The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SUSAN B. LONG, et al., Plaintiffs, v. UNITED STATES INTERNAL REVENUE SERVICE, Defendant.	No. C 74-724S **REPLY IN SUPPORT OF MOTION OF PLAINTIFF SUSAN B. LONG TO ENFORCE THIS COURT'S 2006 ORDERS AND ITS 1976 CONSENT ORDER AND OPPOSITION TO IRS MOTION TO MODIFY CONSENT ORDER** **NOTE ON MOTION CALENDAR: March 28, 2008**

I. INTRODUCTION

The IRS has responded to Ms. Long's motion to enforce its obligations under the Consent Order and this Court's 2006 Orders with a belated request that the Consent Order be amended to curtail substantially Ms. Long's access to data about IRS examination of tax returns. The IRS does not contest Ms. Long's factual showing that it incompletely and belatedly provided the Table 37 reports this Court ordered it to produce in 2006, and that it has violated this Court's direct order that it not redact Table 37 without first seeking permission from this Court to do so. Rather than explaining its defiance of the Court's orders directing it how to proceed if it wished to redact Table 37, the agency repeats the

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unconvincing argument it made in 2006 that the enactment of 26 U.S.C. § 6103 reflected a fundamental change in the law with respect to Ms. Long's entitlement to compilations of IRS data. That argument is contrary to the uniform body of case law—cited by the IRS itself—demonstrating that the Haskell Amendment to § 6103 was designed precisely to avoid any change in the law with respect to public release of such data compilations.

The rest of the IRS's arguments are no more persuasive. It fails to provide meaningful responses to Ms. Long's demonstration that its reliance on FOIA Exemption 5 is both waived and meritless under governing Ninth Circuit case law. Its excuses for not providing other statistical tables sought by Ms. Long, and for providing data on paper rather than electronically, reflect a basic misunderstanding of the scope of the Consent Order. Finally, the IRS's request that the Order be amended is not only unjustified by the so-called change in the law the IRS invokes, but would transform the Consent Order from an affirmance of Ms. Long's rights under FOIA into a tool for limiting those rights.

II. ARGUMENT

A. The IRS's "Return Information" Arguments Are Meritless.

1. The IRS Misconstrues Section 6103.

Both the IRS's opposition to Ms. Long's motion and its own motion to amend the consent decree rely on the argument that release of Table 37 and similar data without redaction of cells of one or two would violate the prohibition on release of "return information" in 26 U.S.C. § 6103. When the IRS opposed Ms. Long's original motion to enforce the consent decree in 2006, its main argument for why release of cells of one or two would violate §6103 was that the identity of taxpayers could be inferred from such data. It was this argument that the Court termed "speculative" in its April 2006 Order (at

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5). Now the IRS has shifted emphasis. It makes no attempt to claim that release of the data would identify taxpayers, but argues that the cells of one or two are themselves "return information," regardless of whether any taxpayers can be identified. The IRS's current argument distorts both Ms. Long's position and the meaning of the Haskell Amendment to § 6103, and turns the legislative history of the Amendment on its head.

The IRS mistakenly believes Ms. Long is making the argument, rejected in *Church of Scientology of California v. IRS*, 484 U.S. 9 (1987), and *Long v. IRS*, 891 F.2d 222 (9th Cir. 1989), that "redaction" of taxpayer identities from return information renders § 6103 inapplicable. *See* IRS Mem. 10-11. The IRS's view misses the point, which is that the Haskell amendment provides that tabulations of data in a form that cannot identify taxpayers are not return information. 26 U.S.C. § 6103(b). The very cases cited by the IRS *unanimously* emphasize that the Haskell amendment provides for the disclosure of statistical tabulations which are not associated with or do not identify particular taxpayers. *King v. IRS*, 688 F.2d 488, 493 (7th Cir. 1982); *accord Church of Scientology*, 484 U.S. at 17 (Amendment provides for disclosure of statistical studies and compilations); *Long*, 891 F.2d at 224 (a reformulated data base is eligible for disclosure under the Haskell Amendment); *Church of Scientology of Texas v. IRS*, 816 F. Supp. 1138, 1150 (W.D. Tex. 1993) (Haskell Amendment applies to statistical studies, compilations and other similar reformulation of return information). The description in the case law of what the Haskell Amendment excludes from the definition of return information precisely fits Table 37 and similar data compilations.

The IRS cites not a single case holding that anything remotely comparable to Table 37 is return information. The principal decision it cites as embodying the correct

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interpretation of § 6103, *Chamberlain v. Kurtz*, 589 F.2d 827 (5th Cir. 1979), did not even touch on statistical reports, but held that work papers pertaining to a specific taxpayer are return information. Similarly, every other opinion the government cites deals not with statistical reports, but with taxpayer-specific files (the Supreme Court and D.C. Circuit *Scientology* opinions); correspondence, memoranda, and forms discussing audits of particular taxpayers (*King*) and individual tax returns (the Texas *Scientology* decision). In each case, the courts held only that redaction of the taxpayer identifying information present in the return information requested would not make it subject to disclosure.

Here, however, the issue is not whether *redaction* of identifying information from the records requested by Ms. Long takes them outside the category of return information. The records contain no identifying information to redact, because the IRS has already, in the words of the case law, reformulated the information into an anonymous statistical compilation. That is exactly what all the decisions say the Haskell Amendment was intended to cover. Indeed, the IRS s own description of the process of creating Table 37 confirms the applicability of the Haskell Amendment. As the IRS explains, the underlying AIMS database contains information about the audits of specific, identified taxpayers. When Table 37 is compiled, *some* of that information not including any identifying information is extracted by the reports program that generates Table 37 (IRS Mem. 7), which then calculates the values presented in Table 37 s various columns and rows by adding together the values reported for individual audits. *Id.* The resulting report is a statistical tabulation, reformulation, compilation, or amalgamation of data by any definition of those words. Table 37 therefore falls within the scope of the Haskell Amendment and, because the IRS has now abandoned any effort

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to establish that disclosure of cells that report values associated with one or two taxpayers would threaten to disclose their identities, it follows that the report in its entirety is not return information and may be disclosed without redaction under § 6103.[1]

The IRS appears to contend that, to fall under the Haskell Amendment, each and every value in a compilation or tabulation of data must relate to more than one taxpayer; otherwise, the government contends, that particular value is not itself an amalgamation or a reformulation. IRS Mem. 6, 13. But the IRS cites no authority to support its position that each number in a statistical tabulation of data must be different from a value found in the original return information in order to fall within the Haskell Amendment. Indeed, one of the IRS s leading authorities, *King*, characterizes the position now taken by the IRS as extreme and declines to adopt it. 688 F.2d at 491.[2] All that is required by the precedents interpreting § 6103 is that the data as a whole reflect reformulation or compilation (which Table 37 undoubtedly does), and that it not identify particular taxpayers (which Table 37 does not do, as the IRS now apparently concedes).

Moreover, the IRS s argument does not even support its position. At best, if accepted, the IRS s reasoning would require redaction only of cells of one, not cells of one or two. The IRS at one point appears to acknowledge this. IRS Mem. 13 (Clearly, then, statistical tables that contain cells of one taxpayer may not be disclosed without running afoul of section 6103.). But the IRS then makes the unexplained leap

[1] The IRS suggests in passing that Table 37 is not subject to the Haskell Amendment because it was not prepared pursuant to 26 U.S.C. § 6108. But although § 6108 provides that certain types of statistical reports are not subject to the prohibition on release of return information (so long as they do not identify taxpayers), the Haskell Amendment's exclusion of statistical compilations from the definition of "return information" is not limited to reports prepared pursuant to § 6108. *See Church of Scientology of Cal. v. IRS*, 792 F.2d 153, 161 (D.C. Cir. 1986), *aff'd* 484 U.S. 9 (1987).

[2] The IRS's position is also inconsistent with the D.C. Circuit's recognition in *Scientology* that the Amendment applies to the "tax model," which is a reformulated individual tax return, with some value identical to those in the original but all identifying features eliminated. *See* 792 F.2d at 162.

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that [t]he Service, therefore, should be permitted to redact cells of one *or two* from any reports produced to plaintiff. *Id.* (emphasis added). Values in cells of two are amalgamated even by the IRS s definition, in that they involve the addition of two individual values. The IRS does not explain either why that amalgamation is not sufficient, or why, if it is not, the amalgamation of values from three, four or 10,000 taxpayers *is* sufficient. Nor does the government s theory explain why values in rows and columns of totals must be redacted, particularly in cases where more than one value contributing to the total has been redacted, making reverse engineering of the values in the cells of one impossible. Indeed, the government offers *no* response to Ms. Long s demonstration that, even on its own theory, it has over-redacted totals. *See* Mot. 14 n.3.[3]

Although the IRS asserts that Ms. Long asks the court to ignore the legislative history of section 6103 (IRS Mem. 12), its own description of the legislative history contradicts its litigation position. As the government correctly points out, the purpose of the Haskell Amendment was *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*. IRS Mem. 11 (quoting 122 Cong. Rec. S 12606 (July 27, 1976) (remarks of Sen. Haskell)) (emphasis added). Oddly, the government seems not to notice that the statistical reports

[3] The government's position also fails to explain why cells with data on one or two taxpayers have been published by the IRS in its public statistical reports, why the IRS continues to provide Ms. Long with other reports containing unredacted cells of one and two, and why the IRS's declarant, Ms. Gulas, herself attached extracts of Table 36 with unredacted cells of one to her declaration. *See* Further Declaration of Susan B. Long in Support of Motion to Enforce this Court's 2006 Orders and Its 1976 Consent Order and Opposition to IRS Motion to Modify Consent Order ("5th Long Dec.") (filed herewith) ¶¶ 2-5. If, as the IRS argues, the "reformulation" required by *Church of Scientology* and its progeny means that numbers pertaining to a single return cannot be included in a statistical report unless they have been added to numbers associated with other returns, then the information in these examples has no more been reformulated than the numbers extracted from the AIMS database and reported in Table 37.

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covered by the Consent Order (which it now acknowledges contained the same data as Table 37) were prepared by the IRS and disclosed to outside parties at the time § 6103 was enacted. Thus, by the IRS s own account, *no change in the law* with respect to the availability of precisely this type of data was intended a conclusion that is fundamentally at odds with the IRS s entire argument for amending the Consent Order.

2. The Burdens Claimed by the IRS Do Not Justify Amending the Consent Order.

The IRS offers no excuse for not complying with this Court's direct order that it seek amendment of the Consent Order *before* redacting Table 37. The IRS does not contest Ms. Long's demonstration that it did just the opposite of what this Court ordered: it redacted first and asked permission only much, much later. Long after the meet and confer process ordered by this Court had ended, the government continued its unilateral defiance of the Court's order, and finally moved to amend the Consent Order only after Ms. Long sought relief from the Court. The Court should not reward such intransigence by retroactively validating the unauthorized redaction of Table 37. After all, a motion to alter or amend a judgment must be brought within a "reasonable time." Fed. R. Civ. P. 60(c). Even assuming it were reasonable for the IRS to bring a motion in 2008 to amend a judgment entered in 1976 based on a supposed change of law that occurred in 1976, it was hardly reasonable for the IRS to wait over a year after this Court specifically ordered that it file a motion to amend the Consent Order if it wished to redact Table 37.

In any event, the IRS has not demonstrated that redaction of Table 37, even if it were necessary, is so burdensome, and the resulting information so meaningless, that the agency should be excused from segregating exempt and non-exempt information. The IRS does not even address Ninth Circuit case law on the point, which places on the agency a

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heavy burden of demonstrating that the cost of redaction would be extreme and that informational value of the resulting document would be minimal. *See Willamette Indus., Inc. v. United States*, 689 F.2d 865, 867 (9th Cir. 1982) (citing *Long v. IRS*, 596 F.2d 362 (9th Cir. 1979)). The IRS has not met that burden. First, as Ms. Long's most recent declaration demonstrates, writing a computer program to redact Table 37 after it has been created, incorporating the detailed redaction rules set forth in the Gulas Declaration, would be a relatively simple matter and would avoid the time-consuming manual process chosen by the IRS. 5th Long Dec. ¶¶ 43-45.[4] Second, although the redacted information is definitely less useful to Ms. Long than unredacted information (particularly in light of the IRS's unjustified over-redaction of rows and columns containing totals), Table 37, even as redacted, contains a wealth of usable information about IRS audits. The IRS, for example, does not redact figures for applied examiner time in Table 37, which provide detailed information on the IRS's allocation of its examination resources. 5th Long Dec. ¶ 48. The redacted Table 37 is hardly comparable to the materials in the cases cited by the IRS, which the courts found would be unintelligible if redacted. *See Assassination Archives & Research Ctr. v. CIA*, 177 F. Supp. 2d 1, 9 (D.D.C. 2001); *FlightSafety Servs. Corp. v. Dep t of Labor*, 326 F.3d 607, 612-13 (5th Cir. 2003).

The IRS's bald assertion that it should be excused from producing Table 37 because "the government has found nothing to show that plaintiff is actually using the data

[4] The IRS's explanation that it employs manual redaction because its electronic redaction software is only licensed for use by one of its offices, and it has chosen to delegate the redaction task to another office, is irrelevant. Although the Court may not be able to direct the IRS to acquire any redaction technology, it can certainly hold the IRS accountable for its own choice to assign the redaction task to an office that lacks access to the software the IRS possesses for the job. In any event, as Ms. Long explains, the most effective way to redact Table 37 would be to write a new computer program for that purpose, not to use the proprietary software package the IRS describes. 5th Long Dec. ¶ 45. Again, the Court may not be able to order the IRS to write such a program, but it can certainly consider the feasibility of that alternative in considering the IRS's claim that it cannot practicably redact Table 37.

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she claims is so vital to the public," IRS Mem. 15, is not only irrelevant but false. TRAC used the Table 37 data in preparing a special report in December 2006 on declines in IRS corporate audits (http://trac.syr.edu/tracirs/latest/174/) and in its comprehensive April 2007 update to its IRS website (*see* http://tracfed.syr.edu/notices/whatsnew/email.20070412.tracfed.html), and it is currently using the data to develop another update to its IRS website slated for release in April 2008. 5th Long Dec. ¶ 46-47. Ms. Long's entitlement to the information is not dependent on whether the IRS ever "finds" the reports her organization prepares with it, but the IRS's claim that it has never "found" those reports is contradicted by the public record, which shows that the IRS entered into a public debate in the pages of the New York Times over the significance of TRAC's findings. *See* "I.R.S. Is Spending Less Time Scrutinizing Big Businesses," N.Y. Times (Dec. 21, 2006).

B. The IRS Fails to Justify Its Belated Invocation of FOIA Exemption 5.

As explained in Plaintiff's motion, the IRS has waived its claim that versions of Table 37 are exempt from disclosure under FOIA Exemption 5. The agency responds that its failure to assert Exemption 5 in its original answer in this case in 1974 was not a waiver. IRS Mem. 23. But Ms. Long is not claiming that the waiver occurred in 1974. The waiver was in 2006, when the agency failed to raise Exemption 5 as a defense to her motions seeking production of Table 37. The IRS ignores both Ms. Long's argument and the substantial supporting authority she cited on this point. *See* Mot. 16. Its argument that there was no waiver because "Table 37 was not identified in the consent order and did not exist at the time it was entered" (IRS Mem. 23) misses the point. Table 37 did exist when Ms. Long specifically sought it in 2006, and the IRS had every incentive and opportunity to argue then that FOIA's deliberative process privilege applied to Table 37. The IRS

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elected not to do so. Instead, it asserted the exemption for the first time only when Ms. Long attempted to get it to obey the 2006 Orders. Because the IRS did not assert Exemption 5 as a ground for withholding Table 37 when the issue was before the Court in 2006, it has waived its right to rely on the exemption.

Even if the proper focus were on the date of the Consent Order rather than the IRS's waiver in 2006, the law of the case doctrine would bar the IRS from asserting that Table 37 is exempt under FOIA. The doctrine precludes a court "from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case," *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000), and it applies fully to issues decided by consent decrees. *See County of Suffolk v. Stone & Webster Eng'g Co.*, 106 F.3d 1112, 1117 (2d Cir. 1997). Here, it is the law of this case that information within the scope of the Consent Order is not exempt from disclosure under FOIA, as the Consent Order entered by the Court specifically recites. Consent Order at ¶ 1. The IRS had its chance to argue, before entry of the Consent Order, that some or all of the data covered by the Order fell within Exemption 5: the current statutory language was enacted in 1967, and has remained the same since then. *Compare* 5 U.S.C. § 552(b)(5) *with* Pub. L. 90-23 (June 5, 1967). It is also the law of the case that the information contained in Table 37 falls within the scope of the Consent Order. That issue was decided conclusively in the 2006 Orders, which squarely held that Table 37 is similar to the reports specified in the Consent Order. The agency's argument that some versions of Table 37 are exempt under FOIA is thus an impermissible attempt to relitigate issues that have already been conclusively resolved.[5]

[5] A court may depart from the law of the case only where "1) the first decision was clearly erroneous; 2) an

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Even if the Court were to consider the IRS's arguments, the Exemption 5 claim has no merit. The IRS's recitation of a few generalizations about the deliberative process privilege (IRS Mem. 22-23) fails utterly to explain why the preliminary year-end runs of Table 37 fall within the privilege. The deliberative process privilege prevents disclosure only of documents that reflect agency predecisional deliberations. *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). The purpose of this privilege is "to prevent injury to the quality of agency decisions" and assure candid internal debate, by protecting deliberations before a decision is reached. *Id.* at 150-51.[6] Consistent with this purpose, the privilege applies only to documents that are both "predecisional" *and* "deliberative." *Assembly of The State of California v. U.S. Dept. of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992). Defendant has the burden of establishing both prongs of the exemption. 5 U.S.C. § 552(a)(4)(B). It has not satisfied that burden here.

First, the preliminary Table 37 reports are not predecisional. A document is predecisional if it was "prepared in order to assist an agency decision-maker in arriving at his decision." *Assembly*, 968 F.2d at 921, quoting *Renegotiation Board v. Grumman Aircraft*, 421 U.S. 168, 184 (1975). The agency invoking the privilege must establish "the

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intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) None of these conditions exists here. There has been no intervening change in the law: as noted above, the FOIA exemption relied on by the IRS predates the Consent Order. Nor does the agency explain why it could not have raised its arguments related to Table 37 when the issue was before the Court in 2006. Legal or factual arguments that were available previously cannot be used to justify deviating from the law of the case doctrine. *See, e.g., Magnesystems, Inc. v. Nikken, Inc.*, 933 F. Supp. 945 (C.D. Cal. 1996) (rejecting defendant's post-remand attempt to refute liability based on grounds that could have been, but were not, raised prior to remand).

[6] It is ***not*** the purpose of the privilege to protect the government from bad publicity, as the IRS suggests. IRS Mem. 23 (arguing Exemption 5 is intended to prevent "the public [from] being misled as to the efficiency and productivity of the agency"). The trial court decision that the agency cites for this proposition does not say so; it notes only that the deliberative process privilege benefits the public by assuring that it is not misled by preliminary rationales that do not reflect "the ultimate reasons" for an agency's course of action. *See AFGE v. HHS*, 63 F. Supp. 2d 104, 107 (D. Mass. 1999).

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character of the decision, the deliberative process involved, and the role played by the documents in the course of that process." *Bay Area Lawyers Alliance for Nuclear Arms Control v. Dept. of State*, 818 F. Supp. 1291, 1297 (N.D. Cal. 1992) (citation omitted). The agency explanation must be specific, factual, and tailored. *Weiner v. FBI*, 943 F.2d 972, 977-80 (9th Cir. 1991). The Court must be "able to pinpoint an agency decision or policy to which the document contributed." *Paisley v. C.I.A.*, 712 F.2d 686, 698 (D.C.Cir.1983). Here, the IRS has failed to identify ***any*** agency decision to which the preliminary runs of Table 37 apply. Nor has it explained even in general terms (much less with the required specificity) how this data contributed to some decisional process.

For the privilege to apply, the documents must also be "deliberative." "Factual material that does not reveal the deliberative process is not protected by this exemption." *National Wildlife Federation v. United States Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988); *Greenpeace v. National Marine Fisheries Serv.*, 198 F.R.D. 540, 543 (W.D. Wash. 2000) ("factual material is protected only to the extent it reflects an agency's 'preliminary positions or ruminations about how to exercise discretion on some policy matter.'").[7] Here, the IRS ***agrees*** that "[g]enerally, exemption 5's application can often be resolved by the simple test that factual material must be disclosed but advice and recommendations may be withheld." Opp. at 22. But it argues this rule does not apply to certain facts, such as budget and cost formulations, "[w]here the numbers themselves are recommendations, and not final determinations." *Id.* at 22-23. While this assertion may be true, it has no relevance here. Table 37 does not contain "deliberative" facts. It is simply a statistical

[7] *See also, e.g., Pacific Molasses Co. v. NLRB* 577 F.2d 1172, 1183 (5th Cir. 1978) ("mechanically compiled statistical report" containing no subjective conclusions not protected under Exemption 5); *Southwest Ctr. for Biological Diversity v. USDA*, 170 F. Supp. 2d 931, 939-40 (D. Ariz. 2000) (raw data collected by Forest Service researchers not exempt), *aff'd*, 314 F.3d 1060 (9th Cir. 2002).

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aggregate of IRS examination practices the number and types of returns examined, the hours spent on the examinations, and the actual results of such examinations. The report contains no recommendation, no deliberation, no commentary, and no material reflecting the agency's consideration of any matter of law or policy. That some versions of this table are preliminary or contain raw data does not deprive them of their fundamentally factual nature, or convert them into deliberative documents. *See, e.g., NRDC v. National Marine Fisheries Serv.*, 409 F. Supp. 2d 379, 386 (S.D.N.Y. 2006) (preliminary findings as to objective facts are not shielded by Exemption 5, because an agency does not have the same discretion in determining facts as determining policy.)

Indeed, as Ms. Long explained in her opening memorandum, and as the agency does not dispute, the Ninth Circuit has squarely rejected the notion that statistical data may be withheld under Exemption 5 simply because its production would reveal adjustments made to the data by the agency. *See Carter v. U.S. Dept. of Commerce*, 307 F.3d 1084 (9th Cir. 2002); *Assembly*, 968 F.2d 916. The IRS does not even cite these decisions, let alone attempt to distinguish them. The agency has provided no basis for this Court to find that the preliminary versions of Table 37 are either predecisional or deliberative.

C. The IRS Should Produce Table 37 Promptly and Completely.

Beyond its argument that cells of one and two must be redacted and its invocation of Exemption 5 for the preliminary year-end tables, the IRS offers no reason to relieve it of its obligation to produce Table 37, and no excuse for its delayed and incomplete production. Indeed, the IRS now concedes that the Court was correct in 2006 in concluding that Table 37 is similar to the reports specified in the Consent Order. The IRS points to no reason other than its unnecessary and cumbersome redaction process for what

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it concedes are lengthy delays in providing Table 37 to Ms. Long. And the IRS does not even respond, let alone offer a defense, to Ms. Long's demonstration that the copies of Table 37 that she has been provided are incomplete in that they are missing hundreds of pages, including the W&I inventory tables that the IRS has told her Table 37 contains but that have not been included in any of the copies of Table 37 provided to her.

Thus, once the IRS's claim that § 6103 requires redaction of cells of one and two from Table 37 has been rejected, it follows not only that the IRS's request that the Consent Order be amended must be denied, but also that Ms. Long's motion to compel prompt and complete production of Table 37 should be granted.

D. The Consent Order Requires Production of Tables 38, 35, and 36.

The IRS contends that Ms. Long may not request Tables 38, 35 and 36 under the Consent Order because she (with TRAC co-director David Burnham) submitted FOIA requests for the materials. Thus, according to the IRS, her sole recourse is to bring a new FOIA action, in which Mr. Burnham must be named as a co-plaintiff. IRS Mem. 20-22.

The IRS's argument is groundless. To begin with, the Consent Order states that Ms. Long is entitled to the materials it covers "upon proper request." Given that the Consent Order itself implements Ms. Long's rights under FOIA, it seems only natural to conclude that a FOIA request is a "proper request" under the Order. Indeed, Ms. Long's requests for Table 37, which this Court ordered the IRS to satisfy in its April 2006 Order, also invoked FOIA. Moreover, even if there were any doubt that a FOIA request is a "proper request" under the Consent Order, Ms. Long's requests for Tables 38, 35, and 36 specifically invoked this Court's order in addition to FOIA. 4th Long Dec. (Dkt. 65, filed Feb. 11, 2008) Exhs. 8, 10 ("We also draw your attention to the standing court injunction

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one of us (Long) has prohibiting withholding of this information, a copy of which we have previously provided you under cover of our previous letter of July 2, 2004. Your prompt release of this information is therefore required."). Having expressly put the IRS on notice that she was requesting these reports under the Consent Order, Ms. Long can hardly be precluded from seeking to enforce the Order just because she also invoked her rights under FOIA itself. Nor does the IRS cite any authority, or provide any reason, for its assertion that Ms. Long can only seek access to the requested materials in an action to which Mr. Burnham is also a party. Nowhere does the statute require that *all* requesters must join in an action seeking release of documents under FOIA.

The IRS's defense of its failure to provide Ms. Long with Tables 38, 35, and 36 thus stands or falls on whether those reports are "similar" to the reports listed in the Consent Order. As to Table 36, the IRS has no argument, because it concedes that Table 36 contains data on the same types of examinations covered by Table 37, and it admits that Table 37 *is* similar to the reports under the Consent Order. The IRS contends, however, that Table 36 is "merely duplicative of the inventory and time tables of Table 37." IRS Mem. 21. That is not so.[8] Rather, Table 36 provides a breakdown of examination time spent at local IRS field offices, which is not found in Table 37. 5th Long Dec. ¶¶ 8-9.[9] As for the government's claim that providing Table 36 would be burdensome because of its length, that would only be the case if it required redaction, which even the IRS does not appear to contend (indeed, the sample of Table 36 attached to the Gulas Declaration is not

[8] Even if the report were "duplicative," the Consent Order itself lists a number of "duplicative" reports and requires the IRS to produce *all* of them. 5th Long Dec. ¶¶ 6-7. Duplication is not a ground for withholding reports under the Order.

[9] Indeed, if Table 36 did not provide detail not found in Table 37, the omission of information on additional taxes recommended (which the IRS says is necessary "due to the prohibition on the use of enforcement data to evaluate personnel that was passed in the IRS Restructuring and Reform Act of 1998," IRS Mem. 21), would be an empty gesture.

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redacted even though it contains cells of one).

As for Table 38, and its local analog, Table 35, the IRS's argument that they are not "similar" rests on its assertion that Table 38, unlike Table 37, "is not broken down into income classes or income ranges, or by types of return filed. IRS Mem. 20. Rather, according to the IRS, Table 38 (again unlike Table 37) reports on accomplishments with respect to "programs" that did not exist at the time of the Consent Order, such as "programs" related to the Tax Equity and Fiscal Reform Act of 1986 (TEFRA), "Fed State exchanges," and automated selection of returns for examination. IRS Mem. 20-21.

To begin with, these assertions are not even correct. For example, even the single page of Table 38 that the IRS chose to provide as an exhibit refutes its assertion that Table 38 does not include information broken down by types of return filed, as that page contains information about partnership returns. *See* 5th Long Dec. ¶¶ 14-15. Moreover, Table 37 itself contains detailed information about accomplishments under the same programs referred to in Table 38 (including programs such as TEFRA that did not exist in 1976) yet the IRS concedes that Table 37 is similar to reports produced in 1976. *Id.* at ¶ 16, 19. Moreover, the IRS ignores the fact that programs included in the Table 38 reports are analogous to programs that existed in 1976 and that were the subject of data in reports included in the Consent Order. For example, report NO-CP:A-233, listed in the Consent Order, provided information on examination of returns broken down by the programs used to select them for examination, and included detailed breakdowns on returns selected by computer for audit (analogous to the "automated functions" referred to by the IRS, IRS Mem. 21), as well as returns selected on the basis of information from states (analogous to the "Fed State exchange" program referred to by the IRS, IRS Mem. 20). *See* 5th Long

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Dec. ¶¶ 17-18, 20.

More fundamentally, however, Table 38 is similar to the data included in the reports listed in the Consent Order because it provides tabulations of examination accomplishments, such as number of audits, dollars recommended, and auditor time, by categories of audits, which is precisely what those reports did. 5th Long Dec. ¶¶ 12-13. Moreover, it tabulates that information for all W&I Division examinations performed at IRS "campuses," which account for over three-quarters of all audits of individual tax returns. *Id.*. ¶ 11. The campuses also account for about 9% of smaller corporate tax return audits and 27% of partnership return audits, as well as significant percentages of other return categories. *Id.* Because the reports included in the Consent Order covered audits of personal income tax returns, as well as partnership and corporate tax returns, the breakdowns of examination data for these returns that are included in Table 38 are similar to the data covered by the Consent Decree, and without production of Table 38, Ms. Long will be deprived of detailed information on one of the most important categories of IRS activity—examination of personal income tax returns.[10]

E. The Court Should Require Production of Sample A-CIS Reports.

The IRS contends that even though it has informed Ms. Long that its A-CIS system is used to generate a variety of standardized reports on examinations, the Consent Order provides her with no entitlement to see samples of those reports in order to determine whether they are similar to reports covered by the Consent Order. At the same time, the IRS insists that the Court should find that the one A-CIS report that it has chosen to provide Ms. Long is the *only* similar A-CIS report, and that the Court should modify the

[10] By the IRS's own description, Table 35 contains more detailed local breakdowns of the same type of data as Table 38; thus, Table 35, too, falls within the scope of the Consent Order. 5th Long Dec. ¶ 21.

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Consent Order to *limit* her to that report—all without ever permitting Ms. Long or the Court an opportunity to see whether that report is in fact the only standard A-CIS report that falls within the scope of the Order. If the Consent Order is to mean anything, however, the IRS cannot be permitted to deny Ms. Long the ability to test its assertion that its proposed Consent Order would provide all reports that are similar to those listed in the Order. Significantly, the IRS does not dispute that the Court has ancillary authority to issue orders needed to carry out the intent of the Consent Order. Requiring the provision of samples of the IRS's standard A-CIS report is an appropriate exercise of that authority.[11]

The IRS attempts to muddy the waters by claiming not to know what A-CIS reports Ms. Long seeks samples of, Gulas Dec. ¶ 16, and by going so far as to accuse Ms. Long of falsely denying that she has ever seen the one A-CIS report that the IRS has been providing her. IRS Mem. 16. Lest there be any doubt, Ms. Long does not deny that she has seen the A-CIS report that the IRS has been providing her since last year; indeed, her motion specifically acknowledged being provided that report. Mot. 9 n.2. However, although that report has now been "programmed" and is not an "ad hoc report," it was, as the IRS itself states, "programmed specifically for Ms. Long, to provide her with [certain] fields of information extracted from Table 37." IRS Mem. 16. The report is a truncated version of a "preformatted" report referred to in the IRS's letter to Ms. Long of December 10, 2004 (4th Long Dec., Exh. 11). The December 10, 2004, letter stated that that report was one of a "number" of "preformatted reports," *id.*, and it was those specific "preformatted reports" of which Ms. Long requested sample copies in her letter of December 15, 2004 (4th Long Dec., Exh. 17). Despite follow-up communications between

[11] The IRS also argues that Ms. Long should not receive sample "IRPCA" and "CAR" reports, IRS Mem. 21, but her motion does not seek them.

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Ms. Long and IRS officials, including the IRS's declarant Frank Keith, the IRS has never provided her access to those reports (including the full version of the report on which the A-CIS report she is currently being supplied was based). 5th Long Dec. ¶¶ 22-26. The IRS's assertion that it does not understand what reports she is referring to is not credible.

F. The Consent Order Does Not Bar Production of Electronic Copies.

The IRS's response to Ms. Long's request that the Court require that Table 37 and other electronic reports be provided in electronic form is based entirely on the claim that the Consent Order specifies one and only one means of providing Ms. Long with reports covered by the Order: photocopying. The IRS does not contest that it has the ability to provide electronic copies, that the paper copies it has been providing are not equivalent to electronic records in their usefulness to readers, or that the E-FOIA Amendments would (but for the IRS's reading of the Consent Order) require that such records be made available electronically. Nor does the IRS contest that providing paper copies is slow, cumbersome, and expensive.

The IRS's contention that this wasteful and backward process is necessitated by the terms of the Consent Order reflects a misreading of the Order. Contrary to the IRS's assertion, the Order does not specify that reports may or must only be provided to Ms. Long as *photo*copies. Rather, in describing the basic obligation of the IRS to provide the reports, the Order states only that the IRS must "promptly furnish *copies* of the records" Consent Order ¶ 4 (emphasis added). The Order then goes on to give *Ms. Long* the option, if she chooses, to make her own photocopies in order to avoid any applicable copying charges imposed by the IRS. *Id.*; *see* 5th Long Dec. ¶¶ 49-51. The provision giving Ms. Long that option is the only reference to "photocopies" in the Consent Order.

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Because the term "copies" by itself includes electronic copies, as the E-FOIA Amendments confirm, *see* 5 U.S.C. § 552(a)(3)(B), the terms of the Consent Order do not, as the IRS contends, require that only paper photocopies be provided. Rather, by using the generic term "copies," and also by requiring the IRS to provide data regardless of its "format," Consent Order ¶ 3, the Order should be read to require the IRS to provide copies in whatever form is necessary to convey the full information contained in the original, which, as Ms. Long has explained, necessitates that electronic copies of electronic data compilations be produced. *See* 4th Long Dec. ¶¶ 33-41. Moreover, because the Order is clearly intended to implement and enforce Ms. Long's rights under FOIA, reading it to exclude the method of providing copies that FOIA today requires—that is, electronic copies where requested and feasible—would be counterproductive.

Finally, the IRS's position that the Consent Order requires paper copies only is inconsistent with its own practice of providing Ms. Long with electronic copies of the A-CIS report and the other data it has been providing on a monthly basis—some of which, it has now admitted for the first time, is covered by the Consent Order. 5th Long Dec. ¶ 52. Similarly, until its production of paper copies of Table 37 beginning last August, the IRS had regularly provided Ms. Long with electronic copies of materials covered by the Consent Order. 5th Long Dec. ¶¶ 51, 53. If, as the IRS now contends, the Consent Order was intended to limit Ms. Long's FOIA rights by restricting her to paper copies, the IRS has failed to explain why it has provided data within the scope of the Order electronically.

G. The IRS Has Failed to Justify Its Proposed Amended Order.

The IRS's argument for amendment of the Consent Order rests almost entirely on its assertions that release of Table 37 without redaction would violate § 6103's prohibition

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on release of return information and that redaction of Table 37 is unduly burdensome. The IRS's incorrectness on both counts, as demonstrated above, is sufficient reason to deny its motion. There are other reasons, however, why the IRS's proposed order is unjustified and would be particularly unfair to Ms. Long..

To begin with, the scope of the IRS's proposed order is considerably narrower than the Consent Order. The IRS does not contend that it has proposed to produce reports analogous to each of the reports listed in the Consent Order; rather, it concedes that it does not know what many of the reports encompassed, and it has only attempted to find substitutes for those reports that Ms. Long has previously provided it examples of. Ms. Long has, of course, never been given notice that she must provide copies of each report listed in the Consent Order on pain of losing her entitlement to production of similar reports, so it would hardly be fair to limit her rights now based solely on her purely voluntary effort to assist the IRS by providing it copies of those reports she was able to locate readily. More importantly, under the express terms of the Consent Order, it was incumbent on *the IRS* to retain copies of the listed reports. 5th Long Dec. ¶ 36. The IRS offers no explanation for why it should be permitted to use its failure to abide by its obligation to retain the reports as an excuse for escaping its obligation to provide Ms. Long with similar reports.

Moreover, even as to the reports of which Ms. Long provided the IRS with examples, the IRS does not contend that the reports it wishes to substitute in the amended consent order encompass *all* currently produced reports that contain similar data. At best, the IRS has shown that *some* of the reports it is currently offering to produce provide *some* data similar to *some* of the reports listed in the Consent Order. *See* 5th Long Dec. ¶¶ 38-

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41. The IRS's declarants do not aver that the reports the IRS offers are the only ones currently produced by the IRS that contain similar data. And some of the reports the IRS includes, by its own account, are *not* similar to reports included in the Consent Order. Finally, the principal report that the IRS offers with respect to its examination activity—the A-CIS report programmed for Ms. Long—offers much less detail than Table 37 and the reports listed in the Consent Order to which it is similar.[12] 5th Long Dec. ¶¶ 27-28. Although the IRS contends that the listing of reports no longer produced renders the Consent Order "vague," it provides no reason why that justifies amending it to provide so much less information to Ms. Long.

In addition, the IRS's proposed amendment, unlike the original Consent Order, fails to protect Ms. Long against the possibility that listed reports will be discontinued and replaced by similar reports that have a different designation or provide somewhat different information. The Consent Order provided such protection because it obligated the IRS to provide similar data, "regardless of the format or particular categorization." Consent Order ¶ 3. The IRS's proposed order, by contrast, appears to provide that if the IRS discontinues a particular listed report because it no longer has a "business purpose" for compiling it, it need not provide Ms. Long with similar data that it continues to compile. Only if the IRS itself decides to "substitute" another of its reports for one of the listed reports does the proposed order indicate that the IRS will provide the "substitute" report to Ms. Long. There is no express requirement, however, that the IRS *must* make such a substitution if it continues (for its own purposes) to produce a report similar to a discontinued report.[13]

[12] Notably, the IRS's own table of "similar" reports indicates that Table 37, not the A-CIS report, is the report most similar to most of the Consent Order reports of which the IRS has copies. 5th Long Dec. ¶ 39.

[13] It could be that paragraph 2 of the IRS's proposed order is intended to impose on the IRS an obligation to

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Indeed, because the IRS, by its own account, has no internal business purpose for compiling the A-CIS report that it proposes to provide Ms. Long, but programmed that report specifically to satisfy her requests, the IRS's order would allow the agency to discontinue producing that report at any time, and to offer Ms. Long no substitute for it. In that case, the principal replacement the IRS is offering for Table 37 would be gone.

Finally, the IRS's proposed order has another feature that is in no way comparable to the existing Consent Order: It purports to preclude Ms. Long from obtaining other data outside its scope, regardless of whether that data is properly available to her under FOIA. Specifically, it would preclude her from obtaining not only Table 37, but also Tables 35, 36 and 38 and any other monthly audit statistics, so long as the IRS provides the listed reports. But the IRS has made no effort to demonstrate that Tables 35, 36, and 38 and all other monthly audit statistics are exempt from production under FOIA. Absent such a showing, there can be no conceivable basis for the Court to enter an order *precluding* Ms. Long from obtaining those records, merely because the IRS is under order to produce other information. The original Consent Order, after all, reflected the parties' agreement that the reports listed were not exempt from production under FOIA, and thus that Ms. Long was legally entitled to them; it did not condition their ability on her giving up her FOIA rights to other information. The IRS cites no intervening change in law or fact that would justify transforming an order that confirms Ms. Long's FOIA rights into one that *limits* them.

III. CONCLUSION

For the foregoing reasons, Ms. Long's motion to enforce this Court's orders should be granted, and the IRS's motion to amend the Consent Order should be denied.

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provide a report if that report replaces or otherwise provides the same or similar data as a discontinued report, but if so, the language is very inartfully drafted and fails to achieve that purpose.

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DATED this 19th day of March, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2008, I caused the foregoing document to be electronically filed the with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED at Seattle, Washington this 11th day of February 2008.

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