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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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:
ELECTRONIC PRIVACY :
INFORMATION CENTER, :
:
Appellant, :
:
v. : No. 17-5225
:
INTERNAL REVENUE SERVICE, :
:
Appellee. :
:
----- X

Thursday, September 13, 2018
Washington, D.C.

The above-entitled matter came on for oral
argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES HENDERSON AND MILLETT, AND
SENIOR CIRCUIT JUDGE EDWARDS

APPEARANCES:

ON BEHALF OF THE APPELLANT:

JOHN L. DAVISSON, ESQ.

ON BEHALF OF THE APPELLEE:

MICHAEL MURRAY (DOJ), ESQ.

C O N T E N T S

ORAL ARGUMENT OF:

PAGE

John L. Davisson, Esq.
On Behalf of the Appellant

3; 31

Michael Murray (DOJ), Esq.
On Behalf of the Appellee

18

P R O C E E D I N G S

1
2 THE CLERK: Case number 17-5225, Electronic
3 Privacy Information Center, Appellant v. Internal Revenue
4 Service. Mr. Davisson for the Appellant; Mr. Murray for the
5 Appellee.

6 JUDGE HENDERSON: Good morning.

7 ORAL ARGUMENT OF JOHN L. DAVISSON, ESQ.

8 ON BEHALF OF THE APPELLANT

9 MR. DAVISSON: Good morning. May it please the
10 Court, John Davisson for the Appellant EPIC. With me at
11 Counsel table are Marc Rotenberg and Alan Butler. I'd like
12 to reserve one minute of my time, please, for rebuttal.

13 Your Honors, in February of 2016 the future
14 President of the United States went on national television
15 and stated repeatedly that the IRS targets him for audits on
16 the basis of his political views and his religious
17 affiliation. The IRS swiftly denied that the Agency would
18 ever do such a thing, but the accusation was never
19 withdrawn. In January of 2017 the President elect went on
20 Twitter and told tens of millions of followers that he had
21 no sources of Russian income and no financial entanglements
22 with Russia. This claim was swiftly refuted by his own
23 attorneys who explained after reviewing his returns that
24 indeed the President had Russian sources of incomes. These
25 apparent misstatements were the fact by the President of the

1 United States impugn the credibility of the IRS and call
2 into doubt the ability of the Agency to fairly administer
3 the Tax Code, yet the President has never corrected the
4 record. The IRS has the ability to correct that record, and
5 it may do so under 6103(k) (3) of the Internal Revenue Code.
6 EPIC's FOIA request seeks exactly this type of record, and
7 seeks the IRS to use exactly this type of disclosure power.
8 Because EPIC has perfected its request, a request that
9 conforms in every respect with the published FOIA
10 regulations, and because EPIC has set forth extensive facts
11 justifying the use of this (k) (3) disclosure power, the IRS
12 is obligated to issue a determination on that request, and
13 to sustain that request in *de novo* judicial review. If ever
14 there were a situation that justified the use of (k) (3) this
15 is it, and we ask the Court to reverse the decision of the
16 District Court and remand for further proceedings so that
17 the IRS can fulfill its FOIA processing obligations.

18 JUDGE MILLETT: I had thought your position here
19 was narrower than that, and that is that they treated your
20 FOIA request as not perfected and just refused to process
21 it, and so really the only thing before us is whether this
22 will (indiscernible 10:41:02) you've argued is that true
23 that it made it a perfected FOIA request, and then they had
24 to bear the burden of coming forward and showing that they
25 have an Exemption 3 statute, which they just haven't yet

1 done, do we have to even get that latter question, whether
2 Exemption 3 would or would not properly be invoked here,
3 notwithstanding the (k) (3) provision? Because they didn't
4 seem to go that far, did they?

5 MR. DAVISSON: No, Your Honor, in fact, and that's
6 precisely the concern that we raise in this appeal is that
7 the IRS did not even begin the FOIA process, it is required
8 to make that determination. So, you're correct that --

9 JUDGE MILLETT: Well, I know what you mean by
10 begin it, they may not -- if they persuade that 6103 is an
11 Exemption 3 statute, which in many ways it is, there's just,
12 we have to figure out what to do with (k) (3), then they
13 don't have to search for records or do any of that kind of
14 stuff. The question is just who had the burden of showing
15 that (k) (3) is, does or does not take them out of Exemption
16 3, isn't that the only thing before us?

17 MR. DAVISSON: Well, yes, but to push back
18 slightly, it is an Exemption 3 statute, 6103, we agree, but
19 it is a statute that includes not only a general presumption
20 of confidentiality, but also a number of different
21 exceptions that permit disclosure, so the --

22 JUDGE MILLETT: No, but all of the other
23 exceptions are to other governmental entities for
24 governmental purposes, am I correct?

25 MR. DAVISSON: No, that's not correct, Your Honor,

1 they're on --

2 JUDGE MILLETT: And then to a tax payer who asks
3 for one?

4 MR. DAVISSON: There are a number of other
5 exceptions, also.

6 JUDGE MILLETT: What other ones are you pointing
7 to?

8 MR. DAVISSON: Well, 6103(e) --

9 JUDGE MILLETT: Yes.

10 MR. DAVISSON: -- lists a number of different
11 circumstances under which a, records concerning a tax payer
12 can be disclosed to a person with a material interest in
13 those records. So, for example, 6103(e)(3) talks about
14 disclosure to the executor of an estate --

15 JUDGE MILLETT: Right, but those are all people
16 who have --

17 MR. DAVISSON: -- the decedent's records.

18 JUDGE MILLETT: -- legal claims to that same tax
19 payer's information. I'm talking about --

20 MR. DAVISSON: Yes.

21 JUDGE MILLETT: -- to, either to the tax payer or
22 tax payer's legal surrogate, or to governmental entities for
23 state or federal for public purposes. Is there anything in
24 6103 that otherwise, other than your arguments about (k)(3)
25 that allows disclosure to the general public?

1 MR. DAVISSON: I can point to three provisions,
2 one is 6103(k) (1) that requires the disclosure of accepted
3 offers and compromise to the public at large.

4 JUDGE MILLETT: Yes.

5 MR. DAVISSON: 6103(m) (1), which contemplates
6 disclosure of certain information about a tax payer to the
7 media, whether it is there are unclaimed funds that the tax
8 payer has paid to the IRS and the IRS is unable to locate
9 that person; and then in the very next section of the
10 Internal Revenue Code 6104 the tax return information,
11 certain tax return information concerning tax exempt
12 organizations is also subject to mandatory disclosure. So,
13 there are in fact numerous circumstances in the Tax Code
14 where disclosure is possible to a third party even though
15 there has not been proof of consent.

16 JUDGE HENDERSON: Can I ask you something that's
17 outside the record, but it occurred to me in preparing for
18 this case, are the financial disclosure forms that the
19 Executive Branch has to fill out just like we do, and ours
20 are a matter of public record, are they not, or do you know?
21 In other words --

22 MR. DAVISSON: Are they a matter of public record?

23 JUDGE HENDERSON: Yes. I mean, can't you get some
24 of this information from the financial disclosure forms that
25 were required to --

1 MR. DAVISSON: I don't believe -- I don't know the
2 answer for certain. I don't believe the particular sources
3 and amounts of income that would be reflected on an income
4 tax return are necessarily available for financial
5 disclosures.

6 JUDGE HENDERSON: Then they're a lot different
7 from ours, but, you may be right about that.

8 MR. DAVISSON: I admit I don't know, Your Honor,
9 I'm --

10 JUDGE HENDERSON: Okay.

11 MR. DAVISSON: -- not familiar with that statute.

12 JUDGE HENDERSON: Okay.

13 MR. DAVISSON: I'd like to turn first to the fact
14 that the -- to describe in more detail why it is that EPIC
15 perfected its FOIA request, and why the Agency must
16 therefore issue a determination. We have complied with all
17 the published rules that would apply to a (k)(3) FOIA
18 request, and the one published rule that the IRS has pointed
19 to and argued that bars processing of a request requires
20 proof of consent as appropriate. And this rule does not
21 operate as a bar to the processing EPIC's request for three
22 reasons, the first is what the Agency says on page 25 of its
23 brief, and that is that this provision implemented 6103(c),
24 this is not a request for the disclosure of records under
25 6103(c), the Agency has no authority to apply this

1 regulation implementing a different disclosure provision to
2 this particular disclosure, this particular request.

3 The second point is that even if that regulation
4 could be said to apply to this request, it only requires
5 proof of consent as appropriate, and the words as
6 appropriate, as this Court has made clear in Consumer
7 Federation v. HHS, when they are included in a statute or
8 regulation they mean something, they mean only to the extent
9 appropriate. So, it would be definitively not appropriate
10 to require proof of consent where that proof of consent will
11 have no bearing on the Agency's determination of whether the
12 records are exempt or will be released, and that is the case
13 here in (k) (3). And that will be the case, as I indicated
14 earlier, for a number of different disclosure provisions,
15 including 6103(e), which permits disclosure based on
16 demonstration of a material interest, but does not require
17 proof of consent, 6103(k) (1), 6103(m) (1), 6104, and so
18 forth.

19 JUDGE HENDERSON: Can I ask you about something in
20 your addendum on page 41, apparently this is the only thing
21 in the record that indicates when the IRS used (k) (3), and
22 it was back in 2000.

23 MR. DAVISSON: Yes.

24 JUDGE HENDERSON: And (k) (3), because leaving
25 aside who can seek the disclosure, I'm wondering about to

1 whom the disclosure it made, and on that one instance 10
2 disclosures were made to federal agencies --

3 MR. DAVISSON: Yes, Your Honor.

4 JUDGE HENDERSON: -- under (k) (3).

5 MR. DAVISSON: It is not entirely clear from the
6 record, I think, whether the disclosures were made for
7 federal agencies, or on behalf of federal agencies.

8 JUDGE HENDERSON: But there's also two, in other
9 words, I read disclosure to or for to mean that is what the,
10 those are the entities to which the IRS discloses something
11 under (k) (3).

12 MR. DAVISSON: But I think the presence of the
13 word for suggests that it might be also to whom the Agency,
14 or sorry, yes, for whom the Agency made the disclosure. So,
15 if there were, federal agencies could be the IRS defending
16 itself by making (k) (3) disclosures, which directly sort
17 of --

18 JUDGE HENDERSON: Okay.

19 MR. DAVISSON: -- the core purposes of --

20 JUDGE HENDERSON: Okay, but --

21 MR. DAVISSON: -- (k) (3).

22 JUDGE HENDERSON: And then there are other ones
23 that go to prospective jurors and so forth, but looking just
24 at (k) (3) it looks as if the record indicates that the 10
25 times that the IRS used (k) (3) it was never to disclose it

1 to the public.

2 MR. DAVISSON: I, unfortunately because of the
3 imprecision of this document I don't know for sure to whom,
4 or for whom the record disclosure was --

5 JUDGE HENDERSON: Well, it says federal agencies.

6 MR. DAVISSON: It says -- well, it's -- but that
7 could also, as I said, it could mean for federal agencies,
8 it could mean for the IRS, it's not -- but, and I'll
9 explain --

10 JUDGE HENDERSON: Okay. Okay.

11 MR. DAVISSON: -- to provide some context, we
12 don't know the exact circumstances of those disclosures, we
13 attempted to obtain records about them. The timing suggests
14 that they were related to the concerns raised by
15 Commissioner Richardson in 1998, that there were being,
16 there false statements being made about the IRS's treatment
17 of certain tax exempt organizations, and it appears that
18 there was a report that came out from the Joint Committee on
19 Taxation in the year 2000 that analyzed those questions, and
20 then these disclosures came in 2000. So, it's our belief
21 that they were probably connected, we don't have definitive
22 proof of that, again, we've tried to obtain it.

23 JUDGE HENDERSON: Okay.

24 MR. DAVISSON: As a second point, the Court, once
25 the IRS makes a determination on EPIC's request would have

1 power to review, and in fact will be required to review that
2 determination in *de novo* FOIA review. The IRS has suggested
3 otherwise, and just put that forward as a basis for why
4 processing would not even be required. But the Court was
5 clear in Church of Scientology that determinations made
6 under 6103 as a Exemption 3 statute are reviewable *de novo*
7 by the Court, and that includes something like 6103(c), that
8 was the provision at issue in Church of Scientology, that is
9 also a discretionary disclosure provision like (k)(3), yet
10 the Court was clear that the District Court on remand would
11 have to review that in *de novo* FOIA review.

12 Another point, the IRS has suggested that
13 Exemption 3 categorically bars these records, the
14 availability of these records to EPIC, the problem is, as I
15 indicated earlier, the IRS hasn't finished applying the
16 criteria of 6103. There is indeed a presumption of
17 confidentiality in 6103(a), but there are also relevant
18 exceptions, and (k)(3) being the one that EPIC has relied on
19 here. The (k)(3) criteria, the Agency has been clear that
20 it's never actually applied those criteria to the requested
21 records, or even to the requested categories of records that
22 EPIC seeks, it states that on page 56 of its brief. It
23 hasn't made a discretionary determination, it hasn't made
24 the factual determinations that would enter into a
25 discretionary determination.

1 JUDGE MILLETT: Well, isn't there the first legal
2 question, just to the question as a matter of law whether
3 6103(k) (3) is an, I hate to say, but an exemption to the
4 exemption, right? The Exemption 3 statute, 6103 --

5 MR. DAVISSON: Yes.

6 JUDGE MILLETT: -- presumption pretty strong,
7 pretty strong one.

8 MR. DAVISSON: We agree.

9 JUDGE MILLETT: And certainly as to public
10 release. And then your theory is that (k) (3) takes some of
11 the air out of that.

12 MR. DAVISSON: Yes.

13 JUDGE MILLETT: And that's, is that something that
14 falls within their burden to demonstrate in the first
15 instance, or since you said it's *de novo* review do we just
16 decide now whether you're right or they're right that (k) (3)
17 creates a right to public disclosure of records? Is that
18 just a question of law we're supposed to decide right now,
19 or do we, given their perfection ruling need to remand for
20 them to take a position on (k) (3) in the first instance?

21 MR. DAVISSON: Your Honor, we believe remand is
22 appropriate here, because, and the IRS, so it is the IRS
23 that has tried to push forward this issue of whether
24 Exemption 3 actually applies, and whether (k) (3) actually
25 applies. But the Court does not have to reach that issue

1 today.

2 JUDGE MILLETT: But you just said it's *de novo*
3 review. That's what I'm trying to --

4 MR. DAVISSON: Yes.

5 JUDGE MILLETT: -- reconcile your two positions.

6 MR. DAVISSON: So, the Court explained in Railroad
7 Workers that it is for the Agency in the first instance to
8 make an Exemption 3 determination, and that is for the Court
9 to review it, and Church of Scientology indicates that in
10 the 6103 context that review would be *de novo*. So, the
11 Agency has an obligation that it has not yet fulfilled, and
12 that it must sustain any determination that it makes, and
13 any withholdings that it asserts on the basis of an
14 affidavit, which it has not provided here, and then that
15 would be submitted to the Court for *de novo* review.

16 JUDGE MILLETT: It doesn't have to be an
17 affidavit, we have their determination letters, that could
18 be enough, could it not?

19 MR. DAVISSON: Well, Your Honor, they have been
20 clear, they say in the Michael Young Declaration from the
21 District Court proceedings that that's not a determination,
22 it's a letter that rejects processing of a request, but it
23 is not a determination letter, they have not identified --

24 JUDGE MILLETT: Well, they have a line that says
25 (k) (3) doesn't create rights.

1 MR. DAVISSON: They do, yes.

2 JUDGE MILLETT: In the second, in the appeal
3 letter, I guess, it says (k) (3) doesn't create rights, is
4 that a determination of the meaning of the statute? You're
5 saying it's not? That's what I'm trying to wrestle with.

6 MR. DAVISSON: Well, I think that represents an
7 attempt by the Agency to categorically remove (k) (3) from
8 the reach of a FOIA request.

9 JUDGE MILLETT: That would be a legal
10 determination as to what 6103(k) means, would it not?

11 MR. DAVISSON: I think it would not meet the
12 requirements of a determination because it does not assess
13 whether the criteria of (k) (3) had been met, it simply says
14 the provision is not accessible.

15 JUDGE MILLETT: No, because it takes a legal --
16 your position is that the only way (k) (3) cannot apply is if
17 they march through the criteria.

18 MR. DAVISSON: Yes.

19 JUDGE MILLETT: As I take it from that one little
20 line in the appeal letter, but it's not much elaboration,
21 they read (k) (3) as it's not for you, there's nothing here
22 that says the public has a right to information, this is a
23 right for the Secretary to make a decision, but there's no
24 public right here, so it doesn't take anything out of the
25 overarching 6103 Exemption 3 status. We could have a

1 different discussion if you came in under (k)(1) or (m)(1),
2 but that's not where we are. And (k)(3) has, that doesn't
3 undo the Exemption 3 status that generally governs tax
4 returns under 6103. I think that's their position from that
5 line in the letter, but they'll tell me if I'm wrong.

6 MR. DAVISSON: I --

7 JUDGE MILLETT: So, they don't --

8 MR. DAVISSON: Sorry.

9 JUDGE MILLETT: We don't need to go through steps,
10 these aren't your steps. These steps don't give the public
11 a right to information.

12 MR. DAVISSON: So, I would push back on that on
13 several --

14 JUDGE MILLETT: Yes.

15 MR. DAVISSON: -- fronts. I would say -- I see my
16 time has expired, but if --

17 JUDGE MILLETT: Yes.

18 MR. DAVISSON: -- I may? I would say that the,
19 first of all, the Court in Church of Scientology discussed
20 at length how FOIA and 6103 are interlocking statutes, FOIA
21 creates the procedures that the Agency must follow when it
22 receives a conforming request, 6103 establishes the
23 substantive criteria for withholding a disclosure, so when a
24 FOIA requester seeks records under the FOIA the Agency must
25 sustain any determination made under 6103 in *de novo* FOIA

1 review.

2 The second point is that the Court in reaching
3 that holding actually singled out (k) (3) as one of the
4 provisions in the statute that concerns disclosure to the
5 public at large. So, it is true that the (k) (3) provision
6 does protect the interests of the IRS, but it does that by
7 assuring that in the right circumstances the public will
8 have access to accurate information to correct damaging
9 misstatements of fact made about the IRS. So, I think I
10 would disagree fully with the characterization that it is
11 not accessible to a FOIA request, or to EPIC in this
12 request.

13 The IRS has suggested that if the Agency, sorry,
14 if the Court were to find favorably for EPIC that it would
15 create an administrative burden for them, but I would say
16 that there is nothing in the record to support this
17 conclusion. There is no evidence, as we know, the (k) (3)
18 provision has only been discussed a small handful of times
19 by the Agency, and as we are aware of no FOIA request that
20 has invoked this provision prior to today, there is nothing
21 to suggest that the (k) (3) power would be invoked by a flood
22 of FOIA requesters, and indeed, if the IRS is concerned
23 about such an eventuality it has the power, as it has had
24 for 40 years, to implement (k) (3) through appropriate FOIA
25 regulations, it hasn't done that, and it cannot deny

1 processing of EPIC's request on the basis of a rule that is
2 not published, that would be unreasonable as applied to this
3 request, and that it is essentially made up on the fly. If
4 there are no further questions, thanks.

5 JUDGE HENDERSON: Mr. Murray.

6 ORAL ARGUMENT OF MICHAEL MURRAY, ESQ.

7 ON BEHALF OF THE APPELLEE

8 MR. MURRAY: Good morning, Your Honors, and may it
9 please the Court, Michael Murray for the United States. The
10 District Court properly dismissed EPIC's complaint in this
11 case, EPIC did not perfect its FOIA request, and thus did
12 not exhaust its administrative remedies because it did not
13 show entitlement to the records that it requested as
14 required by IRS regulations. It did not provide a tax
15 payer's consent, and its invocation of 6103(k)(3) is
16 unavailing for three reasons, first, 6103(k)(3) does not
17 establish a right to disclosure and can be triggered by
18 private parties; second, it is not --

19 JUDGE MILLETT: Where did the Agency decide that?

20 MR. MURRAY: Say again.

21 JUDGE MILLETT: Where did the Agency decide that?

22 MR. MURRAY: In the sentence that you referred
23 to --

24 JUDGE MILLETT: That's a -- okay.

25 MR. MURRAY: -- in the second request when EPIC

1 raised 6103(k) (3) for the first time. So, reading that
2 sentence in combination with the sentence that follows it,
3 which discusses how the requester must establish his right
4 to the information, it is clear that the IRS concluded that
5 EPIC did not have a right to the information under either
6 (c) or (k) (3).

7 JUDGE MILLETT: The difficulty is, and it's right
8 where you started with the, the reasoning, which completely
9 surrounds that one sentence, that this was not a perfected
10 FOIA request, and what the difficulty is it seems like the
11 IRS is collapsing the requirements for a perfected FOIA
12 request with winning, establishing on the merits their
13 position on Exemption 3, and that seems to shift the burden
14 to it's not, they're not within an, there's no Exemption 3
15 problem, provide the consent, prove us on (k) (3), rather
16 than the one thing we've said time and time again is that
17 6103 goes to the same FOIA (indiscernible 10:58:37) statute.
18 And so, when you get a FOIA request that says I would like
19 documents the answer isn't show us why you're not an
20 Exemption 3, if everything else is fine with the FOIA
21 request, the burden is then on the Government to say no,
22 Exemption 3 applies, and that didn't seem to happen here.

23 MR. MURRAY: I'm not sure that's exactly right,
24 Your Honor. It seems quite reasonable for the IRS and the
25 Treasury Department to establish as a regulation under FOIA

1 that in order to perfect a FOIA request an individual has to
2 establish some sort of right to the information before the
3 IRS is going to go out and search for records --

4 JUDGE MILLETT: FOIA is the source of the right to
5 information unless an exemption applies. They don't need
6 another choice of a right, FOIA is the source unless an
7 exemption applies, that's what FOIA says, and then the
8 burden to show the exemption is on the Government. So, you
9 can't make them show that they are outside an exemption,
10 they say I'd like documents and then the burden is on the
11 Government to say an exemption applies. This seems to have
12 averted that, that's all, it's just a procedural problem.

13 MR. MURRAY: I agree with you that there's a
14 procedural issue here, Your Honor, and I think the way to
15 look at it is that FOIA also requires requesters to comply
16 with the Agency's reasonable procedural regulations. And it
17 is quite reasonable for IRS to require that an individual
18 establish their right to the information before requiring
19 IRS to go --

20 JUDGE MILLETT: What do you mean their right to
21 the, what do you mean by their right to the information? Do
22 they have to show that this particular request is one of the
23 exceptions to the bar on disclosure that was identified in
24 Church of Scientology, or do they have to do more, do they
25 have to establish their legal position is correct on their

1 view of what that exemption is, how the exemption works?

2 MR. MURRAY: So, maybe the best example is the
3 6103(c) context. So, if that were the source of the, a
4 particular Plaintiff's right to the particular information
5 at issue they would need to attach some sort of consent
6 authorization from the relevant tax payer, and that would be
7 part of their FOIA request, and then --

8 JUDGE MILLETT: Right. And but you're trying to
9 apply that here, and, but there's no requirement for consent
10 of a tax payer under (k) (3). I mean, it would be ludicrous
11 to require consent of the tax payer under (k) (3), it's not
12 in the statute, it would make no sense since the whole point
13 is for the Secretary to be able to disclose information when
14 some tax payer is, or even a third party is causing problems
15 out there with their false statements, so there can't be a
16 consent requirement for (k) (3).

17 MR. MURRAY: Sure. So, let's take a different
18 example so we don't get confused here between (c) and
19 (k) (3), let's take (m) for example, which is the media
20 exemption for lost tax payers.

21 JUDGE MILLETT: Yes.

22 MR. MURRAY: In the Aronson case what the First
23 Circuit required was the individual to establish that they
24 were in fact a member of the media, that they were not in
25 that case, and so --

1 JUDGE MILLETT: Yes.

2 MR. MURRAY: -- the First Circuit decided that the
3 IRS did not need to process the, they did not need to do
4 anything with the FOIA request (indiscernible 11:01:43)
5 search for the records, produce the records in any way,
6 decide whether the records existed, possibly redact or
7 segregate the records.

8 JUDGE MILLETT: Yes.

9 MR. MURRAY: And was able to cut it off as a legal
10 determination.

11 JUDGE MILLETT: I get that. But our Circuit has
12 been quite clear about that ordinary FOIA processing is what
13 applies even under 6103. So, I'm trying to understand how
14 you can see, conceptualize their burden under (k) (3).

15 MR. MURRAY: Yes.

16 JUDGE MILLETT: If they don't, what they don't
17 have to do is show that the Exemption 3 doesn't apply, you
18 would agree with that, under FOIA people can ask for records
19 and they don't have to include in their request Exemption 1
20 doesn't apply, Exemption 2 doesn't apply, Exemption 3
21 doesn't apply, they don't have to do that, they just say I'd
22 like these documents, correct? That's a perfected FOIA
23 request, I'd like these documents.

24 MR. MURRAY: Generally speaking, although not in
25 this context because the Agency has established a reasonable

1 regulation requiring the Plaintiff to establish some rights,
2 which makes a lot of sense --

3 JUDGE MILLETT: Well, reasonable regulation maybe
4 for (c) (3), I don't know, what, what reasonable regulation
5 do you have that governs (k) (3)?

6 MR. MURRAY: The same, there's an across the board
7 regulation that requires the FOIA requester to establish his
8 right to the information, and that's --

9 JUDGE MILLETT: Well, then that's the very, then
10 that's the very problem here, right? Have we held that that
11 regulation is reasonable in the FOIA context?

12 MR. MURRAY: I'm not aware.

13 JUDGE MILLETT: No. So --

14 MR. MURRAY: I don't think it's been cited, it's
15 been held in a particular case, but I could be wrong, and
16 I'll check that. But the question as to whether it is a
17 reasonable regulation, I think the answer to that is yes, it
18 is quite reasonable for --

19 JUDGE MILLETT: Well, if you dropped in a
20 regulation, which by the way, this is nowhere in the
21 determination letter, right?

22 MR. MURRAY: No, Your Honor.

23 JUDGE MILLETT: That this regulation applies to
24 (k) (3)?

25 MR. MURRAY: Your Honor, the letter --

1 JUDGE MILLETT: Yes.

2 MR. MURRAY: -- the second letter which talks
3 about (k) (3) --

4 JUDGE MILLETT: Yes.

5 MR. MURRAY: Also cites the regulation saying that
6 a person needs to establish their right to the information.

7 JUDGE MILLETT: So, if you -- and if they say my
8 rights under FOIA.

9 MR. MURRAY: I'm sorry, I don't --

10 JUDGE MILLETT: They say my right just to this
11 information is FOIA, FOIA gives me a right to request
12 information from the Government, unless the Government shows
13 it's exempted.

14 MR. MURRAY: That would not be correct because
15 FOIA does not just give them a general right to the
16 information, because FOIA, Exemption 3 says that FOIA
17 disclosures requirement is not applicable when the material
18 is forbidden from disclosure by another statute.

19 JUDGE MILLETT: And who has the burden of showing
20 that? Who has the burden of showing that material is
21 forbidden to be disclosed?

22 MR. MURRAY: Your Honor, in Aronson the Court --

23 JUDGE MILLETT: Who under the statute has the
24 burden of showing, and who under Church of Scientology has
25 the burden of showing that Exemption 3 applies?

1 MR. MURRAY: First of all, Your Honor, I think in
2 this case it doesn't matter because it's a legal issue. But
3 regardless, what the courts have held, and the District
4 Court say in Goldstein, or the Court in Aronson held that it
5 is the, the Plaintiff who has the burden of showing that the
6 particular information that he is seeking is eligible for
7 exemption, excuse me, eligible for release, and the
8 Plaintiff has not shown that here.

9 JUDGE MILLETT: Would you -- so, if your FOIA
10 regulation said anybody who requests, to have a perfected
11 FOIA request you must show not only that you're seeking
12 records that fall within the definition under FOIA, but you
13 must also disprove the application of an Exemption 3
14 statute, that would be perfectly fine?

15 MR. MURRAY: Your Honor, there is probably a limit
16 to what can be a reasonable regulation, but the idea that an
17 individual needs to establish some right to the
18 information --

19 JUDGE MILLETT: No, do they have to --

20 MR. MURRAY: -- I think is quite reasonable.

21 JUDGE MILLETT: But what you're saying, the
22 problem is you're saying the way they didn't show their
23 right is they did not disprove Exemption 3. That's what
24 your regulation as you're telling me now says. The reason
25 they didn't have a perfected FOIA request is they did not

1 disprove that Exemption 3 applies.

2 MR. MURRAY: That is true in some sense, Your
3 Honor, but --

4 JUDGE MILLETT: That's true exactly, that's
5 exactly what your argument is.

6 MR. MURRAY: But I don't see what the problem with
7 that is, that is a reasonable regulation under FOIA to
8 prevent the Agency --

9 JUDGE MILLETT: To say that you have to disprove
10 as part of your FOIA request that Exemption 3 applies.

11 MR. MURRAY: I think it's quite reasonable for the
12 Agency to do what it did here, which is to require some --

13 JUDGE MILLETT: Is that -- my question is if the
14 regulation said in addition to establishing that the records
15 we request fall within the parameters of FOIA you must
16 disprove that Exemption 3 applies, would that regulation be
17 permissible?

18 MR. MURRAY: I'm not sure exactly what that -- I
19 don't want to pass on a regulation that I have not read, or
20 reviewed, or does not exist, Your Honor. But what I can say
21 is that no court has ever held that this particular
22 regulation is not reasonable.

23 JUDGE MILLETT: I don't know why you're resisting
24 it so much. I think it's pretty settled FOIA law that
25 Exemption 3 has to be proved by the Agency. That's pretty

1 settled FOIA law.

2 MR. MURRAY: Yes, Your Honor. Maybe what we're,
3 maybe what we're having is a miscommunication here as to
4 whether what the IRS did was make a, some sort of Exemption
5 3 determination.

6 JUDGE MILLETT: I was giving you a hypothetical.

7 MR. MURRAY: Yes, but it's important for me to
8 understand the hypothetical.

9 JUDGE MILLETT: And the hypothetical is the
10 regulation, as I said, the FOIA requester must disprove the
11 application of Exemption 3.

12 MR. MURRAY: That would not be, that's not the
13 regulation that we have here, so I suspect that the answer
14 might be as Your Honor suggests to that particular
15 hypothetical. The regulation we have here doesn't say
16 anything about that.

17 JUDGE MILLETT: So, this -- now, this, the other
18 regulation said that in tax cases they must disprove the
19 application of 6103 as an Exemption 3 statute, that makes a
20 difference?

21 MR. MURRAY: Well, I think the -- maybe I'm
22 misunderstanding. I think the regulation here is quite
23 reasonable and requires the Agency --

24 JUDGE MILLETT: The question is if this regulation
25 said as part of your FOIA request you must disprove the

1 application of Exemption 3, the application of 6103 as an
2 Exemption 3 statute you must disprove the applicability of
3 6103 as an Exemption 3 statute as part of your FOIA request.

4 MR. MURRAY: Well, I'm not sure that's what this
5 regulation says.

6 JUDGE MILLETT: I'm just asking the question.

7 MR. MURRAY: So, if, in general, in general FOIA
8 regulation statutes do not say that a particular requester
9 must say that Exemption, say, 7, or Exemption 5 does not
10 apply, but it is quite reasonable for an individual, or
11 excuse me, an agency to have a regulation that requires the
12 individual to identify the records that they're trying to
13 request that allows the agency to search for them should it
14 need to do so, and establishes that it is not just a person
15 filing a request to file paper. And so, I think that's all
16 quite reasonable, which is exactly what IRS has here, it has
17 a regulation that, or requires an individual to show its
18 rights to the relief.

19 JUDGE MILLETT: To show that Exemption 3 doesn't
20 apply.

21 MR. MURRAY: So, let me take a step back, Your
22 Honor. I think the Lehrfield case is a good example, as is
23 Hull and Aronson, that's why this is a very important
24 question I think that you're asking, it's a little bit, as I
25 pointed out, academic in this case because there really is

1 no dispute that (k) (3) is not satisfied, and so the
2 individuals do not have a right to the information. So,
3 whether we call this exhaustion, or whether we just make
4 this a merits --

5 JUDGE MILLETT: How is there not -- what do you
6 mean there's no dispute that (k) (3) is not satisfied?

7 MR. MURRAY: There's no Joint Committee
8 authorization in this case.

9 JUDGE MILLETT: Yes.

10 MR. MURRAY: And so, that's a condition one --

11 JUDGE MILLETT: But they very much dispute the
12 order in here.

13 MR. MURRAY: I'm sorry?

14 JUDGE MILLETT: We just haven't gotten to that,
15 you didn't get to that in your determination letters, they
16 haven't gotten, I think they very much do dispute (k) (3)
17 would apply here, it's just a question of ordering, like
18 who, they dispute who does to the committee.

19 MR. MURRAY: Well, I don't think they've ever
20 argued that the Joint Committee has --

21 JUDGE MILLETT: Right.

22 MR. MURRAY: -- has an authorization.

23 JUDGE MILLETT: Right.

24 MR. MURRAY: And so, there really can't be any
25 dispute that all the conditions in (k) (3) have been

1 satisfied.

2 JUDGE MILLETT: I think they say because you
3 haven't processed it, that's why.

4 MR. MURRAY: Well, they've never provided any
5 indication that the Joint Committee has provided an
6 authorization, so if this Court is concerned about the
7 exhaustion issue that you're talking about --

8 JUDGE MILLETT: So, if they did come with a letter
9 from the Joint Committee what would happen then? So, if the
10 FOIA request was the exact same as it was here, and attached
11 was a copy of a letter from the Joint Committee what would
12 happen then?

13 MR. MURRAY: So, in that circumstance we'd have to
14 focus on whether (k) (3) provided a right that could be
15 triggered by private parties, that is whether the Secretary
16 could be forced to do something under (k) (3), which I think
17 is what Judge Henderson was asking my colleague on the other
18 side. We don't really have to focus on that question here,
19 we don't have to decide that issue, and that's why Judge
20 Boasberg didn't really address some of these very important
21 but detailed questions. The easiest way to resolve this
22 case is to say (k) (3) simply is not satisfied because
23 there's no Joint Committee authorization, and so there's no
24 entitlement to the records. And whether we do that as a
25 matter of exhaustion, as our brief suggests, or whether we

1 do it just as sort of a matter of law on the merits, as this
2 Court did in Lehrfield, or as the Tenth Circuit did in Hull
3 where it converted an exhaustion issue to a merits issue is
4 really an academic point, although an important academic
5 point.

6 JUDGE HENDERSON: All right. Thank you. Does Mr.
7 Davisson have any time left?

8 THE CLERK: Mr. Davisson does not have any time
9 left.

10 JUDGE HENDERSON: All right. Why don't you take a
11 minute.

12 ORAL REBUTTAL OF JOHN L. DAVISSON, ESQ.

13 ON BEHALF OF THE APPELLANT

14 MR. DAVISSON: Thank you, Your Honor. Just a few
15 quick points. I think Your Honor, Judge Millett, you were
16 correct exactly that this regulation has the effect of
17 shifting the burden to the FOIA requester proving that there
18 is no exemption that could possibly apply, and that is per
19 se unreasonable FOIA regulation, of the type that is not
20 permitted by this Court's precedence.

21 My colleague on the other side has suggested that
22 this is a reasonable regulation, again, it is not a
23 reasonable regulation because it is an unwarranted burden
24 that provides for a requirement, proof of consent where in
25 fact there is no requirement for consent in the (k) (3)

1 provision.

2 The term right of access was discussed in the FOIA
3 regulations, I just want to clarify that those terms don't
4 mean that the requester has to demonstrate an absolute
5 unqualified right of access to the records at the outset of
6 the FOIA process, they simply mean that if the Agency makes
7 a disclosure the requester is the type of party that can
8 receive those records, it has a right to access them under
9 6103.

10 I want to underscore here that even if there were
11 some limit to the reach of FOIA to the (k) (3) the unique
12 facts of this case, the uniquely damaging misstatements made
13 by a person who occupies the highest office in the land
14 would certainly qualify to place (k) (3) within the reach of
15 FOIA.

16 And finally, we argue vociferously that (k) (3)
17 applies to the records at issue, and of course we've
18 articulated in our brief why the Joint Committee approval
19 clause is unconstitutional, but we have not reached yet that
20 stage of the proceedings, so we ask the Court to remand so
21 that the IRS can do what the FOIA requires.

22 JUDGE HENDERSON: All right. Thank you.

23 MR. DAVISSON: Thank you.

24 (Whereupon, at 11:12 a.m., the proceedings were
25 concluded.)

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Paula Underwood

Paula Underwood

September 16, 2018
Date

DEPOSITION SERVICES, INC.