

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	Civil Action No. 1:13-cv-1759
	)	
v.	)	
	)	
INTERNAL REVENUE SERVICE,	)	
	)	
Defendant.	)	
	)	

**PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT’S  
MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, respectfully submits this memorandum of law in opposition to the motion for summary judgment of Defendant Internal Revenue Service (“IRS”). As grounds thereof, Judicial Watch states as follows:

**I. Introduction.**

On May 22, 2013, Plaintiff submitted a Freedom of Information Act (“FOIA”) request to Defendant seeking “any and all records and communications concerning, regarding, or related to the selection of individuals for audit based on information contained in 501(c)(4) tax exempt applications” from January 1, 2010 to the date of the request.<sup>1</sup> Defendant’s subsequent search efforts were unreasonably limited and did not satisfy its FOIA obligations. Although Plaintiff’s request clearly included “communications” about the selection of individuals for audit, Defendant limited its search efforts to databases and recordkeeping systems that would only identify records of actual, formal audit referrals of particular individuals, not communications or discussions about

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<sup>1</sup> Plaintiff’s request does not seek information about any individual taxpayer, any individual taxpayer’s tax “return,” or any “return information” about individual taxpayers.

using 501(c)(4) tax exempt applications for audit referrals generally. Put simply, Defendant did not search locations where it stores communications. Because Defendant's search was unreasonably limited, its motion for summary judgment should be denied and Defendant must undertake a proper search.

## **II. Argument.**

### **A. Summary Judgment Standard.**

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); Fed.R.Civ.P. 56(c). In reviewing a motion for summary judgment under FOIA, the court must view the facts in the light most favorable to the requester. *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

Also in FOIA litigation, but unlike in most other federal litigation, the defending agency, not the plaintiff, bears the burden of proof. 5 U.S.C. § 552(a)(4)(B) ("the burden is on the agency to sustain its action"); *accord Military Audit Project v. Casey*, 656 F.2d 724, 739 (D.C. Cir. 1981).

At the summary judgment phase, "the agency must demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents.'" *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (*quoting Truitt v. U.S. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)).

### **B. Defendant Has Failed to Conduct an Adequate Search for Documents.**

Defendant did not "make a good faith effort to conduct a search for the requested records, using methods which [were] reasonably expected to produce the information requested." *Id.* Defendant's search efforts were limited to databases and recordkeeping systems that would only

identify records of actual, formal audit referrals of particular individuals, not communications or discussions about using 501(c)(4) tax exempt applications for audit referrals generally. Nor would the databases Defendant searched identify records of informal referrals based on information in 501(c)(4) applications. Defendant *did not* search any databases or recordkeeping systems that would likely contain internal directives, memorandums, meeting notes, agendas, etc., responsive to Plaintiff's request. Defendant also *did not* search any databases or recordkeeping systems for emails responsive to Plaintiff's request. Simply put, Defendant *did not* search any recordkeeping systems that would likely produce *communications* concerning, regarding, or related to *the selection* of individuals for audit as clearly described in Plaintiff's FOIA request.

Limiting the search in this narrow manner was unreasonable. Defendant's own memorandum and declarations admit that the database systems searched only record individual taxpayer's confidential identification information and internal project codes regarding audit referrals. There is no indication that such recordkeeping systems include or refer to communications regarding whether to use application information as a basis for audits much less the selection of individuals for audit based on information the IRS discovers through the 501(c)(4) application process. Defendant must show that it set a proper scope for its search tailored to identify all relevant documents responsive to Plaintiff's request. *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998).

While Defendant offers declarations describing in detail a search of selected databases that record actual, formal audits and individual's personal taxpayer documents (information that Plaintiff *is not* seeking), it provides no explanation for excluding databases and recordkeeping systems that retain communications, emails, discussions, and directives (information that Plaintiff expressly *is* seeking). The IRS has protocols in place for searching databases and recordkeeping

systems for electronically stored information requested in litigation discovery or pursuant to FOIA. Declaration of Neguiel Hicks in *Judicial Watch, Inc. v Internal Revenue Service*, Case No. 14-1039 (RMC) (D. District of Columbia), attached as Exhibit 2 to Plaintiffs' Response to Defendant's Statement of Material Facts Not in Dispute and Plaintiff's Separate Statement of Additional, Material Facts ("Plf's Resp. to Def's Stmt. of Facts"), at paras. 1 and 9-25. Logically, an initial and obvious location to search for communications would be the IRS's centrally-managed Exchange Server Personal Storage Table ("PST"). "The Exchange Server PST stores, *inter alia*, the information contained in employees' email mailboxes (i.e., inboxes, outboxes, sent items folders, etc)." *Id.* at ¶ 7. Yet Defendant ignored this obvious source of potentially responsive records and instead searched for actual, formal audit documents only.

The inadequacy at issue is not the lack of results, but rather the unreasonably limited scope of the search. Plaintiff's FOIA request does not seek audit documents, but specifically asks for "communications" (*i.e.*, emails, discussions, correspondences, directives, *etc.*). Defendant's restriction of its search to databases that do not maintain communications or related documents is plainly insufficient. No plausible reading of Plaintiff's FOIA request seeking "any and all records and communications concerning, regarding, or related to the selection of individuals for audit" could justify Defendant's exclusion from its search of systems that maintain email and other forms of "communications."

Emails produced in response to another Judicial Watch FOIA request reveal that top IRS officials communicated with officials of the U.S. Department of Justice about criminally prosecuting signers of applications for 501(c)(4) tax exempt status based on allegedly false information contained in applications. *See* Declaration of Thomas J. Fitton ("Fitton Decl."), attached as Exhibit 1 to Plf's Resp. to Def's Stmt. of Facts, at para. 2. Plaintiff does not presently

know whether the IRS actually referred specific individuals to the Justice Department for criminal prosecution based on information contained in 501(c)(4) applications, but the subject of referrals was plainly discussed. Discussing criminal referrals generally and actually making criminal referrals are two separate subjects. Likewise, discussing audit referrals generally and actually making formal audit referrals are two separate subjects. Defendant only searched for the latter, not the former, even though Plaintiff expressly requested the former.

In addition, the U.S. House of Representatives' Committee on Ways and Means determined that the IRS required certain applicants for 501(c)(4) tax exempt status to submit lists of donors to their organizations as part of the application process and that nearly one in ten donors identified on such donor lists were subject to audit. *See* Fitton Decl. at para. 4. In an email communication produced to Judicial Watch in response to another FOIA request, a high level IRS official acknowledged that donor lists generally were neither needed nor used in making determinations on tax exempt status. *See* Fitton Decl. at para. 3. It thus appears that, despite Defendant's assertion that it did not locate any records of actual, formal audit referrals based on 501(c)(4) applications, such audits did indeed occur.<sup>2</sup> The failure to search email or recordkeeping systems such as the Exchange Server PST may well explain why no responsive records were located.

Plaintiff seeks more information related to these facts that were discovered through the production of emails, discussions, and communications records not included in the strict parameter of formal audit documentation. Defendant cannot, in good faith, justify its exclusion of the databases and recordkeeping systems that maintain these types of communication as an adequate

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<sup>2</sup> Defendant acknowledges that an "application" includes "any papers submitted in support of such applications," which would include donor lists. Declaration of Tamera L. Ripperda at para. 5.

“effort to conduct a search for the requested records, using methods which [were] reasonably expected to produce the information requested.” *Nation Magazine*, 71 F.3d at 890.

There is no question that Defendant’s search of the specifically described systems was thorough. However, a thorough-but-plainly-too-narrow search does not meet FOIA’s reasonableness standard. *Weisberg*, 705 F.2d at 1351 (“The adequacy of an agency’s search is measured by a standard of reasonableness’ and is ‘dependent upon the circumstances of the case’”) (*quoting McGeehee v. Central Intelligence Agency*, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983) and *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 834 (D.C. Cir. 1979)). An agency “**cannot limit its search to only one record system if there are others that are likely to turn up the information** requested.” *Nation Magazine*, 71 F.3d at 890 (internal citations omitted) (emphasis added). Defendant’s search, limited to these specifically described systems and overlooking more relevant, essential databases, was unreasonably narrow and the IRS should have conducted a broader search. Plaintiff does not seek a “perfect search,” only a reasonable one as required under the law. Defendant has not demonstrated that its search was reasonable. *See McGeehee*, 697 F.2d at 1101 (an agency “bears the burden of establishing that any limitations on the search it undertakes in a particular case comport with its obligation to conduct a reasonably thorough investigation.”). Summary judgment is not warranted and should be denied.

### **III. Conclusion.**

For the foregoing reasons, Plaintiff respectfully requests that Defendant’s motion for summary judgment be denied and that the Court order the IRS to engage in a reasonably adequate search for records and communications responsive to Plaintiff’s request.

Dated: October 22, 2014

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/ Ramona R. Cotca

D.C. Bar No. 501159

425 Third Street SW, Suite 800

Washington, DC 20024

(202) 646-5172

*Attorney for Plaintiff*

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**PLAINTIFF’S RESPONSE TO DEFENDANT’S STATEMENT OF  
MATERIAL FACTS NOT IN DISPUTE AND PLAINTIFF’S  
SEPARATE STATEMENT OF ADDITIONAL, MATERIAL FACTS**

Plaintiff Judicial Watch, by counsel and pursuant to Local Civil Rule 7.1(h), respectfully submits this response to Defendant’s Statement of Material Facts Not in Dispute and Plaintiff’s Separate Statement of Additional, Material Facts:

**I. Plaintiff’s Response to Defendant’s Statement of Material Facts Not in Dispute.**

1. Undisputed.
2. Undisputed.
3. Undisputed.
4. Undisputed.
5. Undisputed.
6. Undisputed.
7. Undisputed.
8. Undisputed.
9. Undisputed.
10. Undisputed.
11. Undisputed.

12. Undisputed.

13. Undisputed.

14. Undisputed.

15. Undisputed.

16. Undisputed.

17. Undisputed.

18. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the “asymmetrical distribution of knowledge” as between a FOIA requester and an agency in FOIA cases).

19. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the “asymmetrical distribution of knowledge” as between a FOIA requester and an agency in FOIA cases).

20. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the “asymmetrical distribution of knowledge” as between a FOIA requester and an agency in FOIA cases).

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26. Undisputed.

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33. Undisputed.

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110. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the “asymmetrical distribution of knowledge” as between a FOIA requester and an agency in FOIA cases).

111. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the “asymmetrical distribution of knowledge” as between a FOIA requester and an agency in FOIA cases).

112. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the “asymmetrical distribution of knowledge” as between a FOIA requester and an agency in FOIA cases).

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114. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the “asymmetrical distribution of knowledge” as between a FOIA requester and an agency in FOIA cases).

115. Plaintiff disputes that Employment Tax has no records responsive to this FOIA request. Plaintiff lacks knowledge to confirm or deny the remainder of the paragraph. *See Judicial*

*Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the “asymmetrical distribution of knowledge” between a FOIA requester and an agency in FOIA cases).

116. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the “asymmetrical distribution of knowledge” as between a FOIA requester and an agency in FOIA cases).

117. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the “asymmetrical distribution of knowledge” as between a FOIA requester and an agency in FOIA cases).

118. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the “asymmetrical distribution of knowledge” as between a FOIA requester and an agency in FOIA cases).

119. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the “asymmetrical distribution of knowledge” as between a FOIA requester and an agency in FOIA cases).

120. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the “asymmetrical distribution of knowledge” as between a FOIA requester and an agency in FOIA cases).

121. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the

“asymmetrical distribution of knowledge” as between a FOIA requester and an agency in FOIA cases).

122. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the “asymmetrical distribution of knowledge” as between a FOIA requester and an agency in FOIA cases).

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124. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the “asymmetrical distribution of knowledge” as between a FOIA requester and an agency in FOIA cases).

125. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the “asymmetrical distribution of knowledge” as between a FOIA requester and an agency in FOIA cases).

126. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the “asymmetrical distribution of knowledge” as between a FOIA requester and an agency in FOIA cases).

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129. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the “asymmetrical distribution of knowledge” as between a FOIA requester and an agency in FOIA cases).

130. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the “asymmetrical distribution of knowledge” as between a FOIA requester and an agency in FOIA cases).

## **II. Plaintiff’s Separate Statement of Additional, Material Facts.**

1. According to records produced obtained by Judicial Watch in response to a Freedom of Information Act (“FOIA”) request, top IRS officials communicated with officials of the U.S. Department of Justice about criminally prosecuting signers of applications for 501(c)(4) tax exempt status based on allegedly false information contained in applications. *See* Declaration of Thomas J. Fitton, attached as Exhibit 1, at para. 2.

2. According to records obtained in response to a Judicial Watch FOIA request, a high level IRS official acknowledged that donor lists generally were neither needed nor used in making determinations on tax exempt status. *See* Declaration of Thomas J. Fitton, at para. 3.

3. According to the U.S. House of Representatives' Committee on Ways and Means, the IRS required certain applicants for 501(c)(4) tax exempt status to submit lists of donors to their organizations as part of the application process, and nearly one in ten donors identified on such donor lists were subject to audit. *See* Declaration of Thomas J. Fitton, at para. 4.

4. Defendant has protocols in place for searching databases and recordkeeping systems for electronically stored information requested in litigation discovery or pursuant to FOIA. *See* Declaration of Neguiel Hicks in *Judicial Watch, Inc. v Internal Revenue Service*, Case No. 14-1039 (RMC) (D. District of Columbia), attached as Exhibit 2, at paras. 1 and 9-25.

5. Defendant did not search any databases or recordkeeping systems that would likely contain internal directives, memorandums, meeting notes, agendas, etc., responsive to Plaintiff's request. Nor did Defendant search any databases or recordkeeping systems for responsive emails. *See* Declaration of Tamera L. Ripperda at para. 7; Declaration of Dagoberto Gonzalez at paras. 6-7; Declaration of David W. Horton at paras. 4-6; Declaration of Cheryl P. Claybough at paras. 4-6; Declaration of Karen M. Schiller at paras. 5-9.

6. Defendant limited its search to actual, formal audit referrals by the Exempt Organization Unit and the three divisions within the IRS that conduct audits of individuals. *See* Declaration of Tamera L. Ripperda at para. 7; Declaration of Dagoberto Gonzalez at paras. 6-7; Declaration of David W. Horton at paras. 4-6; Declaration of Cheryl P. Claybough at paras. 4-6; Declaration of Karen M. Schiller at paras. 5-9.

7. The databases and recordkeeping systems searched would only identify records of actual, formal audit referrals of particular individuals, not communications or discussions about using 501(c)(4) tax exempt applications for audit referrals generally. Nor would it identify records of informal referrals based on information in 501(c)(4) applications. *See* Declaration of Tamera L. Ripperda at para. 7; Declaration of Dagoberto Gonzalez at paras. 6-7; Declaration of David W. Horton at paras. 4-6; Declaration of Cheryl P. Claybough at paras. 4-6; Declaration of Karen M. Schiller at paras. 5-9.

Dated: October 22, 2014

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/ Ramona R. Cotca  
D.C. Bar No. 501159  
425 Third Street SW, Suite 800  
Washington, DC 20024  
(202) 646-5172

*Attorney for Plaintiff*

# EXHIBIT 1



4. As President of Judicial Watch, I regularly monitor congressional hearings and other official investigations concerns subjects related to ongoing Judicial Watch FOIA requests and litigation in which Judicial Watch is involved. Included among the congressional hearings I have monitored are hearings related to the IRS's targeting of "conservative" and "Tea Party" groups seeking 501(c)(4) tax exempt status. According to the U.S. House of Representatives' Committee on Ways and Means, the IRS required certain applicants for 501(c)(4) tax exempt status to submit lists of donors to their organizations as part of the application process, and nearly one in ten donors identified on such donor lists were subject to audit. A true and correct copy of a May 7, 2014 opening statement by Charles W. Boustany, Jr., Chairman of the House Ways and Means Committee, is attached as Exhibit C.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed on this 22nd day of October, 2014 in Washington, D.C.



---

Thomas J. Fitton

**EXHIBIT A**

**TO DECLARATION OF THOMAS J. FITTON**

---

**From:** Flax Nikole C  
**Sent:** Thursday, May 09, 2013 8:04 AM  
**To:** Lerner Lois G  
**Cc:** Grant Joseph H; Marks Nancy J; Vozne Jennifer L  
**Subject:** RE: DOJ Call

I think we should do it – also need to include CI, which we can help coordinate. Also, we need to reach out to FEC. Does it make sense to consider including them in this or keep it separate?

---

**From:** Lerner Lois G  
**Sent:** Wednesday, May 08, 2013 5:30 PM  
**To:** Flax Nikole C  
**Cc:** Grant Joseph H; Marks Nancy J  
**Subject:** DOJ Call  
**Importance:** High

**I got a call today from Richard Pilger Director Elections Crimes Branch at DOJ. I know him from contacts from my days there. He wanted to know who at IRS the DOJ folks could talk to about Sen. Whitehouse idea at the hearing that DOJ could piece together false statement cases about applicants who "lied" on their 1024s --saying they weren't planning on doing political activity, and then turning around and making large visible political expenditures. DOJ is feeling like it needs to respond, but want to talk to the right folks at IRS to see whether there are impediments from our side and what, if any damage this might do to IRS programs.**

**I told him that sounded like we might need several folks from IRS. I am out of town all next week, so wanted to reach out and see who you think would be right for such a meeting and also hand this off to Nan as contact person if things need to happen while I am gone --**

**Thanks**

*Lois G. Lerner*  
Director of Exempt Organizations

**EXHIBIT B**

**TO DECLARATION OF THOMAS J. FITTON**

Obtained by Judicial Watch, Inc. via FOIA

---

**From:** Lerner Lois G  
**Sent:** Monday, May 21, 2012 9:57 AM  
**To:** Paz Holly O  
**Cc:** Flax Nikole C; Marks Nancy J; Grant Joseph H  
**Subject:** FW: (b)(5) DP AC Donor Information

Looks like we can (b)(5) DP AC We'll need a carefully drafted letter to describe what we are doing. Perhaps best to send it past Disclosure.

*Lois G. Lerner*

Director of Exempt Organizations

---

**From:** Stevens Margo [mailto:Margo.L.Stevens@IRSCOUNSEL.TREAS.GOV]  
**Sent:** Monday, May 21, 2012 10:50 AM  
**To:** Lerner Lois G  
**Cc:** Witter Kirsten N  
**Subject:** (b)(5) DP AC Donor Information

Lois, I wanted to get back with you with respect to your question whether TEGE could return to those organizations from whom donor names were solicited in questionnaires following their submission of applications for recognition of their tax exempt status (under 501(c)(4)), now that TEGE has reviewed those files and determined that such information was not needed across-the-board and not used in making the agency's determination on exempt status. As you noted, (b)(5) DP AC

(b)(5) DP AC

Thus, I wanted to touch base with Kirsten Witter, GLS, with respect to any Federal Records Act ("FRA") implications of a decision by TEGE to (b)(5) DP AC Kirsten, and Beth Levine of her branch, called me this morning. Based upon our understanding of what occurred here, they have advised me that the (b)(5) DP AC

Accordingly, it would seem to follow that, (b)(5) DP AC

(b)(5) DP AC

Thanks to Kirsten and Beth for their quick analysis and response back, so that I could provide you what I think is good news.

Margo L. Stevens  
Deputy Associate Chief Counsel for Legislation & Privacy  
Procedure & Administration  
Telephone: (202) 622-3400 Fax: (202) 622-6292

**EXHIBIT C**

**TO DECLARATION OF THOMAS J. FITTON**



# **COMMITTEE on WAYS and MEANS**

## **Opening Statements**

### **Boustany Opening Statement: Hearing on Internal Revenue Service Operations and the 2014 Tax Return Filing Season**

***(Remarks as Prepared)***

**Washington, May 7 | [0 comments](#)**

Good morning and welcome to the Subcommittee on Oversight's hearing on the Internal Revenue Service's operation and budget.

This filing season, million of taxpayers across America have struggled to meet their tax filing obligations. Doing so has become harder over time, as the tax code grows in complexity, forcing taxpayers to spend over 6 billion hours and \$160 billion every single year to comply with its filing requirements. At the IRS, hardworking public servants also bear the weight of America's outdated tax code.

Despite these challenges, and another late start to the filing season, the IRS appears to have carried out the 2014 tax-filing season with success. Initial reports suggest the 2014 filing season was free of the problems that have marred previous filing seasons. As of early April, the Service processed over 98 million returns, issued 80 million refunds, and responded to nearly 40 million calls with lower wait times. All of these are improvements over last year.

The Members of the Subcommittee and I congratulate Commissioner Koskinen and the thousands of dedicated career IRS employees on a successful filing season. We thank them for their hard work under difficult circumstances. In IRS offices across the country, public servants work hard to administer the nation's tax laws fairly and accurately. This is not an easy task, and we thank them for their service.

However, these successes have occurred against the backdrop of the ongoing investigation into the agency's targeting of conservative groups applying for tax-exempt status. As the agency works to recover from the scandal, these kinds of successes will help the agency regain the trust of the American people. It will be a long road, and how the IRS responds to the ongoing investigation will affect the pace of the recovery for better or worse.

We still have serious concerns about the integrity of the agency based on three findings:

First: Lerner Defied Internal IRS Controls to Target Certain Taxpayers.

On April 9, the Committee sent a letter referring former Executive Organization Division Director Lois Lerner to Attorney General Holder for potentially engaging in criminal wrong doing in her capacity as EO Director. One of these actions, in particular, has serious implications for the IRS as it rebuilds from the scandal.

The Committee uncovered evidence that shows Ms. Lerner acted in defiance of internal controls developed to ensure that no single IRS employee could target an organization for an adverse determination or exam. Ms. Lerner was not only familiar with these internal controls, but they were policies she created and touted publicly as a way of

10/8/2014 Boustany Opening Statement: Hearing on Internal Revenue Service Operations and the 2014 Tax Return Filing Season | House Committee on...

commending her agency's impartiality. The evidence shows that Ms. Lerner knowingly bypassed these controls, reached into her division, and directed that specific organizations be subjected to audit.

And yet, an official IRS report declared that, "we have not found evidence of intentional wrongdoing by IRS personnel." Given the evidence the Committee has uncovered to the contrary, I call on the IRS to review the agency's internal controls to ensure that targeting cannot happen again.

Second: Donors Whose Names Were Inappropriately Requested by the IRS Were Audited.

Equally troubling is new evidence uncovered by the Committee that shows the IRS's exam function may have been used for political purposes. It is well known that the IRS improperly requested donor information from scores of conservative groups. For months, this Committee has asked the IRS what it did with these improperly obtained lists and whether those lists were used to target individual donors to right-leaning groups. Recently, the Committee uncovered new information indicating that, after groups provided the information to the IRS, nearly one in ten donors were subject to audit. Any abuse of discretion in audit selection must be identified and stopped.

Because of failures in IRS policy exploited by Lois Lerner and the possible targeting of conservative donors, I have requested that the Government Accountability Office undertake a thorough review of the policies and procedures for audit selection by the IRS's Small Business/Self Employed Division. Last year, I made a similar request that the GAO audit the Exempt Organizations Division. I understand that audit is already underway. Commissioner Koskinen, I call on you to give the GAO your unqualified cooperation to these audits. Only sunshine can begin to restore public confidence in the IRS.

Third: The IRS Has Denied Some Applicants for Exempt Status Their Right to an Independent Appeal.

Through the Committee's investigation, we have also found that the IRS was, until very recently, denying certain applicants for tax exempt status their right to an independent appeal process as guaranteed by the IRS Restructuring and Reform Act of 1998. Ordinarily, if an applicant for exempt status is denied, the applicant can appeal to an independent appeals division that was mandated by the 1998 IRS Restructuring Act. However, if Washington, D.C. selected an applicant for additional review, an adverse determination was not appealable. The most a disappointed applicant could do was "protest" to the very same officials that denied the group in the first place. Noteworthy is that all of the applicants that were subject to extra scrutiny based on the name "Tea Party" or the policy objective to "make America a better place to live" also had their appeal rights taken away.

This practice would never have come to light but for this Committee's thorough oversight of the agency, and as a consequence, the IRS has now pledged to change this practice. We are gratified by this change, but Mr. Koskinen, I call on the IRS today to ensure that all applicants who were denied their right to a fair, independent appeal receive one and receive it soon.

The IRS cannot be an agency in which one senior executive can easily circumvent policies designed to safeguard taxpayers' due process rights. It cannot be an agency in which taxpayers are denied their right to an appeal based on the location of their file. And it cannot be an agency that audits taxpayers based on improperly obtained information.

Commissioner Koskinen, I appreciate your hard work under difficult circumstances, but this Subcommittee cannot simply take the IRS's assurances at face value. The IRS's problems must be addressed with through frank, serious conversations, so I look forward to discussing these matters and more during today's hearing. Again, I applaud the Commissioner and the IRS for its good work during the 2014 filing season and I hope the agency will continue with this success as it begins to regain the trust of the American people.

###

Tags: [Oversight](#), [Full Committee](#)

- 
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## EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No: 1:14-cv-01039-RMC
	)	
INTERNAL REVENUE SERVICE,	)	
	)	
Defendant.	)	

**DECLARATION OF NEGUIEL HICKS**

I, Neguiel Hicks, pursuant to the provisions of 28 U.S.C. § 1746, declare as follows:

1. I am the Senior Level Counsel and Director of the Electronically Stored Information (ESI) group within the Internal Revenue Service (IRS) Office of Associate Chief Counsel, Procedure and Administration. I am responsible within the Office of Chief Counsel for the initiation, management, preservation, and production of ESI, including email, which is subject to litigation discovery or Freedom of Information Act (FOIA) requests.
2. I am aware of two FOIA requests submitted by Judicial Watch, Inc. (JW) which impact all emails sent or received by the approximately two thousand two hundred (2,200) IRS employees assigned to five (5) regional offices (Dallas, Texas; Seattle, Washington; Montgomery, Alabama; Dayton, Ohio; and Hartford, Connecticut) between August 6, 2012, and November 6, 2012. I understand that JW's FOIA requests seek emails sent or received by any IRS employee in any one those five offices between August 6, 2012, and November 6, 2012,

containing any of the following terms: "Obama," "Romney," "election" or "campaign."

3. In response to this lawsuit, on or about July 21, 2014, approximately two thousand two hundred (2,200) IRS employees were notified by email of the need to preserve any email sent or received between August 6, 2012, and November 6, 2012.
4. Neither the IRS Information Technology E-discovery Office (IRS-IT EDO) nor any other component of the IRS has in place a method which allows it to simultaneously search all ESI in the custody of the approximately two thousand two hundred (2,200) IRS employees in the five (5) identified regional offices, or even to simultaneously search all emails in the custody of the approximately two thousand two hundred (2,200) IRS employees in the five (5) identified regional offices.
5. In addition to the concerns identified in paragraphs 6 and 7 below, the IRS-IT EDO is presently unable to simultaneously search all emails in the custody of the approximately two thousand two hundred (2,200) IRS employees in the five (5) identified regional offices because, *inter alia*: the Microsoft Exchange Server which administers and manages email services currently used by the IRS does not have search capabilities; the IRS network bandwidth would not support such searches being conducted; and such searches would be interrupted by IRS employees logging on and off the network.

6. Personal Storage Table (PST) files are compressed files that are commonly used for archiving and maintaining otherwise loose email messages and attachments.
7. As a matter of internal IRS policy, an IRS employee's centrally-managed Exchange Server Personal Storage Table (PST) (which includes, *inter alia*, the information contained in the employee's email mailbox) is subject to a five hundred (500) megabyte (MB) size limitation, which translates to approximately six thousand (6,000) emails. As an employee's centrally-managed Exchange Server PST approaches this file size limitation, a prompt is issued encouraging him or her to reduce the centrally-managed file size by archiving emails and attachments. Once archived, PST files are then solely in the possession and control of the IRS employee and are stored on the employee's IRS-issued desktop computer, IRS-issued laptop computer, centrally-managed network share or peripheral device.
8. The concerns identified in paragraphs 5 through 7 above prevent an IRS information technology specialist from simultaneously searching all emails in the custody of the approximately two thousand two hundred (2,200) IRS employees in the five (5) identified regional offices due to the likelihood that information from the relevant period is maintained by the individual custodians rather than the centrally-administered Exchange Server systems coupled with the fact that the current version of Exchange Server lacks the capability to conduct the type of searches requested.

9. Therefore, the IRS-IT EDO collects ESI, including emails, on a custodian-by-custodian basis (*i.e.*, one employee at a time) as follows: it collects the information using copy and search utilities designed to preserve metadata (*i.e.*, data about data, such as when the data was created, who formatted the data, etc.) and prevent unintended alteration; it uploads that information to a central space on an electronic server; and then it processes the ESI as discussed below.
10. Because of, *inter alia*, the presence of compressed and encrypted files, the IRS-IT EP MO does not have in place a method which allows it to selectively and efficiently collect ESI from custodians limited to (a) only emails; (b) only files sent or received during a particular time period; and/or (c) only files containing particular terms. This is due to the prerequisite collection and preservation of encryption certificates from the individual custodian computers which are then used to decrypt all custodian-managed PST files. Instead, the IRS first collects all ESI from custodians and then subsequently processes and searches it as discussed below.
11. Once collected, preserved and accounted for as described above, all ESI is filtered to identify system files, which are not considered user-created files. System files are files which are located on a custodian's computer partition that the Operating System (OS) and other computer operating programs rely upon for normal operation. Under normal operating conditions, custodians do not directly access or create system files.

12. Once system files are identified, they are removed from the ESI pool and not subject to further processing or searches.
13. Once system files have been removed from the ESI pool, the remaining ESI pool is filtered to identify files which need to be subjected to additional processing before being searched. For JW's FOIA requests, which seek files associated with email repositories, there are three such categories of files: corrupt, compressed, and encrypted.
14. Corrupt files are files which (a) are incapable of being rendered searchable by standard attorney review platforms; or (b) are damaged in some way that makes it impossible to render them searchable by standard attorney review platforms.
15. Once corrupt files are identified, they are removed from the ESI pool and not subject to further processing or searches.
16. Compressed files are archive files that contain one or more files in which the data has been truncated for faster transmission over a computer network or to reduce the amount of physical space required for storage. An example of a compressed file is a PST file which contains multiple Message (MSG) files. An MSG file is an individual email file containing all header information, message content, recipient information, and attachments. Nearly all archived email files are compressed using the PST format; however, there are those instances where for more granular records purposes a custodian may store the individual MSG files.
17. Once compressed files are identified, they are processed to extract the truncated

files within for further processing or searches.

18. In the case of emails stored in PST files, the emails are first processed to identify whether they are encrypted or contain compressed files which are encrypted. Encrypted files are files that have been subjected to an encryption encoding algorithm to render them unreadable without the use of certificate credentials, which is intended to prevent unintended or third party recipients from viewing the contents. The files can be rendered readable only by removing the security parameters with proper credentials, such as entry of a password or use of security certificates. As internal IRS policy requires employees to transmit taxpayer identification information using encrypted emails, a large amount of custodians' email files is encrypted.
19. Once encrypted files are identified, they are decrypted (*i.e.*, processed to remove the security parameters) using Zeva Sectool so the files can be rendered searchable.
20. Custodians' emails and attachments are searched using predetermined criteria ranges only after: system files and corrupt files have been removed from the ESI pool, compressed files have been extracted, and encryption security parameters have been removed.
21. A criteria range search is a search based on file attributes such as the date a file was sent or the date a file was received coupled with keywords.
22. The process of identifying, collecting and preserving ESI from IRS-issued

computer assets and centrally-managed repositories takes between ten (10) and forty five (45) days on average, depending, on *inter alia*, the number of custodians, scheduling conflicts, access restriction, staffing, network connectivity, and the availability of information technology specialists in particular geographic locations.

23. Once identified, collected and preserved, the process of filtering and processing ESI into a searchable format takes up to ten (10) days per ten (10) gigabytes (GB) of data on average, depending on staffing, software malfunction, prioritized cases, and/or credential compatibility.
24. Once filtered and processed into searchable format, ESI is searched using search terms and/or a criteria range search. Depending on the amount of ESI and the complexity of the search terms and criteria range, the process takes between one (1) and three (3) days per one hundred gigabytes (100) on average.
25. Once searching is complete, responsive files are advanced to IRS Chief Counsel attorneys for manual review to determine whether the files are responsive and whether some or all of the information in the responsive files is exempt from disclosure.
26. I am not aware of any prior instance in which the IRS has undertaken an ESI collection and review process involving as large a number of geographically-dispersed employees as would be required to respond to JW's FOIA requests. Therefore, it is difficult to estimate with precision how long it would take to collect,

process, search, and review documents to respond to JW's FOIA requests.

27. Assuming that the IRS had sufficient resources to hire information technology specialists dedicated to each phase of the identification, collection, preservation and processing on a full-time basis (which it does not), it would likely take several years to fully respond to JW's FOIA request.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 26th day of September, 2014.



---

Neguel Hicks  
Senior Level Counsel  
Director of Electronic Discovery  
Office of Associate Chief Counsel  
(Procedure and Administration)  
Washington, D.C.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC. )  
)  
*Plaintiff,* )  
)  
v. )  
)  
INTERNAL REVENUE SERVICE )  
)  
*Defendant.* )

Civil Action No. 13-1759-EGS

**[PROPOSED] ORDER**

Upon consideration of Defendant’s Motion for Summary Judgment, Judicial Watch, Inc.’s Opposition to Defendant’s Motion for Summary Judgment, any replies thereto, any oral argument and the record herein, it is hereby

ORDERED that Defendant’s Motion for Summary Judgment is **DENIED**, and it is further

ORDERED that Defendant IRS engage in a reasonably adequate search for records and communications responsive to Plaintiff’s request and produce all such responsive, non-exempt documents to Plaintiff within **thirty (30) days** of entry of this Order.

Dated:

\_\_\_\_\_  
U.S. District Court Judge

Cc: All counsel of record