RECENT DEVELOPMENTS

ADMINISTRATIVE LAW—FREEDOM OF INFORMATION ACT—Private letter rulings issued by the Internal Revenue Service held disclosable as interpretations of the law adopted by the agency.— *Tax Analysts & Advocates v. Internal Revenue Service,* 362 F. Supp. 1298 (D.D.C. 1973), *appeal docketed,* No. 1978, D.C. Cir., Sept. 11, 1973.

Tax Analysts and Advocates, a public interest law firm and research organization, sought disclosure under the Freedom of Information Act[1] of certain unpublished letter rulings[2] issued by the Internal Revenue Service over a three-year period. The rulings concerned processes treated as "mining" by the Service for the purpose of determining percentage depletion deductions.[3] In addition to the indices relating to this material, Tax Analysts and Advocates sought certain technical advice memoranda[4] on this subject and all communications to and from the Service with regard to such rulings and memoranda from outside the executive branch of the Government. The Service had expressly resisted efforts to compel disclosure of such letter rulings since it first implemented the Information Act in 1967.[5] The Service contended that the In-

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[1]5 U.S.C. § 552 (1970). For a detailed analysis of the Act, see K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3A.19 (Supp. 1970) [hereinafter cited as DAVIS]. Davis' interpretation of the Act as applied to the Internal Revenue Service has been cited with approval in Hawkins v. Internal Revenue Serv., 467 F.2d 787, 794-95 (6th Cir. 1972).

[2]*See* note 17 *infra* & accompanying text.

[3]INT. REV. CODE OF 1954, § 613(c).

[4]A technical advice memorandum is a ruling or an opinion issued by the National Office to a district director in response to the director's request for instructions as to treatment of a specific set of facts relating to a named taxpayer. Tax Analysts & Advocates v. Internal Revenue Serv., 362 F. Supp. 1298, (D.D.C. 1973), *appeal docketed,* No. 1978, D.C. Cir., Sept. 11, 1973.

[5]Treas. Reg. §§ 601.701-02 (1968). No substantive changes in regard to disclosure under the Information Act have been made up to the present.

> This [paragraph 552(a)(2) of the Information Act] applies only to matters which have precedential significance. It does not apply, for example, to administrative manuals on property or fiscal accounting. . . . *Nor does it apply to any ruling or advisory interpretation which is*

formation Act did not apply to private rulings and, even if it did, specific exemptions in the Act precluded disclosure. After extensive discovery both parties moved for summary judgment. The United States District Court for the District of Columbia held that the Information Act did properly apply and issued the general order of disclosure unless within thirty days the Service could show item by item an appropriate exemption.

The Information Act was designed to facilitate disclosure to the public of government information.[6] Besides the information of general applicability required to be published in the Federal Register,[7] the Information Act requires that an agency's final opinions and orders,[8] statements of policy and interpretation,[9] administrative staff manuals and instructions affecting the public,[10] plus a voting record of each agency member engaged in agency proceedings,[11] be made available for public inspection and copying.

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issued to a taxpayer on a particular transaction or set of facts and applied only to that transaction or set of facts.

Id. § 601.702(b)(1) (1973) (emphasis added).

[6]Prior to the Information Act agencies had to disclose information only "to persons properly and directly concerned." Administrative Procedure Act § 3, 60 Stat. 238 (1946), *as amended*, 5 U.S.C. § 552 (1970).

[7]5 U.S.C. § 552(a)(1) (1970).

[8]*Id.* § 552(a)(2)(A). The Internal Revenue Service publishes annually its Federal Tax Regulations.

[9]*Id.* § 552(a)(2)(B). For the IRS, most of such policy statements and interpretations, as well as opinions and orders, note 8 *supra*, not covered in the Regulations, have been published in the weekly Internal Revenue Bulletin, consolidated and indexed semi-annually in the Cumulative Bulletin.

[10]*Id.* § 552(a)(2)(C). For a list of various portions of the Internal Revenue Manual that have been produced voluntarily or by court order, see Long v. Internal Revenue Serv., 349 F. Supp. 871, 874-75 n.18 (W.D. Wash. 1972). In *Long*, the plaintiffs successfully sought under the Information Act the disclosure of the Closing Agreement Handbook of the Internal Revenue Manual.

In Hawkes v. Internal Revenue Serv., 467 F.2d 787 (6th Cir. 1972), a tax fraud defendant sought through both criminal discovery and the Information Act certain portions of the Internal Revenue Manual and material pertaining to the closing of a tax audit. A plea of nolo contendere ended the discovery process and the district court dismissed the civil complaint filed under the Information Act. The court of appeals held that the nolo contendere plea did not render moot the civil complaint and remanded the suit to the district court where the materials could be examined and ordered disclosed or not in light of the Sixth Circuit's liberal interpretation of the Information Act.

[11]5 U.S.C. § 552(a)(4) (1970).

Disclosure is required unless the material sought falls within one of the nine exemptions of the Act.[12] The nine exemptions are to be narrowly construed[13] and disclosure of a complete document can not be precluded because certain parts of the document are properly exempt.[14] With the burden of proof on the agency to sustain its actions,[15] the federal district court has jurisdiction to enjoin the agency to disclose the information after a de novo review.[16]

In accordance with section 7805 of the Internal Revenue Code, the Commissioner may administer the Code by issuing both private[17] and public rulings.[18] Since such rulings apply the law to a specific set of facts, they allow the taxpayer the advantage of predicting the tax consequences of a particular transaction before he engages in it. Having received a favorable ruling, the taxpayer

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[12] *Id.* § 552(b)(1)-(9).

[13]

> This section [the Information Act and its nine exemptions] does not authorize withholding of information or limit the availability of records to the public except as *specifically stated* in this section.

Id. § 552(c) (emphasis added). Wellford v. Hardin, 444 F.2d 21, 25 (4th Cir. 1971); Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

[14] In such a case deletions should be made. 5 U.S.C. § 552(a)(2)(C) (1970). Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970).

[15] 5 U.S.C. § 552(a)(3) (1970). Epstein v. Resor, 421 F.2d 930, 933 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970); Long v. Internal Revenue Serv., 349 F. Supp. 871, 875 (W.D. Wash. 1972).

[16] 5 U.S.C. § 552(a)(3) (1970).

[17] Treas. Reg. §§ 601.201(a)-(m) (1973) govern the procedure and effect of rulings. Private rulings consist of "letter rulings" and "determination letters."

> A [letter] "ruling" is a written statement issued to a taxpayer . . . by the National Office which interprets and applies the tax laws to a specific set of facts. . . .

Id. § 601.201(a)(2).

> A "determination letter" is a written statement issued by a District Director in response to an inquiry by an individual . . . which applies to the particular facts involved the principles and precedents previously announced by the National Office. . . .

Id. § 601.201(a)(3).

[18] A public ruling is called a "revenue ruling" issued only by the National Office as the official interpretation of the Code and published in the Internal Revenue Bulletin. *Id.* § 601.201(a)(6).

attaches a copy of it when he files his return.[19] In addition to deciding which rulings to make public in generalized form, the Service may exercise its discretion and refuse to issue any ruling at all in the matter.[20] Furthermore, the Commissioner is not legally bound by a previously issued ruling, even with respect to the party who has received the ruling and relied on it.[21] But it is the usual policy of the Commissioner to honor retrospectively any rulings issued to a taxpayer.[22]

The Service issues over 30,000 private rulings a year,[23] many of which significantly affect the parties involved and the amount of tax revenues collected.[24] That such rulings should remain secret has caused an increasing amount of justifiable criticism.[25] Certainly one of the reasons of success of any self-assessing taxing system is the public belief that like cases are treated alike and that decisions are made on the merits without any favoritism or political influence. Suspicions of favoritism and special treatment are nourished by an atmosphere of secrecy. Furthermore, in the complicated setting of tax law, private rulings tend to benefit only the rich who have the resources to hire skilled tax attorneys to seek favorable rulings. Such tax advice issued by the Service might

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[19] *Id.* § 601.201(e)(11).

[20]

> There are, however, certain areas where, because of the inherently factual nature of the problem involved, or for other reasons, the Service will not issue rulings or determination letters.

Id. § 601.201(d)(2).

[21] Dixon v. United States, 381 U.S. 68 (1965); Automobile Club v. Commissioner, 353 U.S. 180 (1957).

[22]

> Except in rare or unusual circumstances, the revocation or modification of a ruling will not be applied retroactively with respect to the taxpayer to whom the ruling was originally issued. . . .

Treas. Reg. § 601.201(l)(5) 1973).

[23] Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, 20 N.Y.U. INST. ON FED. TAX. 1, 9 (1962).

[24] For some illustrative examples of the impact of private rulings on the parties involved, see Reid, *Public Access to Internal Revenue Service Rulings*, 41 GEO. WASH. L. REV. 23, 24 (1972) [hereinafter cited as Reid, *Public Access*].

[25] *Id.* at 25. *See also* Kragen, *The Private Ruling, An Anomaly of Our Internal Revenue System*, 45 TAXES 331 (1967) [hereinafter cited as Kragen, *Private Ruling*].

apply to others less affluent who then remain ignorant of such secret rulings and are denied their benefits.[26] Also, secret rulings deprive the public of the opportunity to observe the ruling process and determine in advance whether the Service is faithfully executing the law. Because the Service must now serve a dual role of representing the general public in securing revenue and of ruling on a given issue as a judge, public hearings on major tax rulings have been suggested to insure that neither role is neglected.[27] Alternatively, it has been suggested that all rulings be published if they affect a specified minimum amount of possible tax revenue.[28]

Despite such arguments, practical problems for the Service have tended to prevent the disclosure or publication of private rulings.[29] Hence, faced with a reluctant Service and the need to examine private rulings, one must now rely on either discovery motions[30] or, in light of *Tax Analysts & Advocates*, requests sanctioned under the Information Act.

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[26]Kragen, *Private Ruling*, *supra* note 25, at 336. Among tax attorneys it is common practice to exchange private rulings with each other on a *quid pro quo* basis. Private rulings then become available only to a select group of attorneys of wealthy clients who have sought rulings in the past. *See* Reid, *Public Access*, *supra* note 24, at 29.

[27]Reid, *Public Access*, *supra* note 24, at 40.

[28]A private ruling affecting a court-ordered divestiture of General Motors common stock by E.I. duPont de Nemours & Co. resulted in a tax revenue loss of $56 million. This "unfortunate instance of secret tax favoritism" prompted Senator Gore to introduce S. 2047 which required publication of all rulings affecting $100,000 or more of tax revenue. 111 CONG. REC. 11810 (1965) (remarks of Senator Gore).

> [T]he Internal Revenue Service, for its own mysterious reasons, seems to feel that rulings which affect publicly held corporations, and which directly or indirectly affect perhaps millions of stockholders as well as the general tax paying public should . . . have the veil of secrecy drawn around them.

Id.

[29]To index and publish over 30,000 rulings a year is a staggering task. Deletion of the identifying details with the appropriate explanations would delay the ruling process. See comments of former General Counsel of the IRS Lester Uretz in Uretz, *The Freedom of Information Act and the IRS*, 20 ARK. L. REV. 283, 288 (1967). For the problems created by one taxpayer relying on private rulings issued to another, see comments of former Commissioner Caplin in Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, 20 N.Y.U. INST. ON FED. TAX. 1, 22 (1962).

[30]For a case in which the Service successfully prevented disclosure of private rulings sought under both discovery and the Information Act, see Shakespeare Co. v. United States, 389 F.2d 772 (Ct. Cl. 1968), *cert. denied*,

The Information Act requires disclosure of "interpretations . . . adopted by the agency."[31] Although the Service agreed that private rulings are "interpretations,"[32] it contended that "interpretation" as used by the Act means "precedent."[33] Since no private ruling is a "precedent,"[34] the Service argued, private rulings do not fall within the Act. To support this narrow reading of "interpretation," the Service relied upon the House Report on the Information Act in which an agency's "advisory interpretation . . . not cited or relied upon as a precedent in the disposition of other cases"[35] is specifically exempted from the requirement of disclosure. With the statute clear on its face, the court was reluctant to examine legislative history. Nonetheless, it did note that the Senate report,[36] unlike the House equivalent, conformed more closely to the Act itself and for various reasons has been preferred over the House report.[37]

Had the Service prevailed in its argument that "interpretations" of subparagraph 552(a)(2)(B) means "precedents," disclosure of the items would still have been warranted. The contention that rulings are not "precedents" and are not "relied upon" in future Service rulings proved unconvincing. Private rulings and

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400 U.S. 820 (1970). It should be noted that the Court of Claims had no jurisdiction in the first instance to rule on the Information Act since that jurisdiction is expressly reserved for the district court. 5 U.S.C. § 552(a)(3) (1970). In regard to the discovery motions denied, the Court of Claims still requires "good cause" before discovery is granted. Ct. Cl. R. 71(a). However, since 1970 the Federal Rules of Civil Procedure have eliminated this requirement in regard to documents and materials. Fed. R. Civ. P. 34. *See generally* Curtiss, *Taxpayers Discovery in Civil Federal Tax Controversies*, 51 Neb. L. Rev. 290 (1971).

[31] 5 U.S.C. § 552(a)(2)(B) (1970).

[32] Treas. Reg. § 601.201(a)(2) (1973).

[33] 362 F. Supp. at 1303.

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> A ruling issued to a taxpayer on a particular transaction applies to that transaction only. If the ruling is later found to be in error or no longer in accord with the position of the Service, it will afford the taxpayer no protection with respect to a like transaction. . . .

Treas. Reg. § 601.201(l)(6) (1973).

[35] H.R. Rep. No. 1497, 89th Cong., 2d Sess. 7 (1966).

[36] S. Rep. No. 813, 89th Cong., 1st Sess. (1965).

[37] Getman v. NLRB, 450 F.2d 670, 673 n.8 (D.C. Cir. 1971). *See* Davis, *supra* note 1, § 3A.2, at 117.

technical advice memoranda are kept by the Service in an alphabetical file based on the taxpayer's name and are discarded after four years.[38] But if some rulings and memoranda have "any significant future reference value,"[39] they are placed by their author in a separate "reference" file, which, prior to 1967, was called a "precedent file."[40] In order to achieve efficiency and uniformity, such unpublished rulings, indexed and filed, serve as persuasive if not conclusive authority for Service personnel assigned to the ruling process.[41] Despite the claim that private rulings are not precedent, the Service has on at least two occasions attempted to influence litigation with one party by introducing unpublished rulings issued to other parties but involving similar fact situations.[42] Consequently, the Service could not successfully argue that such rulings in no way serve as precedents.

Having decided that private rulings and technical advice memoranda fall within the inclusive section of the Act, Judge Robinson considered the more difficult question of whether or not

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[38]Brief for Defendant at 4, Tax Analysts & Advocates v. Internal Revenue Serv., 362 F. Supp. 1298 (D.D.C. 1973), *appeal docketed*, No. 1978, D.C. Cir., Sept. 11, 1973.

[39]*Id.* at 5.

[40]*Id.* at 4.

[41]The Service admitted that "[i]f the underlying authorities have not changed and the facts are the same or reasonably similar, a new ruling is bound to hold the same as the old 'reference' ruling. . . ." *Id.* at 6.

[42]In United States Thermo Control Co. v. United States, 372 F.2d 964 (Ct. Cl.), *cert. denied*, 389 U.S. 839 (1967), the Service attempted to prevent an excise tax refund by introducing, among other evidence, an affidavit by its Chief of the Excise Tax Branch "that private rulings have consistently held that truck and trailer refrigeration units were subject to the automotive parts and accessories tax." *Id.* at 966.

In Allstate Ins. v. United States, 329 F.2d 346 (7th Cir. 1964), the Service placed in evidence a number of private rulings given over a twelve-year period to show an unpublished administrative practice, which practice would have granted the plaintiff subsidiary and its parent the right to file a consolidated return had that right been requested. Allstate denied the practice and argued that various provisions in the regulations prevented a consolidated return and that thereby it was entitled to the more favorable alternate growth formula in computing its excess profits tax rather than the average general earnings formula. Neither the district court nor the court of appeals relied on the evidence of the private rulings but decided the case, each differently, in light of published rulings and regulations.

specific exemptions preclude disclosure. The Service relied principally on the third[43] and fourth[44] exemptions.

Section 552(b)(3) exempts from disclosure information already required to be confidential by statute.[45] Section 6103(a)(1) of the Internal Revenue Code provides for the confidentiality of "tax returns." The Service argued that rulings become a part of the return and are statutorily protected from disclosure.[46] The court correctly disagreed with the claim that a ruling was a "return" within the meaning of section 6103(a)(1) of the Code. The Service never knows that a ruling it issues, even if favorable, will be acted upon. If not acted upon, the ruling never becomes a part of a return nor does it lose whatever significant precedent value it had. Yet the Service could not succeed in maintaining that rulings were ultimately disclosable under the Information Act based on whether or not parties acted upon them. Whether the parties act upon them is of no significance when all that one seeks is the Service's answer to a hypothetical problem.

Section 552(b)(4) exempts "trade secrets and commercial or financial information obtained from a person and privileged or

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[43]5 U.S.C. § 552(b)(3) (1970).

[44]*Id.* § 552(b)(4).

[45]For a list of Internal Revenue Code provisions which clearly fall within the (b)(3) exemption, see Schmidt, *Freedom of Information Act and the Internal Revenue Service*, 20 S. CAL. TAX. INST. 79, 84 (1967).

In discussing the (b)(3) exemption the court overlooked the application of 18 U.S.C. § 1905 (1970). This provision prohibits any United States employee by reason of his employment from divulging "to any extent not authorized by law any information . . . which relates to . . . the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. . . ." In M. A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 469-70 (D.D.C. 1972), Judge Robinson had earlier rejected the contention of the SEC that section 1905 of Title 18 was included within the set of statutory prohibitions covered by the (b)(3) exemption. *Accord,* Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578, 580 n.5 (D.C. Cir. 1970); California v. Richardson, 351 F. Supp. 733, 735 (N.D. Cal. 1972); Frankel v. SEC, 336 F. Supp. 675, 678-79 (S.D.N.Y. 1971), *rev'd on other grounds,* 460 F.2d 813 (2d Cir.), *cert. denied,* 409 U.S. 889 (1972). *But see* Consumers Union of United States, Inc. v. Veterans Adm'n, 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed,* 436 F.2d 1363 (2d Cir. 1971).

[46]In addition to advising the taxpayer to attach the ruling to his return, note 19 *supra*, the Regulations define a "return" to include any "information returns, schedules, lists and other written statements filed by the taxpayer . . . which are designed to be supplemental to . . . the return." Treas. Reg. § 301-6103(a)-1(a)(3) (1973).

confidential."[47] Undoubtedly, private letter rulings and technical advice memoranda contain "commercial and financial information obtained from a person."[48] The Service contended that such information is submitted in confidence and hence falls within the additional requirement of being "privileged or confidential." The court disagreed. Relying on *Fisher v. Renegotiation Board*,[49] the court held that "confidential or privileged" information within the (b) (4) exemption must be "independently confidential" or "not otherwise subject to public disclosure."[50] This was not satisfied, according to Judge Robinson, by an agency promise that material would be kept confidential.[51] The fact that a party might justifiably rely on such a promise was not considered by the court.

Judge Robinson failed to mention any of the cases in which the basis of confidentiality for the (b) (4) exemption was either

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[47]For a comprehensive discussion of the fourth exemption, see DAVIS, *supra* note 1, § 3A.19.

[48]"Obtained from a person" in paragraph 552(b)(4) does not include a person within the government. Benson v. General Serv. Adm'n, 289 F. Supp. 590, 594 (W.D. Wash.), *aff'd*, 415 F.2d 878 (9th Cir. 1969); Consumers Union of United States, Inc. v. Veterans Adm'n, 301 F. Supp. 796, 803 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971).

[49]473 F.2d 109 (D.C. Cir. 1972). The court's reliance on *Fisher* was ill-founded because *Fisher* did not concern the standard of confidentiality for the (b) (4) exemption. Rather, in *Fisher* the court of appeals was concerned with the justification for deleting identifying details from material that fell within the inclusive section of the Act. *See* 5 U.S.C. § 552(a)(2)(C) (1970). *Fisher* held that deletion was not proper for all material that was "submitted in confidence" but only proper for material that was "independently confidential within the meaning of exemption 4" or "not otherwise publicly disclosed." 473 F.2d at 113. *Fisher* did not elaborate on what was a sufficient basis of confidentiality for the (b) (4) exemption. It simply held that once material met that standard of confidentiality plus other requirements of the (b) (4) exemption, deletions may be proper.

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> A bare claim or promise of confidentiality will not suffice, for material must be independently confidential based on their contents, i.e. not otherwise subject to public disclosure.

362 F. Supp. at 1307. "To allow a promise of confidentiality by the agency to control would enable the agency to render meaningless the statutory scheme." *Id.* at 1307 n.50.

[51]Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970), was cited for the proposition that "the statutory scheme [of the Information Act] does not permit a bare claim of confidentiality to immunize agency files from scrutiny." 362 F. Supp. at 1307 n.50. But all the *Bristol-Myers* court meant by this was that the "validity and extent of the claim" of confidentiality was subject to judicial scrutiny. 424 F.2d at 938.

directly or indirectly at issue. An examination of those cases reveals that two independent standards of confidentiality have been used. As subsequent discussion will show, one involves an "agency promise" standard; the other involves an "objective content" standard.

In *Tax Analysts & Advocates*, the court expressly rejected the contention that an agency promise of confidentiality satisfied the confidentiality requirement of the (b) (4) exemption.[52] The court did not mention a Ninth Circuit opinion in which the "agency promise" standard of confidentiality for the (b) (4) exemption was first endorsed. In *General Services Administration v. Benson*,[53] a party, who had purchased certain property from the General Services Administration and then resold it, sought disclosure under the Information Act of material obtained by the GSA including two appraisal reports. The GSA argued that the two appraisal reports fell within the (b) (4) exemption. The court of appeals found the material outside the exemption for the reason that those who submitted the financial information, the appraisers, did not seek confidentiality *on their own behalf* but on behalf of their client, the GSA.[54] In interpreting the basis of confidentiality for the (b) (4) exemption, the court of appeals held that an individual's wish to keep information confidental on his own behalf provides a proper basis of confidentiality for the (b) (4) exemption.[55] Professor Davis shares this view.[56] More importantly, in *Tax Analysts & Advocates*, the court cited as authority a case from its own court

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[52]*See* note 48 *supra*.

[53]415 F.2d 878 (9th Cir. 1969).

[54]*Id.* at 881-82.

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> The district court further stated that "the exemption is meant to protect information that a private individual wishes to keep confidential for his own purposes, but reveals to the government under the express or implied promise by the government that the information will be kept confidential." This conclusion as to the meaning of "confidentiality" seems correct.

Id. at 881.

[56]Professor Davis finds the (b) (4) exemption "troublesome" not because it fails to provide a proper basis for what should be treated as "confidential" but rather because it confines the privileged information to commercial or financial.

> [W]hen a government officer induces a corporation to furnish him some non-commercial and non-financial information, with a good faith understanding that the information will be kept confidential, can the

of appeals which in dictum conflicts with the former court's position on the "agency promise" standard of confidentiality for the (b) (4) exemption.[57] In *Getman v. NLRB*,[58] the NLRB sought to resist disclosure of names and addresses of employees who were eligible to vote in certain representation elections. Among other exemptions, the Board relied on the (b) (4) exemption. The court of appeals found the exemption inapplicable because the names and addresses were clearly not "financial or commercial information" nor were they given to the Board with *"any express promise of confidentiality."*[59] This would imply that for the United States Court of Appeals for the District of Columbia Circuit an express promise of confidentiality by an agency is at least one basis of confidentiality for the (b) (4) exemption. The Service's letter ruling procedure contains no such express promise of confidentiality. But revenue procedures do state that when rulings are published, "it will be the practice" to preserve the confidentiality of the financial details and parties involved.[60] One can only speculate on the number of parties who clearly rely on such "practice" when seeking a ruling. Nonetheless, for them the exemption could not be clearer. They are submitting to the government financial or commercial information which, at least in one sense, is "privileged or confidential."

Judge Robinson also ignored the "objective content" standard of confidentiality for the (b) (4) exemption first used by the

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fourth exemption be interpreted to protect the information from required disclosure?

The requirements of common sense directly collide with the clear statutory language. *Obviously, the good faith understanding that the information will be kept confidential should be honored.*

DAVIS, *supra* note 1, § 3A.19, at 146-47 (emphasis added).

[57] 362 F. Supp. at 1307 n.53.

[58] 450 F.2d 670 (D.C. Cir. 1971).

[59] *Id.* at 673 (emphasis added).

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It will be the practice of the Service to publish as much of the ruling or communication as is necessary for an understanding of the position stated. However, in order to prevent unwarranted invasion of personal privacy and to comply with statutory provisions . . . dealing with disclosure of information obtained from members of the public, identifying details, including names and addresses of persons involved, and information of a confidential nature are deleted from the ruling.

Rev. Proc. 72-1, 1972-1 CUM. BULL. 694.

United States Court of Appeals for the District of Columbia Circuit in *Grumman Aircraft Engineering Corp. v. Renegotiation Board*[61] and later discussed and defended by that court in *Sterling Drug, Inc. v. FTC.*[62] As explained by *Sterling Drug*, the "objective content" standard of confidentiality is satisfied if the material "would customarily not be released to the public by the person from whom it was obtained."[63] This standard of confidentiality for the (b) (4) exemption was endorsed by Judge Robinson himself in *M. A. Schapiro v. SEC*[64] just sixteen months before *Tax Analysts & Advocates.* In deciding that the (b) (4) exemption applies, according to Judge Robinson, a court should not consider whether the information was submitted on the basis of an express or implied promise of confidentiality but rather "should determine, on an objective basis, that this is not the type of information one would reveal to its public."[65] In an extraordinary oversight, Judge Robinson failed to consider, in *Tax Analysts & Advocates,* whether the information contained in private letter rulings is or is not the type of information one would reveal to the public. Most assuredly such financial information is not ordinarily revealed to the public. This is the opinion of Judge Gasch, also from the United States District Court for the District of Columbia, in *National Parks & Conservation Association v. Morton,*[66] decided only six months before *Tax Analysts & Advocates.* In *National Parks,* the court held that annual financial statements, secured by the Director of the National Park Service in an audit of various concession operators, contained information of the type "that would not generally be made available for public perusal"[67] and hence were "confidential" within the (b) (4) exemption.

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[61] 425 F.2d 578 (D.C. Cir. 1970). In *Grumman* a contractor sought disclosure of orders and opinions of the Renegotiation Board involving fourteen other companies. The Board relied unsuccessfully on a blanket use of the (b) (4) exemption. The court of appeals remanded for *in camera* inspection with the order to make deletions of identifying details in the case of matter falling within the (b) (4) exemption. "Confidential" information for the court was that "information the contractor would not reveal to the public." *Id.* at 582.

[62] 450 F.2d 698, 709 (D.C. Cir. 1971).

[63] *Id.* at 709, *quoting from* S. Rep. No. 813, 89th Cong., 2d Sess. 9 (1965).

[64] 339 F. Supp. 467, 471 (D.D.C. 1972).

[65] *Id.* at 471.

[66] 351 F. Supp. 404 (D.D.C. 1972).

[67] *Id.* at 407.

Judge Robinson's failure to examine the basis of confidentiality for the (b)(4) exemption might be explained by his belief that the deletion of identifying details would rehabilitate any information found to be "confidential" by whatever standard one would care to use. Deletion of identifying details is provided for in the Information Act to prevent a clearly "unwarranted invasion of personal privacy."[68] Although the deletion provision is limited to "personal privacy," courts have extended the provision to the (b)(4) exemption, and hence have allowed the disclosure of material which, without the deletion of identifying details, would clearly fall within the exemption.[69] In *Tax Analysts & Advocates,* the court held that even if the Service had shown that private rulings fell within the (b)(4) exemption, it had failed to show that confidentiality could not be preserved by the deletion of identifying details. The Service admitted that there were two private rulings and eight technical advice memoranda which fell within the disclosure request.[70] The rulings and memoranda sought were relatively simple, involving no more than a description of a particular "mining" process and the Service's determination whether the process qualified as a section 613(c) mining process. Other private rulings, however, are complex and highly particularized involving inventories, depreciation schedules, dividend distribution plans, and transfers of stock and securities. Given such data plus a specialized knowledge of the facts already available, one with a desire to know could not be prevented from reconstructing from the details the identity of the parties involved.[71] This limitation on the deletion requirement was recognized by the District of Columbia circuit in *Sterling Drug, Inc. v. FTC*[72] for certain financial material

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[68]5 U.S.C. § 552(a)(2)(C) (1970). This deletion provision qualifies and limits the inclusive section of the Act.

[69]Fisher v. Renegotiation Bd., 473 F.2d 109 (D.C. Cir. 1972); Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970); Legal Aid Soc'y v. Schultz, 349 F. Supp. 771 (N.D. Cal. 1972).

[70]362 F. Supp. at 1302.

[71]An obvious example of this is the private ruling issued pursuant to the court ordered divestiture of General Motors common stock by E.I. duPont de Nemours & Co. and Christiana Securities Co., note 28 *supra.* There is no effective way that the Service can reveal the ruling and still maintain the anonymity of the parties involved. The problem of preserving confidentiality when the request for information is highly particularized or focuses on a single party was recognized as a hypothetical problem by the court of appeals in Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578, 581 (D.C. Cir. 1970), but no answer was provided.

[72]450 F.2d 698 (D.C. Cir. 1971).

contained in a FTC merger clearance request.[73] Similarly, in *National Parks & Conservation Association v. Morton*,[74] the district court held that annual financial statements of concessioners obtained in an audit by the Director of the National Park Service could not be rendered anonymous by the deletion of identifying details.[75] After arguing on appeal[76] that Judge Robinson has ignored the two bases of confidentiality for the (b) (4) exemption, the Service could be expected to argue that private rulings, if disclosed at all, must remain particularized and that vast numbers of them cannot be effectively rendered anonymous by the deletion of identifying details.

Contrary to the holding of *Tax Analysts & Advocates*, the (b) (4) exemption should shield from disclosure financial information contained in private rulings which can not be rendered anonymous. This fact, however, does not prevent the Service from publishing such rulings on its own initiative or making them otherwise available.[77] The Service should attempt to accommodate the purpose of the (b) (4) exemption with the Information Act's overall policy of disclosure. As evidenced by the reference to "trade secrets," the central purpose of the (b) (4) exemption—especially as it relates to corporate parties—is to preserve the competitive position of parties who, for various reasons, submit commercial

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[73]"The judge's descriptions also lead us to believe that making deletions will not render the documents subject to disclosure under the Act." *Id.* at 709.

[74]351 F.Supp. 404 (D.D.C. 1972).

[75]

> The Court further finds that any deletions would not alter the basic confidential nature of these documents nor ensure anonymity and privacy of the concessioners who submitted the detailed financial information to the government.

Id. at 407.

[76]The Justice Department has filed notice of appeal but has decided not to pursue the (b) (4) exemption but to rely on only the (b) (3) exemption. 54 P-H FED. TAX REP. BULL. ¶ 60,595 (1973).

[77]

> Even though an exemption . . . may be fully applicable to a matter in a particular case, the . . . Service may, if not precluded by law, elect under the circumstances of that case not to apply the exemption to such matter. The fact that the exemption is not applied by the Service in that particular case has no precedential significance . . . but is merely an indication that in the particular case involved the Service finds no compelling necessity for applying the exemption to such matter.

Treas. Reg. § 601.701(b) (3) (1973).

or financial information to the government.[78] In the case of individuals there is also the provision in the Act which authorizes the deletion of identifying details to prevent an "unwarranted invasion of personal privacy."[79] When the Service issues a ruling, it should not assume that the information contained therein, because it is information not customarily disclosed, will, if disclosed, hinder the party's competitive position or cause some other harm. The Service should adopt the policy of making private rulings available for public inspection unless the party requesting such ruling can demonstrate a substantial threat to his competitive position or a serious invasion of personal, not corporate, privacy. In the case of information submitted to the Federal Trade Commission for merger clearance, the FTC requires a party to justify any request made for nondisclosure before it will even consider, according to its own rules, the appropriateness of such a request.[80] If substantial harm from disclosure is demonstrated, the Service should delete identifying details if the information can be effectively rendered anonymous. If anonymity can not be assured, the Service should notify the party that if it issues the ruling, it will remain private only for a specified period of time. The party would then have the option to withdraw the ruling request. Such a pro-

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[78]

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, lender-borrower, and other such privileges. Specifically it would include any commercial, technical and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan.

S. REP. No. 813, 89th Cong., 1st Sess. 9 (1965).

[79] 5 U.S.C. § 552(a)(2)(C) (1970). This deletion provision qualifies and limits the inclusive section of the Act.

[80]

> All requests for advice . . . concerning proposed mergers, together with supporting materials, will be placed on the public record as soon after they are received as circumstances permit, except for information for which confidential classification has been requested, with a showing of justification therefor, and which the Commission with due regard to statutory restrictions, its rules, and the public interest, has determined should not be made public.

16 C.F.R. § 1.4(b) (1973). In only one reported case, Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.D.C. 1971), was information contained in a merger clearance sought under the Information Act. The court denied disclosure.

cedure would conform with the existing practice of issuing no-action letters by the Securities and Exchange Commission.[81] Since 1970, the SEC has made available to the public all of its no-action letters.[82] No provision is made for the deletion of identifying details although a party can receive confidential treatment for ninety days if he can show a need for it.[83] If the SEC finds the request reasonable, it will grant it; otherwise, the party is notified of its option to withdraw the request.[84]

If the decision in *Tax Analysts & Advocates* is sustained on appeal, it will not create a sudden increase in refund suits by parties who thereby determine that others similarly situated were treated differently. It has always been established that each taxpayer must show the validity of his own claims and not rely on tax rulings issued to another.[85] But what is true at the refund stage may not be true at the negotiation stage or even earlier when one is requesting a similar ruling. To the degree that Service personnel are inclined to retain and index past rulings with "any significant reference value"[86] they are persuaded, though certainly not bound, by previous rulings. Any attorney who enters into negotiation with the Service will benefit by being armed with a series of favorable rulings.[87] As the court noted, such rulings are already disseminated among select groups of tax attorneys and it is unfair for some attorneys to benefit by the rulings while others remain ignorant of them.[88]

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[81]For a discussion of SEC procedure and no-action letters, see Lowenfels, *SEC "No-Action" Letters: Some Problems and Suggested Approaches*, 71 COLUM. L. REV. 1256 (1971).

[82]17 C.F.R. § 200.81 (1973).

[83]*Id.* § 200.81(b).

[84]*Id.*

[85]Hanover Bank v. Commissioner, 369 U.S. 672 (1962); Bookwalter v. Brecklein, 357 F.2d 78 (8th Cir. 1966); Goldstein v. Commissioner, 267 F.2d 127 (1st. Cir. 1959); Bornstein v. United States, 345 F.2d 558 (Ct. Cl. 1965). The only exception to this in recent years is IBM v. United States, 343 F.2d 914 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 1028 (1966). In that case the Court of Claims allowed IBM to be treated the same as Remington Rand, IBM's only competitor in the computer market, when IBM sought to receive the same ruling that Remington Rand had received.

[86]*See* note 39 *supra* & accompanying text.

[87]*See* Circuit, *What You Have Always Wanted to Know About the IRS but Were Afraid to Ask*, 51 TAXES 389 (1973).

[88]362 F. Supp. at 1309-10.

The most beneficial result that might follow from *Tax Analysts & Advocates* is the public scrutiny of the occasional Service rulings which affect millions of dollars of tax revenue. Without public hearings for major tax rulings,[89] disclosure will come only after the ruling has issued. Nonetheless, the Service will no doubt become more reluctant to rule favorably unless it is certain that it can answer any ensuing public criticism. The public needs the assurance that it can review and criticize the Service more than the Service needs to be reviewed and criticized. Public scrutiny will strengthen confidence in the Service, a necessity for a successful, self-assessing tax system.

CONSTITUTIONAL LAW—FAIR HOUSING ACT OF 1968—Anti-blockbusting provision held to be a valid congressional exercise of thirteenth amendment enforcement power.—*United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3195 (U.S. Oct. 9, 1973) (No. 1574).

The Department of Justice, pursuant to 42 U.S.C. section 3604(e),[1] the Fair Housing Act of 1968,[2] alleged that Bob Lawrence Realty, Inc., and four other real estate brokers had engaged in prohibited blockbusting activities. The Government sought injunctive relief in accordance with section 3613.[3] The United

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[89] *See* Stone, *Public Hearings for Private Rulings—Four Recommendations*, in TAXATION WITH REPRESENTATION, COMPENDIUM ON THE PUBLIC AND THE RULING PROCESS, 72-143 (1972), *cited in* Reid, *Public Access*, *supra* note 24, at 24.

[1] 42 U.S.C. § 3604 (1970) reads in pertinent part:

> [I]t shall be unlawful—
>
> . . .
>
> (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin.

[2] *Id.* §§ 3601-19.

[3] Section 3613 reads as follows:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this