



**U.S. Department of Justice**

*United States Attorney  
Southern District of New York*

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*86 Chambers Street  
New York, New York 10007*

January 13, 2020

**BY ECF**

Honorable Jesse M. Furman  
United States District Judge  
United States District Court  
Southern District of New York  
40 Foley Square  
New York, NY 10007

Re: *State of New York et al v. U.S. Department of Treasury, et al.*, 19 Civ. 4024 (JMF)

Dear Judge Furman:

In accordance with the Court's December 13, 2019 Order, ECF No. 39, we write on behalf of Defendants the United States Department of Treasury and the Internal Revenue Service ("IRS") (collectively "Defendants") and Plaintiff the State of New York ("New York") in the above referenced FOIA litigation.

**Status of Defendants' FOIA Response**

Earlier today, Defendants produced 877 pages, which included documents responsive to the Court's December 13, 2019 Order and additional documents responsive to Plaintiff's FOIA request reviewed as part of Defendants' rolling review and production of documents. The number of documents relating to outside speeches and remarks differed somewhat from Defendants' initial estimates<sup>1</sup> because certain documents contained references to "speech" but did not actually relate to outside speeches and remarks, and documents related to conference calls were pulled in by the term "conference." Documents hitting solely on the term "conference call" were eliminated from the review as were certain documents that did not relate to outside speeches and remarks. Defendants have now completed review of all documents related to outside speeches and remarks, and have included additional documents responsive to Plaintiff's FOIA request in this most recent production to meet the document count related in the Court's December 13, 2019 Order.

To date, Defendants have made three productions of Treasury documents and six productions of IRS documents in response to Plaintiffs' FOIA request. In total, the IRS has produced the non-exempt portions of 3,022 pages of documents identified as responsive to

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<sup>1</sup> The hit results previously conveyed to the Court were for all documents that hit on the terms "speech," "conference," "panel," or "remarks."

Plaintiff's FOIA request; Treasury has produced the non-exempt portions of 530 pages of documents responsive to the request.

Currently, IRS has 6,342 documents remaining that have been identified as potentially responsive to Plaintiff's FOIA request that will require further review. Treasury has approximately 465 potentially responsive documents remaining for review.

#### Parties' Proposals Regarding Search Terms & Review/Production

The Parties have been unable to reach an agreement regarding using search terms to narrow and prioritize the review going forward, and therefore present their respective proposals below.

##### *Plaintiffs' Proposal*

Plaintiffs received the Defendants' latest productions earlier this evening and so cannot yet consider how, if at all, the contents of those productions will inform further refinement of Plaintiffs' requests and Defendants' review. New Jersey is continuing to review today's material. Subject to New Jersey's modification based on that review, if needed, New York's update and proposal to the Court is as follows:

Plaintiffs have repeatedly expressed concern that the scope of the agencies' redactions to date makes further narrowing of Plaintiffs' October 2018 requests difficult. Of the 1,642 pages of material that it produced between October 2018 and November 2019, for example, the IRS withheld almost half of the content entirely (approximately 47%) and partially redacted another third (approximately 36%). Plaintiffs noted again during the parties' December 2019 discussions that many of the agencies' search proposals for accelerating the review risked eliminating a significant volume of potentially responsive material from disclosure without offering any means to assess the nature of the material excluded.

In December, Plaintiffs proposed a search term list for the electronic files remaining to be reviewed at both agencies. Plaintiffs also requested a list of the custodians who had collected potentially responsive material, so that searches could be crafted to identify key correspondence regarding the Revenue Procedure's development. The agencies initially offered to prepare the list of source custodians but now conclude that custodian information will not provide a useful tool for narrowing their review and so decline to provide it. The agencies reported that Plaintiffs' December search terms were too broad to offer meaningful time savings but suggested that disclosure of the hit results for each term would reveal privileged information.

On Friday, January 3, counsel for Defendants forwarded an alternative list of proposed search terms that bore little overlap with Plaintiffs' December list. As outlined below, the IRS estimates that application of this new list will identify approximately 478 potentially responsive IRS documents for review. This figure represents a nearly 90% cut to the estimated 4,200 documents generated by Plaintiffs' December list. Last Thursday, January 9, Plaintiffs responded to the new list by reiterating their previous requests for custodian information and hit totals to the December list, as a first step to revising search terms.

Defendants have not provided a custodian list and continue to maintain that they cannot share the actual results of Plaintiffs' proposed December search. Earlier today, however, Defendants identified 17 terms from the December list that generate more than 300 hits each. Several of those terms relate to central concepts in the Revenue Procedure's adoption, including terms related to the inadvertent disclosure of contributor information (cited as a key reason for the policy change) and terms intended to capture discussion of the necessity or benefit to the change. The terms proposed by Defendants on January 3, however, could independently capture many of the same documents for review. New York believes that a combination of the Defendants' January 3 list with the remaining 33 terms from Plaintiffs' original December list represents a reasonable compromise solution.

Defendants have also asked Plaintiffs to identify specific documents or categories of documents sought by their 2018 requests as a means to facilitating accelerated agency response. Last week, Plaintiffs identified one category of document that would be directly responsive to Request No. 1 and readily identifiable by agency staff members with knowledge of the Revenue Procedure's development: the cost benefit analyses prepared in connection with the 2018 change. Plaintiffs proposed in their January 9 email to Defendants' counsel that the agencies could prioritize such documents for search and production, if they exist. Earlier today, Defendants agreed to that proposal.

In light of these exchanges, and today's production completing disclosure of all documents related to outside speeches and remarks, New York respectfully requests a Court Order that directs the agencies to begin rolling monthly productions of at least 150 documents per month each, starting with (i) any and all agency cost-benefit analyses conducted in connection with the Revenue Procedure's adoption, if they exist, and then proceeding to (ii) the approximately 1,678 potentially responsive documents identified by a combination of the parties' respective search term lists (eliminating 17 Plaintiff terms that generate more than 300 results each). At a pace of 150 documents per month from each agency, this approach would substantially complete the agencies' production in approximately six to eight months.

As previously agreed between the parties, Defendants would only review and produce cover emails in the first instance. To the extent Plaintiffs are interested in seeing specific attachments, they will identify them to Defendants and Defendants will then review and produce non-exempt responsive portions of the attachments.

With respect to redaction, the parties have previously agreed that Plaintiffs will identify any particular partial redactions about which they request clarification and Defendants will provide, on a rolling basis going forward, a list of those categories of document that have been withheld in their entirety.

New York proposes to submit a joint letter report updating the Court on the status of Defendants' production consistent with this approach on Friday, March 13.

*Defendants' Proposal*

As Defendants previously explained, Plaintiffs' FOIA request is incredibly broad. Although the request contains a number of specifically described requests, it also includes a catch-all request that seeks "all emails, memoranda, and IRS reports concerning the development, implementation, consideration, or evaluation of Revenue Procedure 2018-38." FOIA Request ¶ 1 (ECF No. 1 at 16). Defendants have already produced all documents responsive to most of the categories of documents specifically described in the FOIA Request, *i.e.*, most communications with outside parties, all communications with OMB, the White House and the Executive Office of the President, and all documents related to external speeches and remarks. *See* FOIA Request ¶¶ 2, 3, 5, 6 (ECF No. 1 at 17-18). Defendants also proposed specific search terms to be applied to the existing set of potentially responsive records, targeted to address the specific subparts, a through f, of paragraph 1 of the FOIA request:

a.	Donor w/2 report* w/10 prior
	Donor w/2 report* w/10 original
	Donor w/2 report* w/10 previous
b.	"the IRS simply does not need tax returns with donor names and addresses to do its job in this area"
	Mnuchin w/10 990
	Mnuchin w/10 donor w/3 names
	Donor w/3 names w/3 need
c. / d.	Costs* w/5 sch* B w/3 report*
	Costs* w/5 sch* B w/3 or fil*
	burden* w/5 sch* B w/3 report*
	burden* w/5 sch* B w/3 fil*
e.	Sch* B w/3 report* w/7 audit*
	Sch* B w/3 fil* w/7 audit*
	Sch* B w/3 report* w/7 exam*
	Sch* B w/3 fil* w/7 exam*
f.	Unauthorized w/2 disclosure w/5 sch* b
	Unauthorized w/2 disclosure w/5 donor
	Return w/3 information w/7 disclos*

When these proposed search terms are applied to the set of potentially responsive IRS documents, they result in approximately 478 documents requiring further review. These proposed search terms are the result of considerable thought in an effort to craft terms that are specifically targeted at what Plaintiffs identified as the particular categories of documents that they are seeking in their FOIA request. These proposed search terms were provided to Plaintiffs on January 3, 2020. Prior to providing the above insert to the joint letter this evening, Plaintiffs offered no response to these proposed terms.

Defendants have repeatedly asked Plaintiffs to identify what else it is that they are looking for through their FOIA request. The only categories of documents that Plaintiffs have identified are documents related to data or statistics and the agency's analysis of costs and benefits. Defendants have agreed to search for these documents and to include responsive materials in the next batches of productions.<sup>2</sup>

By contrast to Defendants' proposal, the 50+ search terms proposed by Plaintiffs result in very limited narrowing of the IRS universe of documents requiring further review. If these terms are run through the entire IRS collection, the result is over 4,200 potentially responsive documents requiring further review. If these terms are run through only the emails, the result is almost 2,300 potentially responsive documents requiring further review. Plaintiffs have requested hit results to eliminate problematic terms. Because providing detailed hit results could reveal information about documents or portions of documents that are privileged and exempt from production, Defendants identified only the search terms that hit on more than 300 emails in the IRS collection. Running the remaining terms through the IRS emails would result in approximately 1,000 documents requiring further review. Defendants have offered to limit their review to these remaining results (after data/statistics and the agency's analysis of costs and benefits, described above). Although Plaintiffs have requested that Defendants provide their custodian lists to assist in the narrowing of the request, the documents collected from the IRS's 50 custodians are not maintained by custodian. Instead the collected documents were de-duplicated across custodians and have been grouped together for further review. Accordingly, the list of custodians would not provide a meaningful way of narrowing. Moreover, as explained above, Defendants are prepared to run the remaining terms proposed by Plaintiffs and review the resulting 1,000 IRS documents. Contrary to New York's assertion above, the agencies did not initially agree to provide custodian lists, rather during the parties' meet and confer counsel for Plaintiffs made this request and counsel for Defendants' agreed to discuss it with the agencies while at the same time flagging the potential issue with the way in which the documents were de-duplicated across custodians.

Accordingly, it is Defendants' proposal that the remaining review should proceed as follows:

- Defendants will continue reviewing and processing communications with outside parties.
- Defendants will continue reviewing and processing documents at the pace of 50 documents / month by Treasury and 150 documents / month by the IRS.
- Defendants will review documents (within the previously collected documents) in the following order:
  - Documents related to the agency's analysis of costs and benefits
  - Emails returned by the terms "data" or "statistics"

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<sup>2</sup> The search for "data or statistics" through the IRS emails resulted in approximately 200 potentially responsive documents. When this search is also run through the attachments in the IRS collection, the result is over 1,000 potentially responsive documents. Based on Plaintiffs' proposal during the Parties' meet and confer, Defendants will in the first instance only be searching and reviewing the cover emails, and if there are specific attachments that Plaintiffs are interested in, they can identify such documents and Defendants will then review and produce any non-exempt responsive portions of the attachments.

- Either:
  - Emails returned by the specific search terms crafted by IRS to target the subparts of paragraph 1 of the FOIA request (identified above) OR
  - Emails returned by the search terms proposed by Plaintiffs that each result in fewer than 300 email hits, which when all applied to the emails result in a total of approximately 1,000 documents requiring further review.
- Defendants will only review and produce the cover emails. To the extent Plaintiffs are interested in seeing specific attachments, they can identify them, and Defendants will then review and produce non-exempt responsive portions of the attachments.

Defendants respectfully request that the Court allow their review to proceed along the lines outlined above, and if any disputes arise, the Parties will work to resolve them. If they are unable to do so, the Parties can then write to the Court for further assistance to resolve any disputes.

Respectfully submitted,

GEOFFREY S. BERMAN  
United States Attorney

By: /s/ Dominika Tarczynska  
DOMINIKA TARCZYNSKA  
Assistant United States Attorney  
Tel. (212) 637-2748  
Fax (212) 637-2686  
dominika.tarczynska@usdoj.gov

*Counsel for Defendants United States Department  
of the Treasury and Internal Revenue Service*