

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT,
1030 15th Street NW, B255
Washington, DC 20005

Plaintiff,

v.

Case No. 20-cv-2787

U.S. DEPARTMENT OF THE TREASURY,
1500 Pennsylvania Avenue NW
Washington, DC 20220

and

INTERNAL REVENUE SERVICE
1111 Constitution Avenue NW
Washington, DC 20224

Defendants.

COMPLAINT

1. Plaintiff American Oversight brings this action against the U.S. Department of the Treasury and the Internal Revenue Service under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. With respect to two FOIA requests at issue in this action, American Oversight timely appealed Defendant Internal Revenue Service's adverse determinations pursuant to 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa). American Oversight has therefore properly exhausted all administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(A)(ii) and is now entitled to judicial review of the agency's determination on the appeal.

5. With respect to the remaining FOIA requests at issue in this action, because Defendants have failed to comply with the applicable time-limit provisions of FOIA, American Oversight is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action enjoining Defendants from continuing to withhold department or agency records and ordering the production of department or agency records improperly withheld.

PARTIES

6. Plaintiff American Oversight is a nonpartisan non-profit section 501(c)(3) organization primarily engaged in disseminating information to the public. American Oversight is committed to promoting transparency in government, educating the public about government activities, and ensuring the accountability of government officials. Through research and FOIA requests, American Oversight uses the information it gathers, and its analysis of it, to educate the public about the activities and operations of the federal government through reports, published analyses, press releases, and other media. The organization is incorporated under the laws of the District of Columbia.

7. Defendant U.S. Department of the Treasury (Treasury) is a department of the executive branch of the U.S. government headquartered in Washington, D.C., and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). Treasury has possession,

custody, and control of records that American Oversight seeks.

8. Defendant Internal Revenue Service (IRS) is a bureau of Treasury and is headquartered in Washington, D.C. The IRS is an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). The IRS has possession, custody, and control of records that Plaintiff seeks.

STATEMENT OF FACTS

IRS Resumes and Ethics Forms Request

9. On June 7, 2019, American Oversight submitted a FOIA request to the IRS seeking the (a) resume, (b) conflicts or ethics waivers or authorizations, (c) records reflecting any recusal determination, and (d) copies of any SF-50 forms for four specified IRS officials and “[a]ny other employee who entered into a position at the agency as a ‘political appointee’ since January 21, 2017.” Ex. 1 at 9–10.¹

10. By letter dated July 3, 2019, the IRS acknowledged American Oversight’s request, assigning it tracking number F19161-0042. Ex. 1 at 16–19.

11. By letter dated September 25, 2019, the IRS issued a purportedly final response to American Oversight’s request. *Id.* at 23–27. In response to part (a) of American Oversight’s request, the IRS stated that it was withholding in full the resumes of the specified officials under FOIA Exemption (b)(6). *Id.* at 24. In response to American Oversight’s requests for (b) conflicts or ethics documents and (c) recusal determinations, the IRS did not clearly state whether responsive records had been identified but referenced FOIA Exemption (b)(6) and released no

¹ Attached hereto as Exhibit 1 is American Oversight’s December 20, 2019 administrative appeal submitted to the IRS regarding this request. *See infra* ¶ 12. American Oversight’s request appears at pages 8–15, as Exhibit A to the appeal. Additional correspondence described *infra* at ¶¶ 10–11 are also attached as exhibits to American Oversight’s appeal.

records responsive to these parts of the request. *Id.* at 25. In response to part (d) of American Oversight's request, the IRS released partially redacted copies of the SF-50 forms for three of the specified officials: Charles P. Rettig, Michael Desmond, and William Paul. *Id.* at 25, 28–33.

12. By letter dated December 20, 2019, American Oversight appealed the IRS's adverse determinations, objecting to the agency's improper withholding in full of records under Exemption (b)(6). A copy of American Oversight's appeal is attached hereto as Exhibit 1 and incorporated herein.

13. By letter dated March 3, 2020, the IRS responded to American Oversight's appeal, upholding the agency's initial determination. Ex. 2.

14. With regards to the blanket withholding of resumes, the IRS Appeals Office stated that:

- 1) Commissioner Charles Rettig's biographical information is listed on the of [sic] the Internal Revenue Service website located at www.IRS.gov and may be found by searching under his name.
- 2) Former Acting Commissioner, David Kautter is the Assistant Treasury Secretary for Tax Policy. In his capacity as the Assistant Treasury Secretary at the Department of Treasury, he serviced [sic] in a dual role as the Acting Commissioner of the IRS. His biographical information is located at www.treasury.gov/about/officials.

Id. at 1–2. The IRS made no other statements supporting the agency's decision to withhold the resumes under Exemption (b)(6). *See id.*

15. With regard to the blanket withholding of conflicts or ethics waivers and authorizations and recusal determinations, the IRS Appeals Office stated that:

To the extent that any data exists which would identify these waivers, the Service will assert exemption 6 to deny that data. In Reporters Committee for Freedom of the Press v. Department of Justice, 489 U.S. 749 (1989), the Supreme Court reviewed the legislative history of the FOIA to conclude that the central purpose

of the statute is to “contribut[e] significantly to public understanding of the operations or activities of the government.” 489 U.S. at 775 (emphasis in original). Reporters Committee requires a balancing of the public interest in the disclosure of information which will add to “the public understanding of the operations or activities of the government” with the countervailing privacy interests of the affected individuals. Because the data you are seeking is located in personnel records and has a strong privacy interest, it is exempt under subsection (b)(6).

Ex. 2 at 2. The IRS made no other statements supporting the agency’s decision to withhold ethics waivers and authorizations and recusal determinations under Exemption (b)(6).

IRS Communications Request

16. On May 7, 2020, American Oversight submitted a FOIA request to the IRS seeking records of communications (a) between specified IRS officials and any White House official about the audits of Vice President Pence, Vice President Pence’s family, President Trump, or President Trump’s family; (b) from specified IRS officials to any career IRS officials responsible for or involved in the audits of President Trump or Vice President Pence; (c) between specified IRS officials and any Treasury Department official containing specified key terms; and (d) between specified IRS officials and specified Treasury Department officials about the audits of Vice President Pence, Vice President Pence’s family, President Trump, or President Trump’s family. *See* Ex. 3 at 10–14.²

17. American Oversight requested all responsive records from January 20, 2017, through the date of the search. Ex. 3 at 10–14.

² Attached hereto as Exhibit 3 is American Oversight’s June 29, 2020 administrative appeal submitted to the IRS regarding this request. *See infra* ¶ 20. American Oversight’s request appears at pages 8–18, as Exhibit A to the appeal. Additional correspondence described *infra* at ¶¶ 18–19 is also attached as an exhibit to American Oversight’s appeal.

18. By letter dated May 28, 2020, the IRS issued a response to American Oversight's request, and assigned it tracking number F20129-0009. *Id.* at 19–22.

19. In its May 28, 2020 response, the IRS denied American Oversight's request in full, asserting that:

The scope of your request extends to records, to the extent that any exist, that consist of or contain the tax returns or return information of third parties. Please be advised that such records, to the extent that they exist, would be confidential and may not be disclosed unless specifically authorized by law.

Id. (citing FOIA Exemption (b)(3) and 26 U.S.C. § 6103).

20. By letter dated June 29, 2020, American Oversight appealed the IRS's adverse determination, objecting to the agency's improper denial of the request purportedly pursuant to Exemption (b)(3) and 26 U.S.C. § 6103. A copy of American Oversight's appeal is attached hereto as Exhibit 3 and incorporated herein.

21. By letter dated August 14, 2020, the IRS acknowledged its receipt of American Oversight's appeal on August 13, 2020. Ex. 4.

22. As of the date of this complaint, American Oversight has not received any further communication from the IRS regarding this FOIA request.

Treasury – White House Communications Request

23. On May 7, 2020, American Oversight submitted a FOIA request to Treasury seeking records of communications between specified Treasury officials and anyone serving in the Executive Office of the President about the audits of Vice President Pence, Vice President Pence's family, President Trump, or President Trump's family. *See* Ex. 5.

24. American Oversight requested all responsive records from January 20, 2017, through the date of the search. *Id.*

25. By letter dated May 19, 2020, Treasury acknowledged receipt of American Oversight's FOIA request, assigned the request FOIA tracking number 2020-05-062, and informed American Oversight of its intention to take a processing extension of ten days. Ex. 6.

26. As of the date of this Complaint, American Oversight has not received any further communication from Treasury regarding this FOIA request.

Treasury – IRS Communications Request

27. On May 7, 2020, American Oversight submitted a FOIA request to Treasury seeking (a) records reflecting communications between specified Treasury officials and specified IRS officials about the audits of Vice President Pence, Vice President Pence's family, President Trump, or President Trump's family; and (b) records reflecting communications sent by specified Treasury officials containing specified key terms. *See* Ex 7.

28. American Oversight requested all responsive records from January 20, 2017, through the date of the search. *Id.*

29. By letter dated May 19, 2020, Treasury acknowledged receipt of American Oversight's FOIA request, assigned the request FOIA tracking number 2020-05-063, and informed American Oversight of its intention to take a processing extension of ten days. Ex. 6.

30. As of the date of this Complaint, American Oversight has not received any further communication from Treasury regarding this FOIA request.

Exhaustion of Administrative Remedies

31. With respect to American Oversight's *IRS Resumes and Ethics Forms Request*, *see supra* ¶¶ 9–15, Defendant IRS informed American Oversight of its final determination on September 25, 2019. American Oversight timely appealed that determination on December 20, 2019. Defendant IRS affirmed the agency's adverse determination by letter dated

March 3, 2020. Therefore, American Oversight has exhausted all available administrative remedies.

32. With respect to American Oversight's *IRS Communications Request*, see *supra* ¶¶ 16–22, Defendant IRS informed American Oversight of its final determination on May 28, 2020. American Oversight timely appealed that determination on July 29, 2020, and the IRS acknowledged that it received American Oversight's appeal on August 13, 2020. Therefore, American Oversight has exhausted all available administrative remedies.

33. With respect to the *Treasury – White House Communications Request*, see *supra* ¶¶ 23–26, and the *Treasury – IRS Communications Request*, see *supra* ¶¶ 27–30, as of the date of this complaint, Defendant Treasury has failed to (a) notify American Oversight of a final determination regarding its FOIA requests, including the scope of any responsive records Defendant Treasury intends to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production. Through Defendant Treasury's failure to respond to American Oversight's FOIA requests within the time period required by law, American Oversight has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I
Violation of FOIA, 5 U.S.C. § 552
Failure to Conduct Adequate Searches for Responsive Records

34. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

35. American Oversight properly requested records within the possession, custody, and control of Defendants.

36. Defendants are an agency, and a component thereof, subject to FOIA and must therefore make reasonable efforts to search for requested records.

37. Defendants have failed to promptly review agency records for the purpose of locating those records that are responsive to American Oversight's FOIA requests.

38. Defendants' failure to conduct adequate searches for responsive records violates FOIA.

39. Plaintiff is therefore entitled to injunctive and declaratory relief requiring Defendants to promptly make reasonable efforts to search for records responsive to American Oversight's FOIA requests.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

40. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

41. American Oversight properly requested records within the possession, custody, and control of Defendants.

42. Defendants are an agency, and a component thereof, subject to FOIA and must therefore release in response to FOIA requests any non-exempt records and provide a lawful reason for withholding any materials.

43. Defendants are wrongfully withholding non-exempt agency records requested by Plaintiff by failing to produce non-exempt records responsive to American Oversight's FOIA requests.

44. Defendants are wrongfully withholding non-exempt agency records requested by Plaintiff by failing to segregate exempt information in otherwise non-exempt records responsive to American Oversight's FOIA requests.

45. Defendants' failure to provide all non-exempt responsive records violates FOIA.

46. Plaintiff is therefore entitled to declaratory and injunctive relief requiring Defendants to promptly produce all non-exempt records responsive to its FOIA requests and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, American Oversight respectfully requests the Court to:

- (1) Order Defendants to conduct a search reasonably calculated to uncover all records responsive to American Oversight's FOIA requests;
- (2) Order Defendants to produce, within twenty days of the Court's order, any and all non-exempt records responsive to all of American Oversight's FOIA requests and *Vaughn* indexes of any responsive records withheld under claim of exemption;
- (3) Enjoin Defendants from continuing to withhold any and all non-exempt records responsive to American Oversight's FOIA requests;
- (4) Award American Oversight the costs of this proceeding, including reasonable attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (5) Grant American Oversight such other relief as the Court deems just and proper.

Dated: October 1, 2020

Respectfully submitted,

/s/ Katherine M. Anthony

Katherine Anthony

D.C. Bar No. 1630524

AMERICAN OVERSIGHT

1030 15th Street NW, B255

Washington, DC 20005

(202) 897-3918

katherine.anthony@americanoversight.org

Counsel for Plaintiff