WRITTEN TESTIMONY OF
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HOUSE OVERSIGHT AND GOVERNMENT REFORM COMMITTEE
ON THE FREEDOM OF INFORMATION ACT
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INTRODUCTION AND BACKGROUND

Chairman Chaffetz, Ranking Member Cummings and Members of the Committee, my testimony today will discuss IRS policies and procedures regarding requests for information under the Freedom of Information Act (FOIA).

FOIA, which went into effect in 1967, established an effective statutory right under which records of the Executive Branch of the federal government are accessible to the public. FOIA applies to records either created or obtained by an agency and under agency control at the time of the FOIA request. Importantly, the statute sets standards for determining which records must be made available for public inspection and which records (or portions of records) must or may be withheld from disclosure, and it also provides administrative and judicial remedies for those who are denied access to records.

The IRS is committed to full compliance with FOIA. The FOIA reflects fundamental values held by our society, including public accountability, while at the same time recognizing other important interests, such as safeguarding national security, enhancing the effectiveness of law enforcement agencies and the decision-making processes, and protecting sensitive business information.

The IRS follows a standard procedure for handling each FOIA request it receives, which involves: analyzing the request to determine whether it in fact requests agency records and otherwise falls within the scope of FOIA; determining the scope of the request and conducting a search for responsive records; reviewing the material collected to determine what should be released or withheld; and preparing and sending a response to the requester.

In managing its FOIA operations, the IRS follows best practices, which include:

- Contacting requesters when necessary to clarify their needs and ensure that the scope of what they are seeking will result in a relevant document set that meets their expectations;

- Providing information to taxpayer requesters through non-FOIA processes that can be used to obtain the records they seek, which may be more efficient for the taxpayer;
- Identifying the FOIA work that needs special treatment because of complexity;
- Making sure that resources and processes are in place so that our FOIA professionals can get specialized legal or technical support when needed; and
- Providing for appropriate review to ensure that the agency is consistent and correct in handling FOIA requests.

The records responsive to each FOIA request that the IRS receives must be reviewed to determine whether any or all of the information is protected by one or more of the nine exempt categories of information found in the statute. When information is exempt, however, in accordance with the President's and Attorney General's 2009 FOIA Memoranda, as well as IRS policy, IRS FOIA professionals examine that information to determine if there is a foreseeable harm in disclosure and if discretionary release is appropriate. IRS policy states that any discretionary decision to release information protected under FOIA should be made only after full and deliberate consideration of the institutional, commercial and privacy interests that could be affected by disclosure of information.

An entire record is not necessarily exempt when a record contains some information that qualifies as exempt. Instead, FOIA specifically provides that any portions of a record that can reasonably be segregated must be provided to a requester after exempt portions are redacted or withheld. FOIA requires the IRS to identify the extent of, and basis for, any redactions from documents it releases, unless including that indication would harm an interest protected by an exemption.

In its FOIA review process, the IRS must also be mindful of its unique obligation to comply with Internal Revenue Code Section 6103, a statutory exemption recognized by FOIA that authorizes disclosure of federal tax information only in specific instances.

ONGOING CHALLENGES IN THE FOIA AREA

Over the last several years, as increasing numbers of documents have been created in electronic form, and as email messages have been requested more frequently, the size of an average FOIA request and the volume of potentially responsive documents has mushroomed. A single request frequently can result in the IRS needing to collect and redact thousands of documents. In addition, the number of cases considered to be "complex" – containing issues or volumes of records too difficult to resolve within the statutory time frame – has increased as well. As of April 1, 2015, 31 percent of the cases in our FOIA inventory were deemed complex, compared with 17 percent in 2012.

While the size of requests and the percentage of complex FOIA cases have increased over the last several years, we have managed to maintain the number of employees able to process basic FOIA matters, even with our financial constraints and related hiring freeze. But a high turnover rate has meant fewer experienced FOIA personnel. Replacing FOIA specialists involves not only hiring new workers, but also investing in extensive training and oversight necessary to bring replacements up to the expert level required to properly process complex FOIA requests, which has been difficult given recent cuts to our budget.

The net result has been the gradual loss of a significant amount of expertise in the FOIA area over the last several years. This challenge is expected to continue, as we estimate that more than 60 percent of our FOIA professionals will be eligible to retire in the next five years.

Another critical aspect of the IRS' ability to adequately respond to FOIA requests involves the ability to efficiently identify and retrieve responsive records. Here too, the IRS has faced challenges in recent years, largely because we do not currently have systems that would allow us to easily search and retrieve electronic records and emails, unless they are part of taxpayer case records.

Without an effective automated method for searching for electronic documents, including email, the IRS must conduct an account-by-account search for documents, which is an extremely time-consuming process. Additional funding would allow us to upgrade our infrastructure platforms and acquire more effective search capabilities, which would in turn allow us to respond to document requests, even extremely large ones, much more quickly than we are able to now.

Yet another challenge in the FOIA area for the IRS involves the out-of-date software we currently use for the day-to-day management of FOIA operations. Upgrading this software would allow the IRS to more quickly process and track FOIA requests, and thus reduce the amount of time it takes to complete a case. Additional funding would allow us to acquire a state-of-the-art web-based program that is currently installed at over 150 U.S. government agencies and offices.

ADDRESSING THE 2013 SURGE IN FOIA REQUESTS

Each year, the IRS processes more than ten thousand FOIA requests, most of which require labor-intensive searches of paper and electronic files. Despite this volume and complexity, the IRS closes the vast majority of its FOIA cases – over 80 percent – in 30 business days or less. For example, we received a total of approximately 10,400 FOIA requests in FY 2014, and the average time it took us to close a case that year was 20 days, with 83.2 percent of cases closed within 30 days.

Beginning in the summer of 2013, the IRS was faced with an unprecedented number of FOIA requests – a total of 154 – seeking records related to the processing of applications for tax exemption under Internal Revenue Code Section 501(c)(4). This followed the release of a report in May 2013 by the Treasury Inspector General for Tax Administration (TIGTA). At the same time, six investigating entities – TIGTA, the Department of Justice (DOJ) and four Congressional committees – were making requests to the IRS for large amounts of documents also related to the processing of exemption applications.

At the time, the IRS's highest priority was responding to the investigations by the four Congressional committees, TIGTA and DOJ. Further straining the IRS's limited resources in this area were document productions related to numerous ongoing civil litigation cases involving the same subject matters.

The IRS has devoted substantial resources to complying with the Congressional requests for information, by transmitting documents and facilitating interviews in an effort to provide complete facts about the determination process for tax-exempt status under section 501(c)(4). More than 250 IRS employees have spent more than 160,000 hours working directly on complying with the investigations, at a cost of approximately $20 million, which also includes the cost of adding capacity to our limited information technology systems to accommodate the voluminous information requests.

To date, the IRS has produced to Congress more than 1 million pages of documents related to the investigations. The House Ways and Means Committee and Senate Finance Committee have received approximately 1.3 million unredacted pages of material, while the IRS has produced about 1.1 million redacted pages to the House Oversight and Government Reform Committee. The difference in the number of pages produced was largely due to the fact that individual case files, which can be voluminous, may be disclosed only to the tax-writing committees under section 6103.

Ultimately, the decision to give priority to the investigations by TIGTA, DOJ and the four Congressional committees resulted in a significant increase in inventory of FOIA casework at the IRS: the number of backlogged cases that remained open at the end of FY 2014 stood at 317, compared with 217 at the end of FY 2013, and 118 at the end of FY 2012. To put these numbers in perspective, it should also be noted that during the FY 2012-2014 period, the total number of FOIA cases closed by the IRS exceeded 33,000.

The IRS remained committed to the FOIA process even as it worked through the challenges posed by the complexity of the issues involved, the limitation on our resources, and the priority we placed on producing the documents requested by Congress and other investigators.

IMPROVING MANAGEMENT OF ELECTRONIC RECORDS

The IRS has a long history of complying with the standards for retention of federal records set by the National Archives and Records Administration (NARA). Nonetheless, the unprecedented volume and scope of the document requests made by Congress and the public in 2013 in regard to the processing of applications for tax-exempt status highlighted the need for the IRS to continue improving its maintenance of federal records that are in electronic form, consistent with the constraints on our budget.

The IRS has been working for the last several months to revamp its records retention practices, focusing particularly on electronic records. In this effort, we have been in close consultation with NARA to ensure the best approach.

As a first step, in October 2014, we implemented an interim email retention policy for all senior IRS executives. This interim policy, which follows NARA's recommendations for email records retention, was extended to all IRS executives in December 2014. This policy is to be followed by a more fully developed enterprise solution for longer-term storage of emails. We are working to complete the development and implementation of the enterprise solution, though success will depend on funding, staffing, and prioritization against other business requirements.

Our next step, to the extent that funding is available, will be to purchase the necessary equipment and technology to allow us to securely store, search, and retrieve emails that are federal records.

While the interim policy is an important step toward a consistent policy of electronic federal records retention, the IRS ultimately intends to develop and implement more automated enterprise solutions, consistent with government-wide guidance and standards. But we cannot wait for those solutions to be fully funded. That is why we have already begun to take action using the resources available to us.

Chairman Chaffetz, Ranking Member Cummings and Members of the Committee, this concludes my statement, and I would be happy to take your questions.