

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
DENVER DIVISION

JEFFREY T. MAEHR,)	
)	Case No. 1:19-cv-03464-PAB-NRN
Plaintiff,)	
)	
v.)	
)	
INTERNAL REVENUE SERVICE,)	
)	
Defendant.)	
_____)	

THE INTERNAL REVENUE SERVICE’S MOTION FOR SUMMARY JUDGMENT

The Internal Revenue Service (“IRS”) moves for summary judgment on Count I of the Plaintiff’s, Jeffrey T. Maehr (“Maehr” or “Plaintiff”), Amended Complaint pursuant to Federal Rule of Civil Procedure 56 because it has satisfied its duties under the Freedom of Information Act (the “FOIA”). Pursuant to Local Civil Rule 56.1, this motion under Fed. R. Civ. P. 56 for summary judgment includes a statement of undisputed facts, argument, and legal authority incorporated into the motion in lieu of a separate opening brief.

The IRS posits that the only issue in dispute in this case is the adequacy of its search because the Plaintiff failed to allege in the Amended Complaint that the IRS’s **exemptions from disclosure were improper.**¹ Therefore, the main issue the Court is to decide is the reasonableness of the IRS’ search for records in response to the Plaintiff’s FOIA requests.

¹ District Courts are vested with jurisdiction to adjudicate FOIA complaints under 5 U.S.C. § 552(a)(4)(B), which states, “On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin an agency from withholding agency records and to order the production on any agency records *improperly withheld* from the complainant.” (Emphasis added in bolded and underlined font).

In support of its motion, the IRS submits Exhibits A-E, a proposed order, and the declarations of IRS personnel Lisa Soli, Angela Winters, Melidy Prater, and Vikramsing R. Barad.

OVERVIEW

The instant case involves Maehr's repeated FOIA requests to the IRS, five of which are discussed in the context of this case. During this case, the IRS re-released to Maehr in July 2020 over 600 pages of responsive documents that it had released to him in 2014. Overall, the IRS has conducted several searches that have spanned for over a year and a half – since May 2019 through January 2021 – in connection with the FOIA requests at issue and have disclosed all relevant and non-protected documents that it has located through its reasonable searches and inquiries to IRS personnel across Colorado, Ohio, Utah, Tennessee, and Missouri.

Summary judgment in favor of the IRS is warranted because the IRS: (1) conducted an overall reasonable search prior to the beginning of, and during, this case in response to Maehr's several FOIA requests, including Maehr's third party summonsed records that he is seeking which could not be located; (2) re-released the unprotected and responsive documents that were already released to Maehr in 2014 in connection with this case; and (3) properly withheld exempted records, which have not been challenged.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. There are five FOIA requests from the Plaintiff that are relevant to this case. (Soli

At a minimum, the Plaintiff here has failed to sufficiently plead this issue under Fed. R. of Civ. P. 8(a). The IRS asserted the exemptions in 2014 when it released the records with the redactions, which the IRS has re-released again during this lawsuit. The plaintiff never challenged the exemptions in 2014. Indeed, he claims he never received the documents in 2014 (which the IRS disputes), his claim of non-receipt necessarily concludes he could not have challenged the exemptions. Nonetheless, the Plaintiff's Amended Complaint cannot in any way be interpreted to object to the exemptions that were made over six years ago in 2014.

Decl. ¶ 4). Only one of the five FOIA requests is the subject of this suit, and the rest are discussed to establish relevant facts. The five requests were dated: May 29, 2014; May 3, 2019; July 23, 2019; August 20, 2019; and October 25, 2019. (Soli Decl. ¶ 4). The FOIA request October 25, 2019 is the one subject to this suit. (*Id.*).

A. May 3, 2019 FOIA Request (the Prior 2019 FOIA Request).

2. On May 15, 2019, Lisa Soli (“Soli”), an IRS Government Information Specialist, was assigned a FOIA request from the Plaintiff dated May 3, 2019. (Soli Decl. ¶ 5). It was not included in the Plaintiff’s Amended Complaint, but it was the beginning of her search for the same documents the Plaintiff requested later in 2019 in his First, Second, and Third FOIA Requests. (*Id.* ¶¶ 1, 5).

3. The May 3, 2019 FOIA request was for the Plaintiff’s IMF Complete transcript, IMF specific transcript, IMFOLT transcript, TXMODA transcript, AMDISA transcript, ENMOD transcript, NMF transcript, BMF transcript, IRS Form 13496, 26 U.S.C. § 6020(b) Certification with IRS Form 4549, IRS Form 4340, ICS history transcript, and frivolous return penalty workpapers for tax years 2003 through 2006. (*Id.* ¶ 7). Between May 2019 and August 2019, Soli conducted an expansive search in connection with this FOIA request and the transcripts mentioned above are derived from the searches she describes in detail below. (*Id.* ¶¶ 8-33).

4. On May 15, 2019, Soli began her search in the Automated Freedom of Information Act (“AFOIA”) system to find out whether the IRS received any FOIA requests from Plaintiff identical to his May 3, 2019 FOIA request. AFOIA is the IRS’s computerized database which was used until recently to maintain FOIA requester file information and secure documents responsive to FOIA requests. (*Id.* ¶ 8). She did not find any duplicate requests at that time (*Id.* ¶ 10).

5. Therefore, Soli looked in a different database to continue her search, the IRS’s

Integrated Data Research System (“IDRS”). (*Id.* ¶ 12). The IDRS is the central database and operating system that the IRS uses to maintain taxpayer accounts. (*Id.*)

6. She input command codes “INOLES,” “IMFOLI,” “IMFOLT,” and “TXMODA” in her IDRS search. Each command code retrieves a specific set of information in IDRS. These transaction codes could provide leads to where Soli could search for documents responsive to a FOIA request. They are common codes that are accessible to the public. (*Id.* ¶ 13).

7. Soli first input the command code “INOLES” in IDRS. The command code “INOLES” provides the most current name, address, and filing requirements for the taxpayer. After she input “INOLES,” she confirmed that she had the correct taxpayer. (*Id.* ¶ 14).

8. Soli then input “IMFOLI” in IDRS. The command code “IMFOLI” populates an overview of all tax years that are available for the certain taxpayer. This is best described as a broad overview of available tax information. This command provides a list of Form 1040 returns filed by the taxpayer, the years for which a transcript can be requested, and the years for which the Form 1040 can be viewed. (*Id.* ¶ 15).

9. Soli then input “IMFOLT” in IDRS. The command code “IMFOLT” looks at specific tax years and it provides a transcript of a Form 1040 for a particular tax period. Through her “IMFOLT” search, she looked at tax years 2003-2006. (*Id.* ¶ 16).

10. Then, Soli input “TXMODA” in IDRS. “TXMODA” is a command code that shows both posted and pending transactions. She looked at tax years 2003-2006 specifically. (*Id.* ¶ 17).


11. The “TXMODA” command code would also display any “transaction codes” or other information that indicate pending transactions or that the examination of a tax year was

currently assigned to a division through the use of “open control bases” for a specific tax year. (*Id.* ¶ 18).

12. An “open control base” means that a specific IRS employee has ownership of a tax module for a specific tax year and is in the process of reviewing or inputting data into the IDRS system for the purpose of adjustments, correspondence with the taxpayer, or other actions. Other information is displayed through the use of “transaction codes” that correspond to specific actions. For example, the transaction code “300” means that an examination occurred. (*Id.* ¶¶ 19-20).

13. At this point, Soli had exhausted her search for leads in IDRS. The information provided to her via her IDRS research was that there were transaction codes “300” and that substitute for returns were prepared by IRS examiners for the Plaintiff for tax years 2003-2006. (*Id.* ¶ 21).

14. After inputting several command codes, Soli located responsive transaction codes on IDRS transcripts, so she filled out an IRS Form 2275 and sent it to the IRS’s federal records center (“FRC”) in Ogden, Utah (which is sometimes referred to as the National Records Center) to procure responsive documents, if any. (*Id.* ¶¶ 12-24).

15. However, the response from the Ogden Utah, FRC identified that certain records for tax years 2003-2005 were “charged-out.” A charge-out means that paper documents were charged out by another IRS employee, but not returned. (*Id.* ¶¶ 24-25). 

16. So, in order to continue her search, Soli decided to follow-up to try to obtain those charged-out records. (*Id.* ¶ 25). She contacted 6 individuals through phone and e-mail between two federal agencies, the IRS and DOJ, to try to locate documents over the course of several months. (*Id.* ¶¶ 26-31).

17. After contacting those six people, on June 25, 2019, Soli received additional

documents via a CD, reviewed the records, determined that some were responsive to Plaintiff's FOIA request, and transmitted those records to the Plaintiff on August 15, 2019. (*Id.* ¶¶ 32-33).

B. July 23, 2019 FOIA Request (the First FOIA Request).

18. On August 2, 2019, Soli was assigned to the Plaintiff's First FOIA Request dated July 23, 2019, which was the First FOIA Request identified in the Plaintiff's Amended Complaint. (*Id.* ¶ 34). The First FOIA Request requested any and all pre-assessment documents for tax years 2003-2006. (*Id.* ¶ 35). Soli responded to his request on August 13, 2019, and deemed his request imperfect for lack of reasonably describing the records. (*Id.* ¶ 36).

C. August 20, 2019 FOIA Request (the Second FOIA Request).

19. No one at IRS was assigned the Second FOIA Request identified in the Plaintiff's Amended Complaint. (*Id.* ¶ 37). Soli became aware of this Second FOIA Request when she researched AFOIA in connection with the Plaintiff's Third FOIA Request. (*Id.* ¶ 39). She discovered that, while the IRS did receive the Second FOIA Request, it was never forwarded to the IRS's Disclosure Unit for assignment from the Central Processing Unit. (*Id.* ¶ 39).

20. The Central Processing Unit had mistakenly scanned the Second FOIA Request and filed it as a responsive document connected to the First FOIA Request instead of filing it as a new FOIA request to be assigned to a specialist. (*Id.* ¶ 39).

D. October 25, 2019 Request (the Third FOIA Request).

21. On November 11, 2019, Soli was assigned another FOIA request from the Plaintiff dated October 25, 2019. (*Id.* ¶ 41). This was her third FOIA request related to the Plaintiff, and the third referenced in his Amended Complaint. (*Id.* ¶ 41).

22. The October 25, 2019 FOIA request sought "pre-assessment" documents for tax years 2003-2006, but it also specified that it was seeking third party documents and summonsed

records for tax years 2003-2006. (*Id.* ¶ 42). This was the first FOIA request from the Plaintiff to which Soli was assigned that specified the Plaintiff was seeking summonsed records from third parties. (*Id.* ¶ 42).

23. Since Soli had conducted a very extensive search between May and August 2019 on the Plaintiff's Prior 2019 FOIA Request on the same tax years, described above, she knew where to search for responsive records for his Third FOIA Request. (*Id.* ¶¶ 8-33, 43).

24. Soli searched AFOIA and IDRS inputting the same command codes as before (*Id.* ¶¶ 8-20, 44). This time in her AFOIA search, she found a duplicate request dated May 29, 2014. (*Id.* ¶ 44). That duplicate request was the 2014 FOIA Request. (*Id.* ¶ 44; *supra*, p. 2).

25. The IRS's response to the Plaintiff's 2014 FOIA Request covered the entire scope of the Plaintiff's full case file between tax years 2003-2013, which case file would include any assessment-related documents for the small subset of tax years 2003-2006. (*Id.* ¶ 45). No records were added to the file since 2014. (*Id.* ¶ 45). So, the Third FOIA Request was deemed a duplicate of the 2014 FOIA Request. (*Id.* ¶ 45).

26. Soli also followed-up on her previous attempt to locate a possible source of third party and summons-related documents that were charged out from the Ogden, Utah FRC in 2017 by a former IRS Disclosure office employee for a separate non-FOIA suit regarding the Plaintiff. These documents were still not returned to the Ogden, Utah FRC. (*Id.* ¶ 47).

27. Soli responded to the Plaintiff's request on December 10, 2019 advising him that he submitted a similar request dated May 29, 2014. (*Id.* ¶ 48). A true and correct copy of Soli's response letter dated December 10, 2019 is attached as Exhibit A (the "2019 Response Letter"). (*Id.* ¶ 48).

28. In Soli's 2019 Response Letter, Soli explained to the Plaintiff that the IRS had

provided him with a detailed letter on July 31, 2014 and 611 pages of documents in response to his 2014 FOIA Request dated May 29, 2014. (*Id.* ¶ 49). A true and correct copy of the response letter dated July 31, 2014 is attached as Exhibit B (the “2014 Response Letter”). (*Id.* ¶ 49).

E. IRS Office of Chief Counsel’s Review of the FOIA Searches and Responsive Documents.

29. Angela Winters (“Winters”) is an attorney in Branch 8 of the Associate Chief Counsel for Procedure and Administration, within the IRS Office of Chief Counsel. She reviewed the documents that were sent to the Plaintiff in response to his 2014 FOIA Request and confirmed that they were responsive to his First, Second, and Third FOIA Requests. (Winters Decl. ¶¶ 1, 31, 38).

30. In her review of the documents that were sent in 2014, Winters found that the following documents in items (a)-(n) were the general types of documents that were used to determine the Plaintiff’s tax assessments for tax years 2003-2006. Thus, disclosure of these documents would satisfy the Plaintiff’s First, Second, and Third FOIA Requests (as well as his 2014 FOIA Request). A description of documents that Winters reviewed which were disclosed to the Plaintiff in 2014 are as follows: (a) business transaction records; (b) notice of assessment forms; (c) bank deposit analysis; (d) property records; (e) communications between the examiner and the Automated Manual Assessment Team; (f) penalty calculations; (g) examination workpapers; (h) 2004 examining officer’s activity log; (i) assessment appeal documents; (j) assessment and penalty 409 activity summaries; (k) income adjustment forms; (l) self-employment tax analysis; (m) review of business sales and deposits with detailed description of audit steps taken to explain final determination, including logs of communications, summonses, etc.; and (n) 1099 and W-2 analysis. (*Id.* ¶ 38).

31. Further, Winters reviewed IRS Disclosure Specialist’s history notes from 2014


related to the Plaintiff's 2014 FOIA Request and confirmed that the Plaintiff received the IRS' response letter and 611 pages of documents that were contained on a CD in 2014. (*Id.* ¶¶ 28-29).

F. Procedural and Case Background.

32. On December 9, 2019, the Plaintiff initiated an action in this Court under the FOIA, which was later amended, and sought to compel the IRS to provide to him "any and all 'pre-assessment documents' the IRS used for creating the tax assessment figures against me for the years 2003-2006, including any and all third party summonsed documents obtained relevant to the assessment itself, and any other relevant documents used to create and substantiate the assessment figures, the 'certificate of assessment,' or any other 'in house' created documents by the IRS against me." (Am. Compl. ¶ 2, Dec. 18, 2019, Docket No. 5).

33. On February 21, 2020, the IRS filed its Answer whereby it averred, *inter alia*, that the Plaintiff already had been provided with all non-exempt documents responsive to his 2019 FOIA requests on or about July 31, 2014 in response to a 2014 FOIA request from the Plaintiff. (Answer, Feb. 21, 2020, Docket No. 20).

34. On May 6, 2020, the Court held a status conference in the above-captioned case. At the status conference, the Court suggested that "[i]f possible, Defense counsel will determine whether the documents sought by Plaintiff can be obtained from the IRS and provided to Plaintiff so as to resolve this dispute without the need for formal briefing." (Courtroom Minutes, May 6, 2020, Docket No. 34).

35. After the May 6, 2020 status conference, IRS personnel obtained electronic copies of the records sent to the Plaintiff in response to his 2014 FOIA request. After its internal review, the IRS electronically transmitted the 2014 FOIA response documents to undersigned counsel to re-release the records to the Plaintiff. (Winters Decl. ¶¶ 36-41). 

36. The IRS properly withheld records or portions of records, as more particularly described in the declarations of Chief Counsel Attorney Angela Winters, and Chief Counsel Senior Technician Reviewer **Vikramsing R. Barad**, under the following FOIA exemptions: 5 U.S.C. § 552(b)(3), (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). (Winters Decl. ¶¶ 42-64; Barad Decl. ¶¶ 5-13).

37. Winters and Barad identify that they are aware of and adhered to the segregation requirement of subsection (b) of the FOIA for any nonexempt information contained in responsive agency records. (Barad Decl. ¶ 4; Winters Decl. ¶ 8). Winters further states that the IRS has withheld in their entirety or partially redacted only those records that fall within a FOIA exemption, or those records wherein the portions exempt from disclosure under the FOIA are so inextricably intertwined with non-exempt material as to be non-segregable. (Winters Decl. ¶ 8).

38. On July 10, 2020, undersigned counsel sent a package that contained an encrypted CD-ROM containing a **duplicate set** of records that the IRS provided to the Plaintiff on or about July 31, 2014 in response to a FOIA request from him dated May 29, 2014. The package was sent via FedEx delivery to the Plaintiff his home address. (Certificate of Mailing, July 10, 2020, Docket No. 38; Winters Decl. ¶ 40; Exhibit C, July 10, 2020 Transmittal Letter).

39. On July 23, 2020, the Court held a status conference. **The Plaintiff admitted on the record that he received the documents**, but averred that he still wants additional documents and identified that he was still seeking third-party summonsed records received by the IRS. (Courtroom Minutes, July 23, 2020, Docket No. 40).

G. The IRS' Continuing Search Throughout The Above-Captioned Case.

40. During this case, Soli and Winters continued to search for the third party summonsed records. (Winters Decl. ¶¶ 65-92; Soli Decl. ¶¶ 50-57).

41. In August 2020, Winters followed-up with the Ogden Utah, FRC to determine if

the **charged-out records** mentioned above in Paragraph 15 had been returned. (*Id.* ¶ 67). These documents had not been returned. (*Id.*). Soli indicated that she had previously sought these documents from the former manager of the individual who had charged out the documents, but there was no resolution to this inquiry. (*Id.*).

42. Thereafter, Winters contacted Deanna Poole (“Poole”), the current Counsel Supervisory Legal Administrative Specialist to discuss the documents’ possible whereabouts. (*Id.* ¶ 68). **Poole informed Winters that her office did not have the records, that they were requested by someone in Cincinnati in connection to a federal court claim instituted by the Plaintiff, but she did not recall who it was that made the request.** (*Id.* ¶ 69).

43. On August 24, 2020, Winters contacted Amy Chanselor (“Chanselor”), a Clerk with the IRS Wage & Investment’s service center, to request any information about the person in Cincinnati. (*Id.* ¶ 71). No information about that person was provided; however, on August 31, 2020, Chanselor ordered seven document locator numbers (DLNs) on documents that related to the taxpayer for tax years 2003, 2004, and 2005 from the Ogden, Utah FRC. (*Id.* ¶ 72). DLNs identify groups of documents that relate to certain tax years for an entity. (*Id.* ¶ 72).

44. On or around November 6, 2020, Chanslor received the response from the Ogden, Utah FRC and sent the response to Winters. **Winters stated that the response only provided duplicate records that had already been produced to the Plaintiff,** as well as the technical phrase “Special Extract – Open Balance Due (CSED) Save DLN” which Winters did not understand. (*Id.* ¶ 73).

45. On November 10, 2020, Winters then contacted Melidy Prater (“Prater”), a File Clerk with the IRS Wage & Investment’s service center in Kansas City, Missouri to help her understand what the technical phrase in the preceding paragraph meant. (*Id.* ¶ 74; Prater Decl. ¶

5). Prater explained to Winters that the technical phrase in Paragraph 44 meant that records related to Plaintiff's tax case that Chanselor requested existed and are being saved because a tax balance remains owed by the Plaintiff. (Winters Decl. ¶ 75; Prater Decl. ¶ 5).

46. Winters then directed Chanselor to send in a second request to the Ogden, Utah FRC. On January 4, 2021, Chanselor finalized that request and demanded an expedited response. As of January 8, 2021, Winters confirmed she has not yet received a received a response to Chanselor's second request for these records. (Winters Decl. ¶ 77).

47. Regarding the documents requested by Chanselor, Winters does not know the content of these documents or if they are even responsive to the First, Second, or Third FOIA Requests. The only thing that Winters does know is that they are documents related to the Plaintiff's tax information for the tax years 2003-2005. (*Id.* ¶ 78).

48. Throughout November and December 2020, Winters contacted Bradley Martinez ("Martinez"), the Denver, Colorado Exam Territory Manager, to obtain further clarification on the existence of any summonses related to banking records, and where those records may be located. (*Id.* ¶¶ 79-82).

49. Winters reached out to Martinez because he is the territory manager who oversaw the cases being worked on in Colorado, which would have included the Plaintiff's case. He also oversaw the revenue agents and their supervisors. The revenue agent who was assigned to the Plaintiff's case has since retired and is separated from the Service. Martinez could not recall whether any banking records existed, which had been referenced by the revenue agent in a document that listed binders of summonses.² (*Id.* ¶ 80).

² For reference, this "Summons Binder" as described in Winters' Declaration was a document that listed binders of summonsed records. This document was re-disclosed to the Plaintiff on July 10, 2020 and is marked with Bates number FOIA-000268. (Winters Decl. ¶ 80).

50. On or around December 2, 2020, Martinez contacted Winters to say that the Plaintiff's tax case was closed out of the Boulder, Colorado office in 2011 and, as per IRS procedures, all case records were sent to a group called Technical Services to determine next steps, specifically whether or not to produce a Statutory Notice of Deficiency ("SND") to the Plaintiff. (*Id.* ¶ 81). Martinez further stated that no one in the local office in Denver was aware of any summons binder which may have contained any banking records related to Plaintiff's administrative case file. Martinez gave Winters the name of Technical Services Program Manager, David Okuda ("Okuda") for more information. (*Id.* ¶ 82).

51. On December 7, 2020, Winters contacted Okuda, who, after some research, told Winters the SND was issued in 2011 by his office, and it was docketed to Tax Court on July 6, 2011. There were no documents, paper or otherwise, in their possession. All case files were then sent to Denver Appeals office, upon notice of Plaintiff intention to appeal the SND. Winters was forwarded to Heather Snider ("Snider"), Lead Tax Examining Technician in IRS Office Independent Office of Appeals in Denver, Colorado. (*Id.* ¶ 83).

52. On December 8, 2020, Winters received an email from Snider who stated that the case referenced in the preceding Paragraph was closed out in 2013. She stated there were no records in the Appeals office and that all of Plaintiff's case files were sent to IRS Centralized Case Processing ("CCP") in Memphis, Tennessee. (*Id.* ¶ 84). She did not have a specific contact within CCP and suggested that Winters request the Plaintiff's administrative case file, which had already been requested by IRS Disclosure and sent to the Plaintiff twice as part of his prior FOIA request and again in this lawsuit. (*Id.* ¶ 84).

53. On December 8, 2020, Martinez responded to Winters' request for a CCP contact with the name of Clyde Jones ("Jones"), who was the Supervisory Internal Revenue Agent with

IRS CCP in Memphis, Tennessee. (*Id.* ¶ 85). On December 9, 2020, Winters contacted Jones who informed Winters that these records were archived at the records center in Kansas City, Missouri. He stated that no one in CCP would be in a position to describe the records with the detail that Winters required for this matter. He referred Winters to Michelle Renner (“Renner”), an IDRS & Specialty Team Manager in IRS’s Kansas City, Missouri office. (*Id.* ¶ 86).

54. On December 14, 2020, Winters contacted Renner who stated that there was no one at her location who would be in a position to be able to describe the contents of the records with the detail that Winters required for this matter, and she recommended going through the same process that had already been conducted in 2014 in response to the Plaintiff’s FOIA request (*i.e.*, requesting the Plaintiff’s administrative case file to determine the contents of those records). The case file had already been requested and non-exempt documents provided to the Plaintiff. (*Id.* ¶ 87).

55. Not leaving any stone unturned, Winters contacted the IRS’ Records Management unit on their retention schedule to determine if any documents related to the Plaintiff had been destroyed. (*Id.* ¶ 90). Under the IRS Records Management’s retention schedule, records are retired to the records center three years after the date of closing of an examination file, and records are destroyed 10 years from the date of closing of the examination file. (*Id.* ¶ 91).

56. To date, Winters has been unable to locate any additional records regarding the Plaintiff’s FOIA request concerning third party summonsed records, notwithstanding her efforts above to coordinate with IRS personnel to search and track down the existence of potential summons-related banking records that may have been used to generate the Plaintiff’s tax liability. (*Id.* ¶ 88). Winters cannot conclude that the third party summons records sought by the Plaintiff have been destroyed because she has not been able to locate anyone with actual knowledge of the

third-party summonsed records at this point to know whether they still exist or if they have been destroyed. (*Id.* ¶ 92).

LEGAL AUTHORITY

A. Summary Judgment Standard in FOIA Cases.

“FOIA was enacted to enable the public to examine government records.” *Trentadue v. FBI*, 572 F.3d 794, 796 (10th Cir. 2009) (citing authorities omitted). “In general, FOIA request cases are resolved on summary judgment.” *World Publishing Co. v. U.S. Dep’t of Justice*, 672 F.3d 825, 832 (10th Cir. 2012). To satisfy its burden of proof under FOIA on summary judgment, “an agency typically submits affidavits.” *Hull v. IRS*, 656 F.3d 1174, 1177 (10th Cir. 2011). “The defendant in a FOIA case must show that the search for responsive documents was adequate, that any exemptions claimed actually apply, and that any reasonably segregable non-exempt information has been disclosed after deletion of exempt information.” *Sanders v. Obama*, 729 F. Supp. 2d 148, 154 (D.D.C. 2010). If the agency fails to do that, “[p]ursuant to the remedial powers of FOIA, a district court may only order the production of agency records, nothing more.” *See Light v. U.S. Dep’t of Justice*, 968 F. Supp. 2d 11, 23 (D.D.C. 2013).

*i. Reasonableness of the Search Requirement.*³

“[T]he issue in a FOIA lawsuit challenging an agency’s search for records is not whether there exist further documents responsive to a FOIA request but whether the agency conducted a reasonable search for responsive documents.” *Trentadue*, 572 F.3d at 807. “[T]he focal point of the judicial inquiry is the agency’s search process, not the outcome of its search.” *Id.* at 797. Thus,

³ The IRS posits that the only issue in dispute in this case is the adequacy of its search. *See, supra*, p.1 and n.1.

actually locating potentially responsive documents in response to a FOIA request is not required under the statute. *See id.*

Under the FOIA, there is no standard search method and each search is determined based on the facts of the case. *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 59, 64 (D.D.C. 2003). An agency demonstrates “that it conducted an adequate search by showing that it used methods which can be reasonably expected to produce the information requested.” *Batton v. Evers*, 598 F.3d 169, 176 (5th Cir. 2010) (internal quotation and citation omitted).

ii. *Proving that a FOIA Search was Reasonable.*

Summary judgment in the FOIA context may be granted solely on the basis of agency affidavits if they are clear, specific, and reasonably detailed, and describe the withheld information in a factual and non-conclusory manner. *See Hull*, 656 F.3d at 1177. “[T]he agency may rely on affidavits or declarations that provide reasonable detail of the scope of the search. In the absence of countervailing evidence or apparent inconsistency of proof, such affidavits will suffice to demonstrate compliance with the obligations imposed by the FOIA.” *Trentadue*, 572 F.3d at 807 (quoting authorities omitted). To prove that a search was sufficient, “an affidavit from one individual who oversaw the search can be sufficient, as long as the methodology employed in directing the search was reasonable and the efforts at conducting the search detailed in an affidavit with sufficient specificity.” *Roe v. Comm’r of the IRS*, 2014 U.S. Dist. LEXIS 7652, at *7 (D. Colo. Jan. 22, 2014). “Agency affidavits are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents.” *Trentadue*, 572 F.3d at 808 (quoting authorities omitted).

Once the agency has offered adequate affidavits establishing it complied with its FOIA obligations, the nonmoving party must either produce evidence contradicting the adequacy of the

agency's search or evidence of the agency's bad faith. *See Miller v. United States Dep't of State*, 779 F.2d 1378, 1382–83 (8th Cir. 1985). The nonmoving party may not rest on mere allegations or denials of pleadings, but must, by affidavit or other means, set forth specific facts establishing the existence of a genuine issue for trial or at least the showing of why she cannot do so. *See Wren v. Heckler*, 744 F.2d 86, 90 (10th Cir. 1984).

ARGUMENT

A. *The IRS Conducted an Adequate FOIA Search Prior to this Case.*

The Soli Declaration establishes that the search she conducted before the lawsuit was filed was reasonably calculated to uncover records with respect to the Plaintiff's First, Second, and Third FOIA Requests that were alleged in his Amended Complaint. Soli's Declaration describes her reasonable, good faith search for responsive records and shows how the search was reasonably calculated to produce all responsive documents over the course of 8 months, between May 2019 and December 2019.

Specifically, Soli's declaration establishes that the IRS' pre-lawsuit search for documents lasted between May 2019 and December 2019 and included the following actions: (1) Searching the IRS's AFOIA database, on two separate occasions, for duplicate FOIA requests and possible leads on where to find responsive documents. A duplicate request was found, the 2014 FOIA Request, and she relayed that information to the Plaintiff. (Soli Decl. ¶¶ 8-10, 41-49); (2) Searching the IRS's IDRS database, on two separate occasions, to locate transaction codes that could lead to sources of responsive documents. (*Id.* ¶¶ 12-23, 44); (3) Identifying that certain transaction codes were present on the IDRS transcripts and following-up on leads to secure responsive documents; (*Id.* ¶ 23); (4) Drafting and sending a request to the IRS's Ogden, Utah FRC to request responsive items. (*Id.* ¶¶ 23-24); (5) After receiving a charge-out response from the Ogden Utah, FRC,


contacting an IRS individual who had charged-out those items. (*Id.* ¶¶ 24-27); (6) After finding out that the person who charged-out items from the Ogden Utah, FRC had retired, contacting five other people at the IRS and DOJ to try to procure responsive items. (*Id.* ¶¶ 25-33); (7) Searching for the third party and summonsed records and requesting those records from the Ogden Utah, FRC in response to the Plaintiff's 2019 FOIA requests. (*Id.* ¶ 56); and (8) Following-up on at least two instances in 2019 to determine if the records that had been charged-out of the Ogden Utah, FRC had been returned, which they were not. (*Id.* ¶¶ 24, 57).

Thus, over the course of 8 months between May and December 2019, Soli searched two databases (AFOIA and IDRS), which included making multiple inquiries to several federal government personnel across the United States to uncover responsive documents. (*Id.* ¶¶ 26-57). That search was reasonable under the circumstances. *See Roe v. Comm'r of IRS*, 2014 U.S. Dist. LEXIS 7652, at *2 (finding that an affidavit describing how the affiant "directed numerous other employees located at various IRS offices . . . to use specific strategies designed to obtain the correct records for Plaintiff" was sufficient to support summary judgment in favor of the agency.).

B. The IRS Has Produced all Responsive and Non-Exempt Documents That it has Located in Connection with the Plaintiff's FOIA Requests.

The IRS has twice produced all responsive and non-exempt documents, which includes the documents produced in connection with the Plaintiff's 2014 FOIA Request. The categories of the responsive documents include: (a) business transaction records; (b) notice of assessment forms; (c) a bank deposit analysis; (d) property records; (e) communications between the examiner and the Automated Manual Assessment Team; (f) penalty calculations; (g) examination workpapers; (h) 2004 examining officer's activity log; (i) assessment appeal documents; (j) assessment and penalty 409 activity summaries; (k) income adjustment forms; (l) self-employment tax analysis; (m) a review of business sales and deposits with detailed description of audit steps taken to explain

final determination, including logs of communications, summonses, etc.; and (n) an 1099 and W-2 analysis. (Winters Decl. ¶ 38). Those are all documents that can be considered “pre-assessment documents” the IRS used for created the tax assessment figures against the plaintiff for the years 2003-2006 and thus satisfies his FOIA requests. (*Id.* ¶ 38).

Because the IRS’ search for documents was reasonable, and it released in 2014 and in 2020 all items that resulted from its pre-suit and post-suit searches, it has satisfied the FOIA. 

C. *The IRS Conducted an Adequate Search During the Pendency of this Case.*

In addition to the months of searching conducted by Soli prior to this lawsuit, the IRS continued to search for the third party summonsed records. Both IRS Disclosure Specialist Soli and Counsel attorney Winters continued to search for any third party or summonsed records during the pendency of this case. Winters confirmed that she could not obtain the charged-out records from the Ogden Utah, FRC, if they are even responsive (which is unknown). (Winters Decl. ¶ 67). She further contacted eight (8) IRS personnel from across Colorado, Ohio, Utah, Tennessee, and Missouri, to try to track down those third party summonsed records including the manager of the now-retired revenue agent who collected the summonsed records (*Id.* ¶¶ 71-89). Further, she ordered DLNs that relate to the tax years for which the Plaintiff is seeking documents. (*Id.* ¶ 77). Winters has no way to know if the ordered DLNs will result in responsive documents or if they are duplicates of the hundreds of pages of documents sent to the plaintiff. (*Id.* ¶ 78).

Consistent with the *Trentadue* case, the IRS’ search was reasonable even if the third party summonsed records have not been located. *See, supra*, p. 16. In total, the IRS has spent between May 2019 and January 2021 searching for the third party summonsed records. The IRS’ search spanned for a year and half, and included contacting several IRS personnel and DOJ personnel from offices across the country, to try to obtain the third party summonsed records. Moreover, the

IRS released over 600 pages of documents that were responsive to the Plaintiff's FOIA requests. That effort constitutes a reasonable search.

D. This Court Need Not Decide the Issue of Whether the IRS Properly Withheld Information under FOIA Exemptions Because the Amended Complaint Fails to Allege any Challenges to Exemptions.

If the Court decides to reach the issue of exemptions, the IRS has thoroughly met its burden in showing it properly withheld from disclosure records or portions of records. The detailed declarations of two Chief Counsel of IRS attorneys explain why certain records located in the 2014 search that were re-released in 2020 were withheld under the following FOIA exemptions: (b)(3), (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). (Winters Decl. ¶¶ 42-64; Barad Decl. ¶¶ 5-13). The IRS reserves all rights, claims, and objections to further discuss its exemption assertions in subsequent briefing if needed.

CONCLUSION

The IRS conducted an adequate search and properly asserted exemptions from disclosure. Therefore, the IRS is entitled to summary judgment as to Count I of the Plaintiff's Amended Complaint, which will fully resolve this action.

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Respectfully Submitted:

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