax returns could be granted or denied and was replaced by strict statutory criteria. Nevertheless, the concept of crafted exceptions and select access--case by case, program by program, category by category of requester--was preserved. See I.R.C. §§ 6103(c)-(o). Congress also preserved section 6104 as a broad "stand alone" right of public access to certain information furnished to the Service by exempt organizations, carved-out and apart from the general rules governing publicity and confidentiality under section 6103(a), as amended in 1976, and under corresponding provisions of prior law governing "Publicity of Returns."

Congress' 1976 amendments reaffirmed that persons authorized to obtain "disclosure or inspection" of a return also were entitled to obtain a copy of such return, and that the Service continued to have authority to charge such authorized recipients reasonable reproduction fees. Since 1976, section 6103(p)(2)(A) has provided as follows:

> (A) REPRODUCTION OF RETURNS.-A reproduction or certified reproduction of a return shall, upon written request, be furnished to any person to whom disclosure or inspection of such return is authorized under this section. A reasonable fee may be prescribed for furnishing such reproduction or certified reproduction. (Emphasis added).

The wording of section 6103(p)(2)(A) is curious, particularly when compared with the text of the immediately succeeding provision authorizing the Service to charge a reasonable fee for copies of return information furnished to authorized recipients. Section 6103(p)(2)(B) provides as follows:

> (B) DISCLOSURE OF RETURN INFORMATION.--Return information disclosed to any person under the provision of this title may be provided in the form of written documents, reproductions of such documents, films

section 6103(p)(2)(A) is confined to copies of tax returns that are available for inspection under the statutory framework of section 6103, not to copies of material that are available outside that comprehensive confidentiality and disclosure scheme, for example, pursuant to the provisions of section 6104. This interpretation, moreover, accords with IRS' fee authority, and IRS practice with respect to the imposition of copying fees, historically, under the internal revenue laws, as our research reveals.

It is evident that a basic statutory structure was put in place under section 257 of the Revenue Act of 1926, governing inspection of tax returns and--to the extent inspection of tax returns was available--the furnishing of copies of tax returns for a reasonable fee. Although modified significantly, in 1976, to shift the balance from publicity to confidentiality, this same basic structure under which the privilege of obtaining copies of tax returns, for a fee, from the Service, is coextensive with the privilege of being entitled to inspect them, remains in place, today. Historically, under this structure "publicity" has been controlled through a statutory scheme that contemplates disclosure and inspection on an individualized case by case, or category by category of requester basis--quite distinct from a straightforward, unequivocal, statutory directive that the IRS shall make specified information available to the general public, as is the case under section 6104.

Rules and regulations of administration and procedure for accomplishing inspection and copying of returns, under IRS' basic operating structure, were promulgated from time to time, together with published schedules of the reasonable fees imposed by the Service for furnishing copies of returns to persons entitled to inspect them. Prior to the amendment of section 6103, in 1976, rules and regulations addressing inspection and copying of tax returns for 1938 and prior years was governed by T.D. 4873 (Nov. 12, 1938), as amended by T.D. 5019 (Nov. 7, 1940), and by T.D. 4878 (Jan.4, 1939).

Over that same time period, i.e., prior to the 1976 overhaul of section 6103, inspection and copying of returns under the 1939 Code was governed by T.D. 4929 (Aug. 28, 1939), 1939-2 C.B. 91 (as amended by T.D. 4991 (Jun. 20, 1940), by T.D. 5019 (Nov. 7, 1940), and by T.D. 6271 (Nov. 15, 1957)) in conjunction with T.D. 4945 (Sept. 20, 1939), 1939-2 C.B. 97, as amended by T.D. 5808 (Apr. 20, 1950). In addition, disclosure of information from certain excise tax returns under the 1939 Code was governed by T.D. 5138 (Apr. 20, 1942). These specific rules and regulations pertaining to inspection of tax returns operated in conjunction with general procedural rules addressing Disclosure of Official Information of the Department of Treasury. See Department Circular 591, 1938-2 C.B. 495; Mimeograph 6727, 1952-1 C.B. 234.

Prior to 1976, inspection of returns filed under the 1954 Code, generally was governed by regulations contained in T.D. 6543, 1961-1 C.B. 671, and T.D. 6546, 1961-1 C.B. 682, and subsequent amendments, which rules were published in the Code of Federal Regulations, Title 26, Internal Revenue, Part 601--Procedure and Administration.

6747, 1952-1 C.B. 54. These rates were republished in Rev. Proc. 62-9, 1962-1 C.B. 432, 437, and superceded by revised rates prescribed in Rev. Proc. 66-3, 1966-1, 601. Although Rev. Proc. 66-3 has been modified to prescribe revised copying fees, periodically since section 6103 was amended in 1976, it has not been superceded.

To sum up, IRS' practice (both before, and after members of the public were permitted, by regulation in 1961, to request copies from the Service) has been to accept and process requests to inspect and/or copy exempt organizations' material that is available to the public under section 6104 in accordance with the requirements of the statute and procedures spelled out in implementing Treasury Regulations, in conjunction with prescriptions as to copying fees set forth in Rev. Proc. 85-56, 1985-2 C.B. 739. The public is directed to these specific procedures for accessing section 6104 information by IRS' Statement of Procedural Rules, 26 C.F.R. § 601.702(d)(3).

Similarly, the Service processes requests for copies of tax returns, based on disclosure authority bestowed under section 6103 and in accordance with the procedures stated in 26 C.F.R. § 601.702(d)(1), and implements fees for those copies under authority of section 6103(p)(2)(A) in conjunction Rev. Proc. 66-3 as modified.

It is the Service's practice to divert requests for copies of tax returns and exempt organizations' material, made under the FOIA, to the process provided under IRS' Regulations of Administration and Procedure, 26 C.F.R. §§ 601.702(d)(1) and (d)(3) in conjunction with applicable revenue procedures. We therefore, turn next to the FOIA, and examine that statute--most particularly, FOIA fee authority--as it implicates IRS' authority to impose copying fees under section 6103(p)(2).

Fees recoverable under FOIA

The FOIA was enacted as an amendment of section 3, chapter 324, of the Administrative Procedure Act of 1946, 60 Stat. 238, 5 U.S.C. § 1002, and emerged from the functional inadequacy of the prior section 3, which contained the first general statutory provision for public disclosure of Executive branch rules, opinions, orders, and public records.[39] Section 3 provided that unless otherwise required by statute, "matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found." The section contained a blanket exemption for records requiring secrecy "in the public interest" and "any matter relating solely to the internal management of an agency." The FOIA, instead, created a right of access by "any person" to identifiable records; the agency would have the burden of proving the need to withhold said records. H.R. Rep. No. 92-1419 at 3 (1972), reprinted in "Freedom of Information Act and Amendments of 1974 (Pub. L. No. 93-502)," 94th Cong., 1st Sess. 10 (1975).

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[39] See analysis and discussion, supra, at pp. 23-24.

"Freedom of Information Act and Amendments of 1974 (Pub. L. No. 93-502)," 94th Cong., 1st Sess. 60-61 (1975).

However, several years later, after public hearings were held, the House Government Operations and Government Information Subcommittee identified various problem areas; among them, fees:

> The abuses in fee schedules by some agencies for searching and copying of documents or records requested by individuals; excessive charges for such services have been an effective bureaucratic tool in denying information to individual requesters.

H.R. Rep. 92-1419 at 8, reprinted in Joint Comm. Print, "Freedom of Information Act and Amendments of 1974 (Pub. L. No. 93-502)," 94th Cong., 1st Sess. 15 (1975).

To remedy this perceived problem, Congress amended the FOIA to limit agency recovery of fees to only the direct costs of search and duplication. No longer did Congress envision agencies' FOIA program as self-sustaining:

> S.2543 proposes that the fee schedule set "shall be limited to reasonable standard charges for document search and duplication." This standard would provide a ceiling and prevent agencies from using fees as barriers to the disclosure of information which should otherwise be forthcoming. Under this standard, and with the provisions for waiver and reduction of fees, it is not necessary that FOIA services performed by agencies be self-sustaining. Recovery of only direct costs would be provided for search and copying, while no costs would be assessed for professional review of the requested documents if necessitated.

S. Rep. 93-854 at 11-12, reprinted in Joint Comm. Print, "Freedom of Information Act and Amendments of 1974 (Pub. L. No. 93-502)," 94th Cong., 1st Sess. 163-64 (1975).

For twelve years, agencies operated under this fee provision, each promulgating their own regulations assessing the direct costs of duplicating and search for all requesters. The Department of the Treasury promulgated regulations, at 31 C.F.R. § 1.1 et seq., for all its constituent bureaus authorizing a duplication charge of $.10 per page initially, later raised to $.15 per page, and a search charge of $10.00 per hour or fraction thereof. The Service included these charges in its own regulations found at 26 C.F. R. § 601.702. The Treasury Department's FOIA regulations, which IRS as a Treasury bureau is constrained to follow, were last amended effective July 1, 2000. As amended, those regulations establish revised standard fees of $.20 per page for

Clearly, then, Congress, confronted with testimony from the Administration as to the serious gap between the costs of the FOIA program and the fees recoverable under the Act, chose **not** to close that gap. As a practical matter, for many agencies, including the Service, the two hours of free search time and 100 free pages of duplication (to which all noncommercial use requesters are entitled) means the lion's share of FOIA requests are being processed free of charge.

Reasonable Fees Under I.R.C. § 6103(p)(2)(A) or Direct Costs Under FOIA

The 1986 amendments to the FOIA significantly changed the way fees are assessed under the FOIA. A new fee structure was established. There were three interrelated components to implementing this new structure: requirements set forth in the amended FOIA statute, itself; guidance that OMB was required, under the amendments, to promulgate pursuant to notice and public comment; and finally, implementing regulations promulgated by agencies in light of the 1986 amendments and OMB's guidance, specifying each agency's schedule of fees for processing FOIA requests together with procedures and guidelines for determining when such fees shall be waived or reduced.

As amended, FOIA provides for three levels of fees determined by category of requester: (1) records requested for commercial use, (2) records requested, not for commercial use, by an educational or noncommercial scientific institution whose purpose is scholarly or scientific research, or by a representative of the news media, or (3) other requesters--those who do not fall into category (1) or (2). 5 U.S.C. § 552(a)(4)(A)(ii). Most significantly, however, FOIA's amended fee provision specifically states:

> Nothing under this [provision] shall supercede fees chargeable under a statute **specifically providing for setting the level of fees for particular types of records.**

5 U.S.C. § 552(a)(4)(A)(vi) (subparagraph (4)(A)(vi)) (emphasis added) .

The legislative history of subparagraph (4)(A)(vi), explains Congress' intent with the aid of examples:

> This provision does not change current law. The new language simply clarifies that **statutes setting specific alternative bases for recovering dissemination costs can supercede FOIA fees.** An example of a qualifying statute is 44 U.S.C. § 1708 (1982) which allows the Public Printer to set charges at cost plus a fifty percent surcharge to recover indirect costs. However, the User Fee Statute, 31 U.S.C. § 9701 does not qualify under new subparagraph (4)(A)(vi) of the FOIA because it does not establish a specific level of fees. Similarly, the statute governing the

On March 27, 1987, OMB issued its Uniform Freedom of Information Act Fee Schedule and Guidelines (OMB Guidelines), to which individual agencies were required, by the FOIA amendments, to conform their respective FOIA fee regulations. 52 Fed. Reg. 10,012 (1987). With regard to subparagraph (4)(A)(vi), the OMB Guidelines provide in pertinent part:

> 6. Definitions--For purposes of these Guidelines:
> ***
> b. A 'statute specifically providing for setting the level of fees for particular types of records' (5 U.S.C. § 552(a)(4)(A)(iv)) means any statute that specifically requires a government agency, such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set the level of fees for particular types of records, in order to:
>
> (1) Serve both the general public and private sector organizations by conveniently making available government information;
> (2) Ensure that groups and individuals pay the cost of publications and other services which are for their special use so that these costs are not borne by the general taxpaying public;
> (3) Operate an information dissemination activity on a self-sustaining basis to the maximum extent possible;
> (4) Return revenue to the Treasury for defraying, wholly or in part, appropriated funds used to pay the cost of disseminating government information.
>
> Statutes, such as the User Fee Statute, which only provide a general discussion of fees without explicitly requiring that an agency set and collect fees for particular documents do not supercede the Freedom of Information Act under section (a)(4)(A)(iv) of the statute.

OMB Guidelines at 10,017 (emphasis added).

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[43] (...continued)
Section 275 and related provisions of Title 42, have since been repealed. At the time that this provision was mentioned in the legislative history of FOIA subparagraph (4)(A)(vi), section 275 established within the Public Health Service a National Library of Medicine, and under section 276(c) [Rules for public access to materials], the Secretary of Health and Human Services was authorized to act in the following terms:

> The Secretary is authorized, after obtaining the advice and recommendations of the Board [established under section 277] to prescribe rules under which the Library will provide copies of its publications or materials .... Such rules may provide for making available such publications, or materials ... (1) without charge as a public service, or (2) upon a loan, exchange, or charge basis, or (3) in appropriate circumstances, under contract ....

provision on fee waivers. Id. at 1177-78. NARA's fee authority is bestowed under 44 U.S.C. § 2116(c), which provides:

> The Archivist may charge a fee set to recover the costs for making or authenticating copies or reproductions of materials transferred to his custody. Such fee shall be fixed by the Archivist at a level which will recover, so far as practicable, all elements of such costs, ...

Plaintiff argued that this statute neither sets a fixed fee nor mandates assessment of fees, and, thus, did not qualify as a fee statute exempt from the FOIA's fee structure. Id. at 1177. Rejecting plaintiff's argument, the court held that the statute fits squarely within FOIA subparagraph (4)(A)(vi) providing that the FOIA's fee provisions "shall [not] supercede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records." Id. at 1177-78.

A more recent opinion of the District Court of the District of Columbia, Wade v. Department of Commerce, No. 96-0717 (D.D.C. Mar. 26, 1998), is in accord with the holding in Oglesby on the interpretation of FOIA subparagraph (4)(A)(vi). At issue in Wade were two FOIA requests, one of which was a request to the National Technical Information Service (NTIS), a component of the Department of Commerce, for a list of tax preparers approved by the IRS to file electronically. Wade, slip op. at 2. The plaintiff provided with his request a check for $210 to cover FOIA processing fees, but NTIS informed the plaintiff that he could only purchase the list for $1,300. Id. The $1,300 fee was set in accordance with a fee schedule made pursuant to another statute, 15 U.S.C. § 1153. Id. at 2-3.

NTIS was created to be a clearinghouse for "scientific, technical, and engineering information." 15 U.S.C. §§ 1152, 3704b, 3704b-2. NTIS is charged with collecting such information from any source and disseminating it to business and industry, federal, state, and local governments, and the public. 15 U.S.C. §§ 1152, 3704b. Under 15 U.S.C. § 1153 [Rules, regulations and fees], NTIS is authorized, but not expressly required, to set fees for the dissemination of information, in the following terms:

> [t]he Secretary [of Commerce] is **authorized** to make, amend, and rescind such orders, rules and regulations as he **may** deem necessary to carry out the provisions of this chapter, and to establish ... a schedule or schedules of **reasonable fees** or charges for services performed or for documents or other publications furnished under this chapter....

(Emphasis added).

The issue presented to the court was whether the requested list of IRS-approved preparers qualified as "scientific, technical and engineering information" for purposes of the Department of Commerce statute. Wade, at 5. The status of 15 U.S.C. § 1153 as a statute not superceded by the fee provisions of the FOIA was not at issue–the parties

laws. Plainly, this analysis supports the conclusion that section 6103(p)(2) qualifies as a superceding fee statute under FOIA subparagraph (4)(A)(vi).

Independent of whether section 6103, thus is at least a superceding fee statute within the ambit of FOIA's subparagraph (4)(A)(vi) exception, recent case law has raised a fresh issue as to the scope of an agency's obligations under FOIA with respect to furnishing copies of material requested and available under FOIA. For example, in St. Hilaire v. Department of Justice, No. 91-0078, slip op. at 4-5 (D.D.C. Sept. 10, 1991), 1991 US DIST LEXIS 12724, plaintiff sought documents from three agencies, including NARA, pursuant to FOIA. Plaintiff specifically identified the documents he wanted and noted in his FOIA request that he could neither travel to Washington, D.C., to examine the records requested, nor pay for copies. NARA performed a search for responsive records and informed plaintiff that although it could not furnish free copies of the records requested, it could make those records available for inspection at the Archives building in Washington, D.C.

NARA argued that its fee authority under 44 U.S.C. § 2116(c) permits it to charge fees for copies of agency records in the National Archives, and that this fee authority qualified as a statute "specifically providing" for fees within the meaning of FOIA subparagraph (4)(A)(vi) and that NARA's fee statute preempted FOIA's fee and fee waiver provisions. The District Court recognized, but found that it did not need to address the question of whether a FOIA subparagraph (4)(A)(vi) statute "specifically providing for setting the level of fees" encompasses "waiving" of fees as well, for the reason that "NARA properly responded to plaintiff's FOIA request by making the requested records publicly available." Slip. op. at 5.

The District Court relied on the holding of the United States Court of Appeals for the District of Columbia Circuit, in Tax Analysts v. Department of Justice, 845 F.2d 1060, 1065 (D.C. Cir. 1988), aff'd 492 U.S. 136 (1989), to the effect that an agency:

> need not respond to a FOIA request for copies of documents where the agency itself has provided an alternative form of access. .... Moreover, an agency is not even required by FOIA "to mail copies of records, nor even to provide a requester convenient location for access." Oglesby v. US Dept. of Army, 920 F.2d 57, 70 (D.C. Cir. 1990) quoting Tax Analysts, 845 F.2d. at 1065 n.10). FOIA "requires only availability, not delivery." Martin v. Louisiana & A.R. Co., 535 F.2d 892 (5th Cir. 1976), cert. denied, 429 U.S. 1043 (1977). All defendant NARA is required to do to satisfy FOIA's requirement that it make records available to the public is to "make all responsive records available in one central location for plaintiff's perusal." Id.

These opinions clearly support the proposition that mere continued compliance by IRS with the minimal public inspection requirements mandated by section 6104(b), i.e., making specified information furnished to IRS by exempt organizations available to the

> Given the increasing availability of low-cost, and free government information through the Internet and other electronic sources, it remains to be seen whether those agencies with [] statutorily based fee schedules--and which do not receive appropriated funds to support their record-distribution service, but are required by law to be self-sustaining--will continue to be viable sources of government information. Id. at 499-500.[47]

Conclusion

To sum up, IRS consistently has taken the position that its fee setting authority under section 6103(p)(2) has not been overridden by FOIA, with respect to fees that may be charged for duplication of returns and return information that are available to specifically authorized recipients, or categories of recipients, who are entitled to access under carefully crafted exceptions to the general nondisclosure rule of section 6103(a). Our exhaustive review of the history and application of IRS' statutory fee authority under the internal revenue laws, indicates clearly, that historically, section 6103(p)(2) (and corresponding provisions of prior law), is authority to charge reasonable fees for copies furnished to recipients authorized to request and receive such copies under section 6103 (and corresponding provisions of prior law). With respect to the implications of the FOIA, in terms of IRS' practice (since 1927, at least) of relying on this reasonable fee authority to prescribe rates for copies of returns requested by persons authorized to inspect them, both the legislative history of the 1986 amendments to FOIA and OMB Guidelines interpreting those amendments emphasis that FOIA's fee provisions were not intended to affect prior law. Further, the recent case law examined above, buttresses IRS' position that section 6103(p)(2) authority survives, indeed is exempt under subparagraph (4)(A)(vi) of FOIA, from the FOIA's fee limitations, as expressed in the 1986 amendments to FOIA. We are therefore of the opinion that IRS may continue to prescribe reasonable fees for copies of tax returns furnished to requesters, authorized, under the provisions of section 6103 as presently enacted, to obtain disclosure or inspection of such returns. In this regard we point out OIP's May 2000 Guidance with respect to the application of FOIA subparagraph (4)(A)(vi) as follows:

> FOIA fees are superceded by "fees chargeable under a statute specifically providing for setting the level of fees for particular types of records." 5 U.S.C. § 552(a)(4)(A)(vi). Thus, when documents responsive to a FOIA request are maintained for distribution by an agency according to a statutorily

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[47] This point is illustrated by reference to the Press Release of Secretary William M. Daley, Department of Commerce (Aug. 12, 1999) (announcing proposal to close National Technical Information Service (NTIS), the Department of Commerce's scientific and technical clearinghouse because "the core function of NTIS, providing government information for a fee, is no longer needed in this day of advanced electronic technology") (available at the Department of Commerce's site on the World Wide Web (www.doc.gov)). Id. 500 n.68; see also n.69, noting St. Hilaire v. Department of Justice, supra, (fee waiver issue avoided because requested records were publicly available).

copies of such records that total 100 pages or less.[48] Lastly, it is recognized that from time to time, members of the public may take issue with IRS as to whether certain information that IRS has not made available to the public under section 6104 is information that IRS is obligated to make available to the public under section 6104. In that event, FOIA would be a vehicle that a member of the public could use to request the information in question. Such requests should be processed as particular requests under subsection (a)(3) of FOIA. Such "(a)(3)" requests are subject to the FOIA, including FOIA administrative processing steps, administrative appeal and judicial rights, as well as FOIA's fee schedule. Note, however, that this does not mean that FOIA is an alternative vehicle or route for requesting inspection or copies of information which is available to the public from the IRS under section 6104. It is not. Members of the public must pursue inspection and copying of the information that IRS makes publicly available under section 6104 in accordance with the regulations under section 6104. See Treas. Reg. §§ 301.6104(a)-6 and (b)-1(d); 26 C.F.R. § 601.702(d)(3)-(5).

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[48] Regarding the fees that exempt organizations may charge for copies of the information that they are required to provide to members of the public under section 6104(d), we note that Treas. Reg. § 301.6104(d)-1(d)(3) provides that, while such organizations may charge reasonable copying fees, "[a copying] fee is reasonable only if it is no more than the per-page copying charge stated in § 601.702(f)(5)(iv)(B) of this chapter (fee charged by the Internal Revenue Service for providing copies to a requester)." To the extent IRS, henceforth, grants noncommercial use requesters 100 pages free of charge in accordance with FOIA's fee schedule, exempt organizations would not be constrained to do likewise. Rather, they may charge not more than the per-page photocopying fee charged by the IRS for providing copies to a requester who is not entitled to 100 pages free, currently 20 cents per page. See n.41, supra.