

WILLAMETTE INDUSTRIES v. UNITED STATES
79-2 U.S.T.C. ¶: 9520 (1979)
44 AFTR2d 79-5321 (1979)

Editor's Summary

Key Topics

FREEDOM OF INFORMATION ACT

- Timber valuation materials

VALUATION

- Fair market Value
- How determined

Facts

The taxpayer is disputing certain timber valuations with the Government and requested under the Freedom of Information Act, 5 U.S.C. § 552, to obtain from the files of the Internal Revenue Service offices in Portland; Seattle, Shreveport, New Orleans, and Houston copies of essentially all materials for the years 1970 to 1976 related to the valuation of timber and timberland. The Government refused the request on the grounds that the materials contain tax return information protected from disclosure by Section 6103. The taxpayer sued to compel release of the requested materials.

District Court

Held: Government was ordered to provide detailed information concerning the materials in question to allow the Court to determine whether protected information can be segregated from nonprotected information. In so ordering, the Court rejected the Government's argument that all of the requested material was exempted third party tax return information. The taxpayer's justification for release of the information indicated to the Court that the material requested may contain disclosable information;

Case Text

Opinion and Order

Burns, District Judge: This is a Freedom of Information Act suit, 5 U.S.C. § 552. It is also another in an unfortunately lengthening series of squabbles between these parties, Plaintiff seeks to compel the IRS to produce: (1) what plaintiff terms to be "final opinions" of timber valuations; and, (2) information held in certain IRS offices relating to sales of timber between private parties.. Plaintiff says it needs this in connection with its dispute with IRS for certain tax years. Plaintiff, in turn, is in tax court litigation with IRS over what tax it owes (based upon a dispute relating to valuation of timber) for the years 1971-73, In addition, in a different case, *U.S. v. Willamette Industries*, Civ. 78-280, the parties are gearing up to be at odds over timber valuations for

succeeding tax years. That case is now on appeal to the Ninth Circuit. During the course of pretrial discovery, plaintiff served interrogatories upon defendant which sought in part the same information which is at the heart of its FOIA claim.¹

Defendants refused to answer these particular interrogatories on the grounds that the information was exempt by law from disclosure, 5 U.S.C. § 552(b)(3), as "return information" within the meaning of 26 U.S.C. § 6103 and accompanying regulations. Plaintiff moved to compel answers to the disputed interrogatories. Defendant then moved for summary judgment, urging the same grounds as previously stated. The parties agree that this latter motion superseded the earlier motion to compel.

Oral argument was heard February 22, 1979. At the hearing plaintiff augmented the record by filing the depositions of several of defendants' employees.² Plaintiff also supplied me with a transcript of the trial of its companion (tax court) case. It is conceded that defendants have made no effort to undertake a search of its files for the requested information. Defendants argue that the information is nondisclosable, hence such a search would be burdensome as well as fruitless.

As mentioned, these same parties have been before this court before and have been involved in tax court proceedings³ I have had occasion to comment before upon the adamancy of their positions.⁴ I have also commented, and I reiterate it, that there are times when cooperation and good will achieve results superior to those which an impartial tribunal must impose. When bound by rules of law. Nevertheless, the parties are before me again and I must rule upon a close question of law, which, to some extent, involves public policy.

STANDARD OF REVIEW Summary judgment is authorized only if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Rule 56, Fed. R. Civ. P. Upon such a motion my function is limited to ascertaining whether any pertinent factual controversy exists. In reviewing the record--in this case, consisting primarily of an affidavit and several depositions--I must give Willamette (as the party against whom the motion is made) the most favorable view of the record should there be doubt as to the sufficiency or a factual showing.

Further, in a suit brought under the Freedom of Information Act,

The burden of proof is on the agency claiming exemptions from the statutorily-imposed duty to disclose information, and, the court must apply that burden with an awareness that the plaintiff is at a distinct disadvantage in attempting to controvert the agency's claims [cites omitted]. *Ollestad v. Kelly*, 573 F. 2d 1109, 1110 (9th Cir. 1978).

Employing these standards, I conclude that defendants have failed to meet their burden in this context. Quite simply, the affidavit and depositions, which repeat the legal conclusion that all the requested material is exempted third party return information, fail, in a summary judgment context, to establish defendants' contention. Apart from the conceded tautology that return information is return information and nondisclosable, which is not in dispute, the depositions suggest that the taxpayer audit files, and independently compiled files, may contain disclosable

information. In Short, absent some factual showing by defendants to carry their burden, I have no basis upon which to conclude that there is no disclosable material or segregable material contained within otherwise exempt documents or files. Absent agency examination of at least a representative number of files, there is insufficient evidentiary foundation for the claim that *only* return information is within taxpayer files.

Nor is there adequate support for the related proposition that *everything* that ever finds its way into an IRS file becomes return information and inviolate from disclosure. Without such a record I can reach no conclusion whether some information therein might not be otherwise "reasonably segregable" material under § 552(b) of the FOIA. I therefore reserve consideration of the question whether the provisions of the Internal Revenue Code insulate return information from the general policy of disclosure through segregation and sanitization whenever reasonably possible. Hence, I deny, for the time being, the motion of summary judgment.

MEETING THE BURDEN OF NON-DISCLOSABILITY Defendants argue strongly that the information which plaintiff seeks resides in uncollected form in the files of numerous unrelated taxpayers. If indeed such timber sale information has not been collated and reduced to a usable form by IRS officials for use in assessing the accuracy of claimed tax deductions in connection with land and timber allowances, then defendants' argument may be well taken. Such a search may require an unusual commitment of agency personnel resources. In and of itself, however, this is not an adequate basis upon which to grant defendants' motion for summary judgment. The inconvenience upon the agency is acknowledged. It may even forward the purposes of the Act. In certain circumstances the degree of difficulty required to sift through files for disclosable documents might prompt an agency to narrow its exemption claims, thus improving the adversarial position of the FOIA plaintiff, who would otherwise face an impasse with a recalcitrant agency. *Mead Data Center, Inc. v. U.S.*, 566 F. 2d 242, 262-3 (D.C. Cir. 1977).

I do not rule here that that is the situation before me. I cannot now conclude that intransigence or bad faith permeates the claim of a blanket exemption which IRS asserts. Instead I will try to fashion an order which will enable the parties to establish a record upon which I may reach an informed conclusion. I do not yet propose (since I do not yet think and fervently hope it will not be necessary) that I undertake review of the files *in camera*. The FOIA places the burden of justifying nondisclosure on the agency claiming applicability of an exemption. Congress did not contemplate wholesale judicial review of agency files. This untoward task may not be shifted to the courts by government agencies who make sweeping, less than scrupulous claims of exemption, and then submit documents to the court for *in camera* review, tacitly understanding that the resulting bottleneck and delay may prove more effective in dissuading FOIA plaintiffs than would expeditious and discriminating agency action upon requests for information,⁵ *Mead Data Cent.*, *supra*, at 260.

Instead, the court may employ other, less burdensome means by which to intelligently evaluate defendants' exemption claims. See generally, *Ollestad, supra*; *EPA v. Mink*, 410 U.S. 73, 93 (1973). For example, a court may "require defendants to prepare an index with detailed justifications for withholding documents or it may require more detailed affidavits or testimony justifying continued retention of requested documents." *Ollestad, supra*.

Under the circumstances of this case, and in consideration of the kinds of files and documents which must be searched I believe that defendants should undertake a search of representative files in each of the several IRS offices described in the interrogatories, starting with the Portland office. Defendants then should provide the court with the following information: (1) the total number of all files which would fall within the scope of the interrogatory; (2) how many such files in each office were actually searched in order to supply the sample; and, (3) the time taken already for such search, plus an estimate of the time necessary to complete a similar survey of the total number of files. Of those files actually researched, the agency should provide a description of all material in the file including which parts, if any, of the withheld documents are non-exempt. The agency should offer adequate justification for continuing to withhold all information which it maintains is exempt return information or disclose it forthwith to plaintiff.

In addition to a statement of its reasons, the agency should describe what proportion of the information researched is nonexempt or possibly segregable, to aid the court in its determination of segregability should the matter need resolution after the submission of the information herein ordered. This information is to be made available within 30 days in the form of affidavits submitted by the proper officer in each IRS office (starting in the Portland office) upon diligent review of the files by personnel under such officer's direct control and supervision, It is my present intention that once the defendants have provided the description, justification and supplemental affidavits hereby ordered that I will not need to conduct my own *in camera* inspection unless the response is vague, impermissibly broad, in bad faith, or otherwise not in keeping with the express intent and spirit of accommodation sought by this order. It is so ORDERED.

It is further ORDERED that defendants' motion for summary judgment is denied for the time being.

1. The specific records requested by plaintiff and at issue in this action are described in paragraphs 8(b) and 8(c) of the complaint as follows:

(b) Copies of final opinions by defendants' Portland, Seattle, Shreveport, New Orleans, and Houston offices at any time during the years 1970 and 1976, inclusive, made in the adjudication of any income, estate or gift tax cases involving the fair market value of timber, together with the following information associated with those opinions; the names and addresses of the taxpayers; the volume of timber involved in each case by species, land value allocations, the fair market value determined by defendants for each specie, the valuation dates and the specific area in which the timber was located;

(c) Copies of all records in defendants' Portland, Seattle, Shreveport, New Orleans and Houston offices relating to the sales of timber, stumpage or timberlands between private parties during the years 1970 to 1976 inclusive, including the following:

- (1) Character and quality of the timber as determined by species, age, size, condition, etc.;
- (2) The quantity of timber per acre, the total quantity involved, and the location of the timber in question with reference to other timber;

(3) Accessibility of the timber (location with reference to distance from a common carrier, the topography and other features of the ground upon which the timber stands and over which it must be transported in process of exploitation, the probable costs of exploitation and the state of industrial development of the locality); and

(4) The freight rates by common carrier to important markets. Reference: Income Tax Regulations 1.611-3(f)(I).

2. Since the taking of the depositions, defendants have agreed to release certain information referred to in the deposition of F. Schrom. The parties agree that the record does not adequately reflect the extent of the requested information which may have thus been released. This order deals with the more general claim of exemption as raised in the context of defendants' motion for summary judgment.

3. *Willamette Industries v. Comm'r*, USTC, NO. 5083-76, 5096-76, 5097-76 and 5098-76.

4. Order of this court, February 19 1979.

5. I do not suggest, of course, that the defendants' conduct and assertions as shown here fits this unflattering description, which is borrowed largely from thrust of the *Mead* opinion.