[NOT YET SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5246

JUDICIAL WATCH, INC.

Plaintiff-Appellant,

v.

SOCIAL SECURITY ADMINISTRATION

Defendant-Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT JUDICIAL WATCH, INC.

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INTRODUCTION

Five years after Judicial Watch, Inc. ("Judicial Watch") first filed this lawsuit based on its Freedom of Information Act ("FOIA") request seeking a listing of the top U.S. employers by highest number of "no match" letters received through the Social Security Administration's ("SSA") Code V program, the SSA's admission that the data sought is maintained electronically and is readily reproducible means that only one dispositive issue is still genuinely in dispute. Although the SSA's brief addresses such issues as the scope of Judicial Watch's request and the adequacy of the SSA's search, only one is now both contested and decisive: whether the "taxpayer's identity" referred to in 26 U.S.C. §6103(b)(2)(A) on a taxpayer's return refers to not only the identity of the taxpayer sending the return to the Internal Revenue Service ("IRS") but the identity of his employer as well. The SSA's position that such a listing is exempt from production under FOIA Exemption 3 depends on this interpretation.

In its brief, the SSA argues that the employer is a taxpayer with respect to a return because an employer withholds income from the employee pursuant to the Internal Revenue Code at 26 U.S.C. §§ 3102, 3402. Appellee's Brief at 20. However, the fact that these provisions of the Internal Revenue Code require employers to withhold tax from their employees' wages in no way makes the employer a "taxpayer" under 26 U.S.C. §6103(b)(2)(A). Tellingly, the language

of Section 3102 itself explicitly distinguishes between the employer and the taxpayer, stating that "the tax imposed by section 3101 shall be collected by the employer of the taxpayer." The employer is therefore not one of the "taxpayers" for the purposes of the W-2 and the tax return. Because only the taxpayer's identity, not his employer's, is included in the definition of "return information" in Section 6103, the employer's identity should not be protected from disclosure by the statute.

The data requested by Judicial Watch is therefore not exempt from disclosure under Exemption 3. Because the SSA has admitted that the data is maintained electronically and is readily reproducible, it has essentially conceded that, if not exempt, such data is available and therefore should be searched for and produced. The SSA has not demonstrated that providing such data would violate 26 U.S.C § 6103, as it has not shown that the list Judicial Watch requests constitutes "return information," and so this list must be produced.

ARGUMENT

I. Although the SSA Has Shown That Section 6103's Definition of "Tax Return Information" Includes the Taxpayer's Identity, It Has Not Shown That This Definition Includes a Taxpayer's Employer's Identity.

The SSA insists that 26 U.S.C. § 6103's definition of the term "tax return information" settles whether the information sought by Judicial Watch is covered by Exemption 3 of FOIA. It cites Section 6103's definition of the term as

including a "taxpayer's identity" and cites case law to support the idea that Section 6103 "encompasses a taxpayer's identity." Appellee's Brief at 18. *See* 26 U.S.C. § 6103(b)(2), *Landmark Legal Found. v. IRS.,* 267 F.3d 1132 (D.C. Cir. 2001). However, this formulation sidesteps the question of who is the relevant taxpayer whose identity is being protected. Clearly, the employee who submits the tax return to the Internal Revenue Service ("IRS") is a taxpayer whose identity must be protected as "return information," but the SSA's position is that the person (who under 26 U.S.C. § 7701(a)(1) may be an individual, trust, estate, partnership, association, company, or corporation) whose identification information appears on this employee's tax forms as this taxpayer's employer must also be considered the "taxpayer." Appellee's Brief at 21.

No case law cited by the SSA supports this definition of taxpayer, however, as no case law has addressed this issue. The District Court addressed this issue for the first time, and this Court's *de novo* review will therefore reexamine the arguments which both the SSA and Judicial Watch have used. The SSA implies that Judicial Watch should not "continue to argue" using legal reasoning that it has consistently employed throughout this litigation. Appellee's Brief at 19. However, Judicial Watch's position that the relevant taxpayer in Section 6103's definition of "return information" is the person who files the return and no other continues to be the logical interpretation of the definition.

The SSA believes this question is settled merely because the employer must submit a copy of the employee's W-2 showing that the employer has withheld taxes on the employee's account for the year, according to 26 U.S.C. §§ 3102, 3402. The SSA argues that, therefore, the employer is a "person with respect to whom a return is filed." 26 U.S.C. § 6103(b)(6). Appellee's Brief at 20. However, the employer's duty to send a copy of IRS Form W-2 to the SSA does not make the employer a person "with respect to whom a return is filed." This copy of the tax return is being sent with respect to the employee's taxes, not the employer's. The employer (though likely a payer of taxes also sending the IRS his own return) is not the "taxpayer" of these taxes. The money owed to the federal government comes out of the employee's pocket, not the employer's.

The employer is not the "taxpayer" with respect to a particular tax return merely because the federal government finds it more expeditious to have the taxpayer's employer withhold the taxpayer's taxes rather than have taxpayers send the full amount owed to the IRS themselves. The federal government could in theory collect these taxes directly from the taxpayers who owe them: however, perhaps out of concern that taxpayers will not be as compliant as their employers are on their behalf, or that taxpayers would spend too much of their gross income every year to be able to pay their taxes in full when they are due on April 15th, the government has chosen to use employers as tax collectors. Nevertheless, this

decision by the federal government to command employers to send at least some of their employees' taxes straight to the IRS rather than allow their employees the use of their income over the year does not convert the employer into the "taxpayer." If, for instance, the taxpayer reports more exemptions on his W-2 than he is entitled to and owes taxes on his income on April 15, the employer does not have to pay these taxes—it is only the employee who owes them, not the employer who did not collect them.

Thus, only the employee—the one who actually owes the taxes—is properly described as the "taxpayer." The sections of the Internal Revenue Code which the SSA cites make this distinction clear, by discussing the employer and the taxpayer as two separate persons. Section 3102 states that: "The tax imposed by section 3101 shall be collected by the *employer* of the *taxpayer*, by deducting the amount of the tax from the wages as and when paid" (emphasis added). 26 U.S.C. § 3102. The employer, therefore, is a legal person distinguished from the taxpayer. The employer is the person responsible for collecting the taxes owed by the taxpayer, not the person responsible for paying the taxes. Thus the employer himself is not the taxpayer. If the word "taxpayer" in these provisions covered both the employee and the employer, this sentence would rather state that the tax shall be collected by the "employer" from the "employee." The employer in this context is a tax collector, not a tax payer.

Classifying only the employee paying taxes and not his employer as the "taxpayer" referred to in Section 6103 also makes sense because the language of the statute focuses on the employee, not the employer. Every item in 26 U.S.C. § 6103(b)(2)(A), including the amount of tax liability and tax payments, makes sense in reference to the employee, most of them *only* make sense in reference to the employee, and none of them *must* refer to the employer in order to make sense. The SSA's point that "the amount of taxes the employer has withheld related to the employee for [the] year" is "[s]pecific to the employer" does not show that the amount of "tax liability, tax withheld, and tax payments" relate to the employer in the definition in 26 U.S.C. § 6103(b)(2)(A). Appellee's Brief at 20. All of those items relate just as clearly to the employee, whose "tax liability, tax withheld, and tax payments" are items relevant to calculating the taxes he must pay according to his return. Thus, an examination of the definition of "tax return information" provides no reason to think that the employer as well as the employee is a relevant taxpayer. The employee who submitted the return is the "person with respect to whom a return is filed" of Section 6103(b)(6), and the person who withheld taxes on his wages is not. Therefore, revealing the identity of an employer is not revealing a "taxpayer's identity" under the statute. Although the tax that his employer withheld from the taxpayer's wages is "tax return information," the identity of the withholder, his employer, is not. Section 6103, and thus Exemption

3, does not protect the identities of the employers from FOIA requests seeking information about classes of unidentifiable taxpayers. This information is what Judicial Watch seeks.

The SSA also argues that an employer can be considered a taxpayer for the purposes of Section 6103 (b)(2)(A) merely because he is a taxpayer under the Internal Revenue Code pursuant to 26 U.S.C. 6103(b)(6) and 7701(a)(1). Appellee's Brief at 21. However, this definition would mean that the relevant taxpayer was any person who happens to also pay taxes (a great number of Americans). If that were the case, any person who pays taxes could make the claim that Section 6103 exempts his identity from disclosure under FOIA. The "taxpayer" is not anyone who pays taxes at all, but the specific person with respect to whom a return is filed. However, as long as the employer does himself pay taxes, his own tax return is protected by Section 6103. Judicial Watch is not seeking the tax returns of the employers who appear on the requested list.

II. The SSA Has Not Demonstrated Why It Should Not Conduct a Search.

The SSA admits that it "did not conduct a search of information subject to Section 6103," and has claimed that "[a]ll [r]esponsive [i]nformation [f]alls [w]ithin Section 6103." Appellee's Brief at 25, 29. The SSA has therefore admitted that it has not conducted a reasonable search for documents responsive to the request, as a reasonable search would not exclude any search of all documents

responsive to the request. The SSA also admits that "the data is maintained electronically and is readily reproducible." Appellee's Brief at 13, n. 4. Because the SSA maintains the data Judicial Watch requested electronically, a reasonable search would include a search of these electronic records. The SSA cannot avoid a reasonable search for responsive records by claiming an exemption.

The SSA relies on the claim that such documents are exempted from disclosure, and so such a search would be "futile." Appellee's Brief at 27. The SSA states that *Landmark* held that "Section 6103 information 'is categorically sheltered from disclosure regardless of whether it was collected "with respect to a return"' *Landmark*, 267 F. 3d at 1135 (emphasis added). Appellee's Brief at 26. Although such a quotation does not appear in *Landmark*, the page cited does hold that taxpayer identities are a category of information that should be sheltered from disclosure. That they are shielded from disclosure does not imply they are shielded from search, however. An agency could avoid a search under the excuse that it would be futile anytime it made a claim of exemption, if this were the case. Despite the SSA's statement that "very few courts" have addressed this issue of "futile" searches, the D.C. Circuit has addressed this issue. Appellee's Brief at 27. As cited in Judicial Watch's Opening Brief, under the general FOIA framework, an agency must search for properly requested records, even if the records ultimately

are found to be subject to a valid exemption. *Oglesby v. United States Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Opening Brief of Appellant at 17.

The SSA relies on a case, *Hull v. Internal Revenue Service*, from the 10th circuit, which also addresses the issue of "futile" searches but comes to a different conclusion than this circuit. 656 F.3d 1174 (10th Cir. 2011). This Court should not adopt the reasoning in *Hull*, which departs from the reasoning of the D.C. Circuit. As the dissenting judge in *Hull* explained:

> As the D.C. Circuit Court recently noted, "to prevail on summary judgment, [an] agency must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents. Even if the protected records could be withheld under one of the FOIA exemptions, that does not absolve the agency of its duty to identify responsive documents, claim the relevant exemptions, and explain its reasoning for withholding the documents in its affidavit." *Elliott v. U.S. Dep't of Agriculture*, 596 F. 3d 842, 851, 389 U.S. App. D.C. 272 (D.C. Cir. 2010) (quotation marks, alternations, and citations omitted). To allow the IRS to claim that a FOIA request does not comply with its regulations, thus precluding any duty to search, obviates the requirement of a search under FOIA.

Hull v. IRS, 656 F. 3d 1174, 1197 (10th Cir. 2011). The facts of *Hull*, are also distinguishable from this case, because that plaintiff was attempting to obtain tax return information about a specific individual, whose identity was known and named by the plaintiff, without that individual's consent. There is no specific individual in this case whose identity is known to Judicial Watch, and whose specific tax return information Judicial Watch is attempting to obtain.

III. Judicial Watch's Records Request Is the Type of "Statistical Data" Covered by the Haskell Amendment Exception.

Statistics pertains to the collection, organization, analysis, and interpretation of data. A list which ranks top U.S. employers by the numbers of "no match" letters received clearly relates to the collection, organization, and analysis of data. Statistical analysis need not be so complex that performing the manipulations required to assemble a statistical compilation would be more than trivial. Such information would still be readily reproducible by the SSA. In this case, the SSA admits that "the data is maintained electronically and is readily reproducible." Appellee's Brief at 13, n. 4. This admission refutes any argument that the SSA should not produce the data simply because it requires performing trivial statistical analysis to it. However, the SSA's admission that Judicial Watch seeks only data that has been compiled and ranked does show that the even if the records which Judicial Watch seeks were to be considered "tax return information," because it seeks only a statistical compilation, the request fits within the Haskell Amendment's exception for statistical data.

Judicial Watch is not arguing that the "Haskell Amendment intended to modify 6103 by making nonidentifying return information eligible for disclosure." Appellee's Brief at 24. Such an argument would mean any nonidentifying return information that is not in the form of "statistical studies and other compilations of data" is subject to disclosure, and thus that return information should be disclosed

if the identifying information within it were redacted. Judicial Watch does not claim that this is the case, nor has it sought a listing of employers with the employers' names redacted. Rather, Judicial Watch argues that what it seeks is the type of "compilation of data" that the Haskell Amendment meant to preserve for disclosure, as held by the Supreme Court in *Church of Scientology v. Internal Revenue Service*, 484 U.S. 9 (1987). In *Church of Scientology*, the Court reiterated that "'the purpose of this amendment is to insure that statistical studies and other compilations of data now prepared by the Internal Revenue Service and disclosed by it to outside parties will continue to be subject to disclosure to the extent allowed under present law.'" *Id.* at 16. The presence of the Haskell Amendment shows that the confidentiality protections passed by Section 6103 were not directed towards compilations of data but towards protecting the privacy of Americans who have no choice but to submit tax returns.

IV. Judicial Watch Has Not Narrowed Its Request; The More Narrow Category of Documents To Which The SSA Seeks To Limit The Request Is All Judicial Watch Ever Sought.

The SSA has misunderstood Judicial Watch's initial request. The SSA states that Judicial Watch's request seeks "all records in SSA's possession detailing the top 100 U.S. employers" without requiring the records to be limited to those containing information establishing that the employer satisfies the criteria for being on the list. Judicial Watch does not seek and has never sought all

records detailing any information about those employers, merely all records which do detail such top U.S. employers as being employers who have received the comparatively largest number of no-match letters. In its initial request, Judicial Watch stated that a "listing" is specifically what it sought. Judicial Watch has only ever sought to obtain a listing of employers and so it was not self-servingly mischaracterizing its FOIA request when it stated that it is not seeking to obtain "no match" letters themselves nor the information therein. Judicial Watch has never sought such letters. Judicial Watch therefore did not expect that such a list would necessarily include the employers' Employer Identification Numbers, and would readily accept a list with such numbers redacted. Judicial Watch's request therefore does not compromise Section 6103's protections of confidentiality.

V. Because Releasing the Data Sought by Judicial Watch Would Not Violate Section 6103, and the SSA Admits That the Data is Readily Reproducible, the SSA Must Produce the Data.

In footnote 4 of its brief, the SSA states that "[i]t is undisputed that the data is maintained electronically and is readily reproducible (see Appellant's Br. At 20-21), but SSA's position is that it cannot provide it to Judicial Watch without violating 26 U.S.C. § 6103." Appellee's Brief at 13, n. 4. The SSA has therefore all but conceded that such data is available. Since this data is available, and it is not exempt, the SSA must search for and disclose it. The SSA has admitted that *Sample v. Bureau of Prisons*, 466 F.3d 1086 (D.C. Cir. 2006) "requires agencies

to provide records to requesters in electronic format," if the agency keeps the records in electronic format." Appellee's Brief at 13, n. 3. The SSA also admits that it does keep the records at issue in electronic format. Appellee's Brief at 13, n. 4. The SSA therefore must produce them to Judicial Watch. The SSA also concedes that the Electronic Freedom of Information Act Amendments of 1996 and the widespread usage of advanced technology have changed the requirements of the law since *Krohn v. Department of Justice*, 628 F.2d 195 (D.C. Cir. 1980), which the District Court relied upon. Appellee's Brief at 12, 13, n. 3.

Having conceded it can find and readily produce the documents sought by Judicial Watch and that the law requires it to do so if such documents are not exempt from FOIA, the SSA simply states that the passage of the E-FOIA amendment "neither repealed nor diminshed[sic] Exemption 3." Appellee's Brief at 13, 14, n. 4. Judicial Watch does not dispute that the E-FOIA amendment did not repeal or diminish Exemption 3, nor any of FOIA's other exemptions. However, as stated above and in Judicial Watch's Opening Brief, the information requested is not tax information shielded from disclosure by Exemption 3.

Even the SSA has not consistently taken the position that such information is tax information. Although the SSA attempts to characterize the earlier case of *Davis, Cowell, & Bowe v. SSA* as "of no moment here," the case is more relevant than the SSA portrays it. Appellee's Brief at 19, n. 9. The SSA, by quoting only

that "[p]laintiffs sought records reflecting communications between the SSA and two employers…" without quoting the rest of the sentence, attempts to obscure that those plaintiffs also sought "notices from the SSA to the employers that social security numbers on their wage reports do not match the corresponding employee's name, date of birth, and/or sex," that is, the "no match" letters of the type at issue here. *Davis v. SSA*, 281 F. Supp.2d 1154, 1155 (N.D. Cal. 2003). Appellee's Brief at 19, n.4. But, here, Judicial Watch seeks only a ranking of top receivers of "no match" letters, not the letters themselves, and so the data requested is even further removed from being tax information. In *Davis*, the SSA represented that: "the IRS has changed its policy. It will no longer argue that the social security information sought in this case is tax information." *Id*. at 1156. If the "no match" letters themselves are not tax information, then clearly a ranking of U.S. employers who have received the largest number of "no match" letters is not tax information. If it is not tax information, Section 6103 does not shield its disclosure under Exemption 3. These records are readily reproducible and not exempt under FOIA. The SSA must produce them.

CONCLUSION

For the foregoing reasons, and the reasons in Judicial Watch's Opening Brief, Judicial Watch respectfully requests that the Court reverse the District

Court's grant of summary judgment in favor of SSA and denial of Judicial Watch's cross-motion for summary judgment and remand this case for further proceedings.

Dated: May 17, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 32(a)(7), I certify that the foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). The brief contains 3, 579 words, as counted by Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii).

2. I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a 14-point, proportionally spaced Times New Roman font.

/s/ Julie Axelrod

CERTIFICATE OF SERVICE

I hereby certify that on this 17 th day of May 2012, I filed the foregoing **REPLY BRIEF OF APPELLANT JUDICIAL WATCH, INC.** with the Clerk of Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the Appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

I also hereby certify that I caused eight copies to be delivered to the Clerk of Court for the U.S. Court of Appeals for the District of Columbia Circuit via hand delivery.

/s/Julie Axelrod