

CC-2005-005

April 08, 2005

Subject: Discretionary Disclosure Policy **Cancel Date:** Upon incorporation into CCDM

Purpose

The purpose of this Notice is to apprise all Chief Counsel employees of a change in the discretionary disclosure policy of the Service that affects our responses to discovery and Freedom of Information Act (FOIA) requests.¹ This Notice also explains who has the authority to make certain discretionary disclosure determinations for the Office of Chief Counsel.

Discussion

On April 23, 2004, the Commissioner issued a revised discretionary disclosure policy that incorporates the principles announced in the Attorney General's government-wide Freedom of Information Act policy directive issued in October 2001. [Policy Statement 11-13 Freedom of Information Act Requests \(4-23-04\)](#). Both policy statements emphasize a commitment to full compliance with the FOIA while recognizing the importance of protecting sensitive institutional, commercial, and personal interests that can be implicated in government records, such as the need to safeguard national security, enhance law enforcement effectiveness, respect business confidentiality, protect internal agency deliberations, and preserve personal privacy. In accordance with that policy, any discretionary decision to release information protected under the FOIA should be made only upon full and deliberate consideration of all interests involved.

The Attorney General's policy directive superseded a FOIA policy regarding discretionary disclosures that was commonly referred to as the "foreseeable harm"

¹ In some cases, the FOIA mandates that agencies withhold information from public disclosure, while in others it requires disclosure of information. This Notice does not apply to those cases. In other instances, the FOIA permits, but does not require, that agencies withhold information; decisions not to withhold information under these circumstances are referred to as "discretionary disclosures."

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standard. That standard directed the Department of Justice “to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption.” The October 2001 policy directive established a new “sound legal basis” standard governing the decisions whether to defend agency actions under the FOIA when they are challenged in court. This differs from the “foreseeable harm” standard and which was analogous to the Service’s longstanding discretionary disclosure policy. Under the October 2001 directive, agencies should reach the judgment that their use of a discretionary FOIA exemption is on sound footing, both factually and legally, and that any discretionary decision to release information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.

The most common examples of information that an agency might disclose as a matter of administrative discretion can be found under subsection (b)(5) of the FOIA. This subsection incorporates discovery privileges that almost always protect only the institutional interests of the agency possessing the information. The three primary, most frequently invoked, privileges that have been incorporated into FOIA subsection (b)(5) are the deliberative process privilege (referred to by some courts as “governmental or executive privilege”), the work product doctrine, and the attorney-client privilege. The Service’s assertion of these privileges in response to FOIA requests, and the discretionary determinations related thereto, should be consistent with the application of these same privileges in the context of discovery.

A predicate to the use of a FOIA exemption or the assertion of a privilege during discovery is that the exemption or a privilege is applicable. It is our responsibility to determine whether any exemption or privilege is applicable. The analysis is a two-step process. First, does the information fall factually and legally within a FOIA exemption or a privilege? For example, when determining whether to assert the deliberative process privilege, one must determine whether the information preceded the adoption of the agency policy and whether the information played a direct part in the deliberative process. Generally, if the information contains purely factual matters, as opposed to recommendations or opinions, or merely reflects a final decision adopted by the agency, it does not fall within the deliberative process privilege. Second, once having determined there is a sound factual and legal basis for asserting the privilege, should the agency exercise discretion not to claim the applicable exemption or privilege? Any decision to disclose information during discovery, at trial or in response to FOIA requests should be made only after a full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosing this information.

The Office of Chief Counsel has considered the institutional interests implicated by the disclosure of the following categories of documents and has determined that discretionary privileges and FOIA exemptions **are to be asserted**, in accordance with

the procedures described below, except in extraordinary circumstances after receiving an appropriate level of review:

1. Documents pertaining to published guidance.

Documents pertaining to published guidance that are exempt from disclosure pursuant to discretionary discovery privileges or FOIA exemptions will be withheld. Published guidance includes regulations, revenue rulings, revenue procedures, notices, and announcements and is disclosed to the public by publication in the Federal Register or the Internal Revenue Bulletin. See 5 U.S.C. § 552(a)(1) and (2). The U.S. Department of Treasury's Office of Tax Policy and the Office of Chief Counsel have determined that it is inappropriate to waive applicable discretionary privileges or FOIA exemptions for privileged documents generated during the preparation of published guidance. The basis for this determination is twofold: (1) to protect against public confusion that might result from the disclosure of various internal positions that do not reflect the grounds for the adoption of the guidance that was published (or the decision not to publish guidance at all); and (2) to protect against exposing the decision making processes of the Department of the Treasury, Internal Revenue Service, and Office of Chief Counsel that would discourage candid discussion within these offices and undermine their ability to perform this critical tax administration function.

2. Documents pertaining to statements of agency policy and interpretations adopted by the agency, administrative staff manuals, and instructions to staff within the meaning of FOIA, 5 U.S.C. § 552(a)(2)(B) and (C), including written determinations under section 6110.

It is inappropriate to waive applicable discretionary privileges or FOIA exemptions for privileged documents that are generated during the preparation of any statements of agency policy and interpretations adopted by the agency, administrative staff manuals, and instructions to staff within the meaning of FOIA, 5 U.S.C. § 552(a)(2)(B) and (C), including written determinations under section 6110. Written determinations subject to the disclosure requirements of section 6110 include Private Letter Rulings, Technical Advice Memoranda, Chief Counsel Advice,² and Determination Letters. Other statements of agency policy and interpretations made available for public inspection under the FOIA include Actions on Decisions, General Counsel Memoranda, and Field-authored advice reviewed in the National Office. Administrative staff manuals and instructions to staff within the Office of Chief Counsel include the Chief Counsel Directives Manual and Chief Counsel Notices. Examples of privileged documents may include memoranda weighing reasons for and against the proposed policy, or meeting

² The "Chief Counsel Advice" umbrella includes Tax Litigation Bulletins, Criminal Tax Bulletins, General Litigation Bulletins, Service Center Advice, and Litigation Guideline Memoranda.

notes that reflect the exchange of opinions between agency personnel on the proposed written determination. The basis for withholding the deliberative or other privileged documents underlying “agency working law” is to encourage frank discussions on these matters between subordinates and decision makers and to protect against public confusion that might result from disclosure of various internal positions that were not in fact ultimately the grounds for the adoption of the policies, advice, or written determinations that are released to the public upon issuance (or the decision not to adopt any particular matter).

3. Documents pertaining to litigation.

The decision to release information contained in this group of documents is to be made only after full consideration of the appropriate factors, documented in writing³, and approved by the designated level of authority, as set forth below. Documents pertaining to litigation include not only documents prepared by Counsel attorneys, but documents maintained in the administrative files of the Service to which the litigation pertains. The procedural requirements to elevate and coordinate are not triggered in each case, but only in those cases when waiver of the discretionary privileges or FOIA exemptions is recommended. The FOIA has sometimes been used as a discovery tool, and, therefore, it is important that Counsel employees carefully coordinate their responses in discovery with Service personnel processing FOIA requests seeking the same documents or information. It is also important that Counsel employees carefully consider the impact of the assertion or waiver of discretionary privileges on their pending cases as well as on other pending or future cases.

a. Cases governed by Significant Case Procedures or Cases included in the Treasury Significant Litigation Report: The decision to waive any applicable discretionary privileges or FOIA exemptions for documents pertaining to these cases may be waived only by the Division Counsel Headquarters Office, in consultation with the affected Associate Chief Counsel office.

b. Cases in litigation that involve an issue for which the Office of Chief Counsel requires coordination with the National Office: Discretionary discovery privileges or FOIA exemptions for documents pertaining to these cases may be waived only by the Associate Area Counsel in coordination with the affected Associate Chief Counsel office.

c. Cases in litigation handled by the Associate Chief Counsel: Discretionary discovery privileges or FOIA exemptions for documents

³ Any decision to exercise administrative discretion and waive the assertion of an applicable discretionary privilege or FOIA exemption should be reflected on a Case History Sheet or brief memorandum to file. This documentation should be maintained in the litigation file.

