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TAX LAW—THE INTERNAL REVENUE CODE: INTERPRETING THE "HASKELL AMENDMENT" TO 26 U.S.C. SECTION 6103—DEFINING "RETURN INFORMATION"

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INTRODUCTION

In enacting the Freedom of Information Act (FOIA)\(^1\) Congress determined that there is need for the government to disclose the information it possesses. This determination stemmed from two concerns: first, individuals have a right of access to information possessed by the government;\(^3\) and second, disclosure of information to individuals will aid in preventing government abuse.\(^4\) The FOIA provides for nine exceptions to the general rule of disclosure.\(^5\) Exception three of that Act exempts from disclosure those documents specifically exempt by

2. The FOIA was premised on the principle that the public has the right to know the workings of its government. Although this right is not enumerated in the Constitution it is embedded in our society. See O'Brien, Privacy and the Right of Access: Purposes & Paradoxes of Information Control, 30 ADMIN. L. REV. 45 (1978). As O'Brien noted, "the democratic theory assumes an informed citizenry and acknowledges that in principle the public has a right to know." Id. at 58.
3. Id.
4. The purpose of the FOIA is to protect an individual's right to obtain information about the government and its activities. Congress sought to "remedy the mischief of arbitrary and self-serving withholding by agencies which are not directly responsible to the people." Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1210 (4th Cir. 1976) (footnote omitted). See generally Wine Hobby USA, Inc. v. IRS, 502 F.2d 133 (3rd Cir. 1974); Montrose Chem. Corp. of Cal. v. Train, 491 F.2d 63 (D.C. Cir. 1974); Weisberg v. United States Dep't of Justice, 489 F.2d 1195 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1974); Epstein v. Resor, 421 F.2d 930 (9th Cir. 1970), cert. denied, 398 U.S. 965 (1970).
5. 5 U.S.C. § 552(b) (1982). The section reads in part:
   This section does not apply to matters that are-
   (1) specifically authorized . . . by Executive order to be kept secret in the interest of national defense or foreign policy . . . ;
   (2) related solely to the internal personnel rules and practice of an agency;
   (3) specifically exempted from disclosure by statute . . . ;
   (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
   (5) inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency;
   (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
other statutes. One statute which relies on exception three is 26 U.S.C. § 6103, a non-disclosure provision of the Internal Revenue Code (I.R.C.) relating to federal tax return information.

Congress enacted I.R.C. § 6103 as part of the Tax Reform Act of 1976. Prior to 1976, the I.R.C. provided for the disclosure of tax returns only in accordance with regulations approved by the President or under presidential order. This provision, however, resulted in well documented abuse by government entities. The staff of the Joint Committee on Taxation detailed the reason for changing the law in 1976:

The IRS has more information about more people than any

(7) [some instances] where investigatory records are compiled for law enforcement purposes . . .
(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

Id.

6. The statute states that information must be disclosed unless it is "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3).


For example, during the hearings before the House Judiciary Committee on the impeachment of President Nixon, it was revealed that the former President had requested and attempted to obtain, confidential information contained in income tax returns from the Internal Revenue Service allegedly for political and other purposes not authorized by law. President Nixon had also endeavored to cause income tax audits and investigations to be initiated and conducted in a discriminatory manner.

other agency in this country. Consequently, almost every other agency that has a need for information about U.S. citizens sought it from the IRS. However, in many cases the Congress had not specifically considered whether the agencies which had access to tax information should have that access . . . . This, in turn, raised the question of whether the public's reaction to this possible abuse of privacy would seriously impair the effectiveness of our country's very successful voluntary assessment system, which is the mainstay of the Federal tax system . . . . The Congress strove to balance the particular office or agency's need for the information involved with the citizen's right to privacy and the related impact of the disclosure upon the continuation of compliance with our country's voluntary tax assessment system.11

Section 6103 states the general rule of non-disclosure: "return and return information shall be confidential . . . except as authorized by this title . . . ."12 "Return information" is defined in § 6103(b)(2) as:

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over assessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or

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12. 26 U.S.C. § 6103(a) (1982). Sections 6103(c) through § 6103(o) provide specific exceptions to this general rule of non-disclosure. The headings are:
   (c). Disclosure of return and return information to designee of taxpayer.
   (d). Disclosure to state tax officials.
   (e). Disclosure to persons having—material interest.
   (f). Disclosure to committees of—Congress.
   (g). Disclosure to President and certain other persons.
   (h). Disclosure to certain Federal officers or employees for purposes of tax administration.
   (i). Disclosure to Federal officers and employees for administration of Federal laws not relating to tax administration.
   (j). Statistical use.
   (k). Disclosure of certain returns and return information for tax administration purposes.
   (l). Disclosure of certain returns and return information for purposes other than tax administration.
   (m). Disclosure of taxpayer identity information.
   (n). Disclosure to certain other persons.
   (o). Disclosure of return and return information with respect to certain taxes.
processing, or any other data, received by, recorded by, prepared
by, furnished to, or collected by the Secretary with respect to a re-
turn or with respect to the determination of the existence, or pos-
sible existence, of liability (or the amount thereof) of any person
under this title for any tax penalty, interest, fine, forfeiture, or other
imposition, or offense, and

(B) any part of any written determination or any background file
document relating to such written determination (as such terms are
defined in section 6110(b)) which is not open to public inspection
under section 6110, but such term does not include data in a form
which cannot be associated with, or otherwise identify, directly or in-
directly, a particular taxpayer.13

The italicized language of this definition is known as the Haskell
amendment.14 Several courts of appeals have interpreted the defini-
tion of “return information” and the language of the Haskell amend-
ment.15 In the 1987 term the United States Supreme Court will hear
arguments in the Church of Scientology of California v. IRS case.16
The issue before the Court will be whether return information includes
only information which identifies an individual taxpayer or all infor-
mation listed in § 6103(b)(2)(A).

This note discusses the text, significance, and legislative history of
§ 6103(b)(2) and describes and analyzes the three major cases discuss-
ing the definition of “return information.”17 The analysis focuses on
those portions of the opinions discussing the Haskell amendment’s im-
pact on the definition of “return information.” Finally, this note pro-
poses an interpretation of the Haskell amendment that satisfies the
congressional intent in promulgating § 6103 and an analytical frame-
wor which the Supreme Court could use in deciding Church of
Scientology.

I. THE STATUTE

A. 26 U.S.C. § 6103

The purpose of 26 U.S.C. § 6103 is to prevent disclosure of “re-
turn information” to persons who do not have a material interest in it,
thereby protecting an individual's right of privacy. If tax information requested under the FOIA is "return information," and the requester does not have a material interest in that information, that request will be denied. However, if the IRS determines that the requested information is not "return information" it is released pursuant to the FOIA, regardless of whether the requester's interest is material.

B. The Haskell Amendment

The term "return information" is ambiguous largely due to the Haskell amendment, which states that "return information" "does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." The phrase "in a form" can be interpreted to mean that "return information" may be disclosed if it is put in another form (e.g., statistical studies or other compilations of data) or that "return information" may be disclosed if it is disclosed in a manner that does not identify an individual.

1. Legislative History of the Haskell Amendment

Senator Haskell of Colorado proposed the amendment to § 6103(b)(2) in the closing days of deliberation on the Tax Reform Act of 1976. In response to the question whether the IRS could avoid

20. The IRS determines whether requested documents contain "return information" thereby determining whether those documents are disclosable under the FOIA. If a requester challenges this determination in court, the IRS has the burden of proving that the documents were exempt from disclosure. See generally Campbell v. Department of Health & Human Services, 682 F.2d 256, 265 (D.C. Cir. 1982); Barney v. IRS, 618 F.2d 1268, 1272-74 (8th Cir. 1980); Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 997 (1974).
22. For further discussion of the ambiguous language see infra text accompanying notes 132-37.
26. This was the only question that concerned the substance of the proposed amendment.
disclosing statistical studies simply by adding identifying information, Senator Haskell stated:

The purpose of this amendment is to insure that statistical studies and other compilations of data now prepared by the Internal Revenue Service can continue to be subject to disclosure to the extent allowed under present law. Thus the Internal Revenue Service can continue to release for research purposes statistical studies and compilations of data, such as the tax model, which do not identify individual taxpayers.

The definition of "return information" was intended to neither enhance nor diminish access now obtainable under the Freedom of Information Act to statistical studies and compilations of data by the Internal Revenue Service. Thus, the addition by the Internal Revenue Service of easily deletable identifying information to the type of statistical study or compilation of data which under its current practice, has been subject to disclosure, will not prevent disclosure of such study or compilation under the newly amended section 6103. In such an instance, the identifying information would be deleted and disclosure of the statistical study or compilation of data would be made.

The amendment was passed by consent with no dissenting votes.27

Interpretation of the Haskell amendment has led to the inconsistent application of the term "return information" by the Seventh, Ninth, and District of Columbia Circuit Courts of Appeals.28 The Ninth Circuit in Long v. IRS,29 the Seventh Circuit in King v. IRS,30 and the District of Columbia Circuit in Church of Scientology of California v. IRS31 all agreed that information that identifies individual taxpayers is "return information." The disagreement among the courts centered on what "return information," if any, the Haskell

27. 122 CONG. REC. S24,012 (1976) (statement by Sen. Haskell). Congress amended the Haskell amendment in 1981 by adding at the end of the sentence:

Nothing in the preceding sentence or in any other provisions of law shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.


28. Church of Scientology of Cal. v. IRS, 792 F.2d 153 (D.C. Cir. 1986), cert. granted, 107 S. Ct. 947 (1987); King v. IRS, 688 F.2d 488 (7th Cir. 1982); Long v. IRS, 596 F.2d 362 (9th Cir. 1979), cert. denied, 446 U.S. 917 (1980).

29. Long, 596 F.2d 362.


31. Church of Scientology, 792 F.2d 153.
amendment exempts from the non-disclosure requirement of § 6103. Long held that all non-identifying "return information" is exempt from the non-disclosure requirement.\(^{32}\) King held that unless information is specifically exempt under § 6103(b)(2)(A), non-identifying information may be disclosed but only as statistical data or compilations.\(^{33}\) Church of Scientology held that some non-identifying "return information" may be disclosed if it is reformulated.\(^{34}\)

II. THE CASES

A. Long v. IRS and the "Identity Test"

Bill and Susan Long requested that the IRS release source data from the Taxpayer Compliance Measurement Program (TCMP).\(^{35}\) The IRS released to the plaintiffs all statistical tabulations based on the TCMP but refused to disclose the requested source data. The source data is in the form of check sheets and data tapes. The data tapes include a taxpayer's social security number and all the financial information reported on his or her tax return. The check sheets contain, in addition to a social security number and financial data, the taxpayer's name and address.\(^{36}\) The plaintiffs brought suit in the United States District Court for the Western District of Washington seeking access to data tapes and the check sheets necessary to interpret those tapes.\(^{37}\) The Longs requested that any identifying information be deleted before the source data was disclosed.\(^{38}\) The district court denied the plaintiffs access to the requested data.\(^{39}\)

The issue presented to the Seventh Circuit Court of Appeals was whether TCMP source data constituted "return information."\(^{40}\) The
court interpreted the Haskell amendment as allowing for the disclosure of any non-identifying information and held that "return information" includes only information that can identify a particular taxpayer.41 The court's analysis was limited to refuting the IRS' arguments.

The plaintiffs pointed to the fact that they requested data with identifying information deleted and they argued that so edited data is not "return information" as defined by § 6103.42 They reasoned, therefore, that because the requested data was not protected from disclosure by § 6103 it should have been released pursuant to the FOIA.43

The IRS argued that in addition to being non-identifying, source data must be in a statistical study in order to be exempt from the non-disclosure provision of § 6103.44 In support of this position the IRS argued that the purpose of the Haskell amendment was to insure continued release of statistical studies by the IRS.45 It also argued that "return information" includes non-identifying as well as identifying information.46 Presumably, the IRS believed that source data which did not identify could still be included in the definition of "return information."

The IRS relied upon the text of § 6103 and the legislative history of the Haskell amendment to support its proposition that the amendment allows only for the disclosure of non-identifying statistical studies.47 The IRS argued that "a requirement to disclose the edited data would be a significant extension of the duty to disclose under the law prior to the Haskell amendment and that it was not the intent of the

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41. Id. at 368.
42. Id. at 365.
43. Id.
44. The IRS also argued that even if the names, addresses, and social security numbers of taxpayers were deleted from the requested material there would still be a risk of indirect identification. For example, a requester may hold certain extrinsic information which, when combined with the disclosed data, would identify a particular taxpayer. Id. at 367. This argument is referred to as the "informed requester" argument. See infra text accompanying note 140 and notes 182-87.
45. Long, 596 F.2d at 367-68. In support of this position the IRS pointed to the remarks made by Senator Haskell in proposing the amendment: "the addition by the IRS of easily deletable identifying information to the type of statistical study or compilation of data . . . will not prevent disclosure of such study or compilation under the newly amended section of § 6103." Id. (quoting 122 CONG. REC. S12,606 (1976)).
46. Id. at 368.
47. This note refers to this proposition relied on by the IRS as the "statistical studies" interpretation.
amendment to effect such changes."

The court rejected this argument on the ground that the remarks do not indicate that the amendment was "simply a codification of pre-existing IRS practice." The court determined that the purpose of § 6103 is two-fold: first, to protect the privacy of individual taxpayers; and second, to permit the disclosure of compilations of useful data in circumstances which do not pose a serious risk of privacy breach.

To support further its proposition that only statistical studies are disclosable under the Haskell amendment, the IRS discussed the language of § 6103. The IRS argued that the text of § 6103 indicated that there are two types of "return information," that which identifies a particular taxpayer and that which does not. The IRS concluded that the mandate of § 6103 not to disclose "return information" may extend to "return information" which identifies individual taxpayers as well as to that which does not. The IRS pointed to § 6103(f) to support this argument.

Section 6103(f) allows the Secretary of Treasury to furnish "return information" to certain legislative committees. However, when the "return information" can be associated with or identify a particular taxpayer, it shall be released to such committee only when that committee is sitting in closed executive ses-

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49.  Long, 596 F.2d at 368. The court noted that:

Even if we were to accept the IRS' argument that the Haskell amendment was simply intended to freeze the status quo, neither our research nor that of the parties reveals any case deciding whether, under law existing prior to the Haskell amendment, audit results which were not identified to particular taxpayers were not open to FOIA disclosure.

Id. at 368 n.4.

50.  Id. at 368. For example, the plaintiff in Nuefeld v. IRS, 646 F.2d 661 (D.C. Cir. 1981) sought information relating to the practices by government officials of intervening in IRS proceedings. Professor Nuefeld "disclaim[ed] any interest in information that would directly or indirectly identify individual taxpayers." Id. at 662. See also infra note 130.

51.  Long, 596 F.2d at 368.


53.  Section 6103(f)(2) states:

Upon written request by the Chief of Staff of the Joint Committee on Taxation, the Secretary shall furnish him with any return or return information specified in such request. Such Chief of Staff may submit such return or return information to any committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

Id.
sion. The IRS argued that § 6103(f) imports the negative implication that when "return information" does not identify a particular taxpayer, the committees do not have to sit in closed session. Therefore, the IRS concluded, "return information" includes identifying as well as non-identifying information. Presumably, the IRS contended that this "6103(f)" argument contradicted the plaintiffs' interpretation that "return information" consists only of identifying information. Apparently, the IRS reasoned that because "return information" does include data that is non-identifying (§ 6103(f)), the Haskell amendment requires something more than the mere fact of non-identification before "return information" can be disclosed.

The court rejected the IRS' argument. The court saw its decision as a choice between accepting either the explicit language of the Haskell amendment or the implication drawn from another subsection, § 6103(f). The court found that the IRS, in relying on § 6103(f) for an interpretation of the Haskell amendment, ignored the language of § 6103(b)(2) which defines "return information." In refusing to be bound by that interpretation the court concluded that information which does not identify is disclosable.

The IRS in Long also argued that § 6108 demonstrated that the Haskell amendment referred only to the disclosure of statistical information. The IRS noted that the purpose of § 6108 is to prevent the disclosure of identifying statistical studies and the language used to achieve that purpose is identical to the language of the Haskell amendment. The IRS, therefore, argued that § 6108(c) and the Haskell amendment both are directed at statistical studies and because source data is not in a statistical study, such data is not protected from the non-disclosure requirement of § 6103.

The court found it unnecessary to interpret the reach of § 6108

54. Id.
55. Long, 596 F.2d at 368.
56. Id. at 368.
57. Id.
59. Long, 596 F.2d at 368-69; 26 U.S.C. § 6108 "Statistical publications and studies." Section 6108(c) of the Act states:
No publication or other disclosure of statistics or other information required or authorized by subsection (a) or special statistical study authorized by subsection (b) shall in any manner permit the statistics, study, or any information so published, furnished, or otherwise disclosed to be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.
Id. (emphasis added).
60. Long, 596 F.2d at 369.
61. Id.
because of Senator Haskell's remark that the amendment would permit disclosure of the tax model.\textsuperscript{62} The court concluded that because the tax model, which is not a statistical study, is subject to disclosure, the TCMP is as well.

The court concluded that non-identifying information is disclosable under the Haskell amendment and that TCMP source material is not exempt from disclosure simply because it is not in statistical form. The court held that TCMP source material may be disclosable under the terms of the Haskell amendment if the release of that material would not indirectly identify a particular taxpayer.\textsuperscript{63} The court of appeals remanded the case to the district court for a determination on that point.\textsuperscript{64}

The court's conclusion is reasonable because it comports with the legislative history as well as the text of the Haskell amendment.\textsuperscript{65} Given the premise on which the FOIA was based,\textsuperscript{66} it is likely that Congress would want to encourage the disclosure of non-identifying information. The "identity test" of Long, which permits disclosure of non-identifying information, balances Congress' intent to disclose information with the interest in protecting the taxpayer's right of privacy. Because the court's interpretation does not allow for the release of identifying information, a breach of the taxpayer's privacy is not implicated.\textsuperscript{67} By limiting its analysis to the refutation of IRS arguments, however, the court failed to present a number of arguments that would support further its conclusion.\textsuperscript{68}

B. \textit{King v. IRS and the "Statistical Studies" Approach}

In 1978, Sharon King requested that the IRS release "data, memoranda and background information relating to or commenting on cer-

\textsuperscript{62} The TCMP and the Tax Model are similar. The court discussed this similarity earlier in the opinion when it suggested that, "[i]n evaluating the degree of the risk of disclosure from TCMP source material, it will be helpful to . . . compare the risk that the IRS has found acceptable with the tax model." \textit{Id.} at 367. The court again referred to the tax model in the opinion when it rejected the district court's finding that only statistical tabulations were important in determining the effectiveness of the IRS. The court of appeals noted that with respect to the tax model "the IRS will either supply statistical tabulations from the data base or it will supply the source data itself, apparently recognizing the value of a researcher's doing his own analyses. The TCMP is similar." \textit{Id.} at 369.

\textsuperscript{63} \textit{Id.} at 370. This issue of the "informed requester" is explored more fully later in the text. \textit{See infra} text accompanying notes 140-41 and notes 182-86.

\textsuperscript{64} \textit{Long}, 596 F.2d at 370.

\textsuperscript{65} \textit{See supra} text accompanying notes 51-60.

\textsuperscript{66} \textit{See supra} note 2.

\textsuperscript{67} \textit{But see infra} note 140 and accompanying text ("informed requester" argument).

\textsuperscript{68} \textit{See infra} text accompanying notes 113-14 and notes 166-87, 199-201.
tain revenue rulings and regulations which had been issued by the Service on various subjects . . . ."69 Pursuant to the FOIA the IRS released some, but not all, of the documents.70 The plaintiff filed suit against the IRS in the United States District Court for the Northern District of Illinois, Eastern Division, seeking the release of the remaining, non-disclosed documents. The district court granted summary judgment, ordering the IRS to disclose eight of the documents under the FOIA.71 The IRS appealed from that portion of the order which related to the eight documents the court exempted from disclosure under § 6103.72

The issue presented before the Seventh Circuit Court of Appeals was whether the district court erred in holding that the documents must be released after deletions of taxpayer identifying material were made. The plaintiff, in adopting the “identity test” interpretation developed in Long,73 argued that information that does not identify a particular taxpayer is not “return information” as defined by § 6103(b)(2).74 The plaintiff further argued that only “return information” is protected from disclosure under § 6103.75 The plaintiff based her conclusion on the Ninth Circuit Court of Appeals’ opinion in Long v. IRS as well as the legislative history of the Haskell amendment.76

The IRS urged the court to adopt the “statistical studies” interpretation of the Haskell amendment.77 The IRS relied on the lan-

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69. King v. IRS, 688 F.2d 488, 489 (7th Cir. 1982).
70. Id.
71. The eight documents at issue were:
   (a) two taxpayer protests of IRS agents' audit report;
   (b) a transmittal letter and a portion of an audit;
   (c) a form setting forth adjustments to a taxpayer's return and the reasons therefor;
   (d) a form stating a specific taxpayer's liability by period, the amount of adjustments and the reasons therefor;
   (e) two IRS intra-office memoranda requesting information on a specific taxpayer;
   (f) a letter from the IRS to a taxpayer asking the taxpayer to alter its method of accounting.

Id. at 490.
72. The court ordered the release of twenty-four documents not claimed exempt from disclosure under § 6103. The IRS did not appeal that portion of the order. Id.
73. Long, 596 F.2d 362. See supra text accompanying note 41.
74. King, 688 F.2d at 493.
75. Id.
76. Id.
77. The IRS argued that for “return information” to be exempt from the § 6103 non-disclosure requirement, the information must be amalgamated with other data to form sta-
guage of § 6103(b)(2), the legislative history of the Haskell amendment, and the broad statutory context of § 6103 to support its position.78 The IRS argued that even if the district court order were followed and all identifying information were deleted, the remaining data was not in a statistical study and therefore it would not meet the standards for disclosure set forth in the Haskell amendment.79 Apparently, the IRS concluded that because those documents were not exempt from the non-disclosure requirement of § 6103, the IRS was not permitted to disclose them.80

The court of appeals agreed with the IRS' interpretation of the Haskell amendment,81 holding that the amendment provides only for disclosure of statistical studies and compilations which do not identify particular taxpayers.82 The court relied on the language of § 6103 as well as the legislative history of the Haskell amendment in deciding that the release of the documents was improper and reversing the judgment of the district court.83

The court began the analysis of § 6103(b)(2) by examining the language of the Haskell amendment, focusing on the words “in a form.”84 The court rejected the plaintiff’s proposed “identity test” by noting that the test would render superfluous those three words. That is, if one were to accept the plaintiff’s definition of “return information” the meaning of the Haskell amendment would not be changed if “in a form” were to be deleted. The court refused to construe the statute in such a way.85

The court’s concern about statutory superfluity was inconsistent with the narrow interpretation it assigned the Haskell amendment. The court was correct that the “identity test” would render the words

tistical studies or compilations and must not directly or indirectly identify a specific taxpayer. Id. at 491. Presumably the IRS noted that the eight documents in question were not in an amalgamated form and that their release could possibly result in indirect identification of individual taxpayers. Id.

78. Id. at 488.
79. Id. at 491.
80. Although this argument was not articulated in the court’s opinion the conclusion is a logical result of the IRS’ argument.
81. King, 688 F.2d at 491-92.
82. Id. at 493.
83. Id. at 496.
84. Id. at 491. “[B]ut such term [return information] does not include data in a form which can be associated with or otherwise identify, directly or indirectly a particular taxpayer.” 26 U.S.C. § 6103(b)(2)(B) (1982) (emphasis added). It is the three words “in a form” that underlie the court’s position that the information must be changed in structure before it is disclosed under the Haskell amendment. King, 688 F.2d 488.
85. Id. at 491.
“in a form” superfluous; however, its own interpretation rendered an entire section superfluous. In adopting the “statistical studies” interpretation, the King court ignored explicit language of § 6108 which already provides for the disclosure of statistical studies and compilations to certain parties. It is unlikely Congress would want to reiterate implicitly in the Haskell amendment that which it stated explicitly in § 6108. Therefore, the Haskell amendment must have provided for something more than just the release of statistical studies.

The court determined that if the “identity test” were to be accepted, all the items specifically listed in § 6103(b)(2)(A) would also become superfluous. Apparently the court reasoned that there would not be any purpose in listing individual items as “return information” if they are only “return information” when they identify. That argument is premised on the possibility that the only purpose of § 6103(b)(2)(A) is to list specific items that constitute “return information.” However, because there is another purpose for § 6103(b)(2)(A), the “identity test” would not render that section superfluous. Those items not listed in § 6103(b)(2)(A) are treated as any other item requested under the FOIA.

The King court determined that had Congress wanted to exempt from disclosure only those items that identified individual taxpayers, it could have done so with a much simpler statute. For example the statute could have specified that “all non-identifying information is disclosable.” This language, the court argued, is much clearer than

86. 26 U.S.C. § 6108 (1982). See supra note 59. Subsection 6108(a) mandates that the Secretary “prepare and publish not less than annually statistics reasonably available with respect to the operation of the internal revenue laws . . . .” Subsection (b) allows the Secretary, “upon written request, to make special statistical studies and compilations involving return information available . . . and furnish to such party or parties transcripts of any such special statistical study or compilation.” Subsection (c) mandates that any statistical study or compilation released must be in amalgamated form so as to render the information anonymous. Id.

87. King, 688 F.2d at 491.


89. The standards of review for the IRS' determinations as to whether information is disclosable differ depending on which statute mandates the non-disclosure. If an item is listed under § 6103, and made non-disclosable, upon judicial review the claimant has the burden of proving that the IRS abused its discretion by refusing to disclose information. However, if the FOIA applies, the court determines the matter de novo and the agency has the burden of showing that the non-disclosure was warranted by one of the stated exceptions. See White v. IRS, 707 F.2d 897, 900 (6th Cir. 1983); Zale Corp. v. IRS, 481 F. Supp. 486, 490 (D.D.C. 1979); accord King, 688 F.2d at 495.

90. King, 688 F.2d at 491 (citing Cliff v. IRS, 496 F. Supp. 568, 574 (S.D.N.Y. 1980)).

91. Id. at 491.
the technique of listing specific items in one subsection and then stating in another subsection that those items count only if they do not identify. The court concluded that Congress did not intend the items in § 6103(b)(2)(A) to be disclosed and that the result of the "identity test" is not germane with respect to this intent.\footnote{92}{Id. at 494.}

The court continued its analysis of the Haskell amendment by looking at the remaining language: "which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." \footnote{93}{Id. at 491.} The court asserted that the "identity test" would also render this language superfluous because the plaintiffs' interpretation equated "associated with" and "directly or indirectly identify." \footnote{94}{Id.} The court noted that "information which might not on its face identify a taxpayer might well be associated with a taxpayer by a FOIA requester who knows sufficient extrinsic facts ... to draft a request in a manner sufficiently narrow to produce information which could only pertain to that taxpayer." \footnote{95}{Id.} The court relied on a basic rule of statutory construction which prohibits courts "in the guise of construction of an act, [from] either add[ing] words to or eliminating words from the language used by [C]ongress." \footnote{96}{Id. (quoting DeSoto Sec. Co. v. Commissioner, 235 F.2d 409, 411 (7th Cir. 1956)).} In conforming with this rule, the court rejected the plaintiffs' proposed definition.\footnote{97}{Id.}

The court found that unless disclosed information was in an amalgamated form the court could never be certain that the requested information would not "indirectly identify an individual taxpayer." \footnote{98}{Id.} This "informed requester" argument is premised on the notion that if a requester already holds some extrinsic knowledge about an individual's tax return, that requester would not need identifying information to determine to whom the "non-identifying" information relates.\footnote{99}{Id.} The court concluded that if requested information were to be amalgamated with other information the risk of indirect identification would be less.\footnote{100}{King, 688 F.2d at 492.}

In further support of its conclusion that "return information" is not limited merely to taxpayer identifying information, the court ana-
lyzed the broad statutory context of § 6103.101 The court articulated the § 6103(f) argument proposed by the IRS in Long102 and found this language to contradict the identity test proposed by the plaintiff.103 The court disagreed with the determination in Long and concluded that this language clearly acknowledges two types of "return information": "return information" which identifies individual taxpayers and "return information" which does not.104

The court also relied on the legislative history of the Haskell amendment and the 1981 amendment to § 6103(b)(2)(B). Even though the King court agreed with the plaintiff that Senator Haskell's remarks were not a comprehensive statement on the amendment's purpose,105 the court concluded that those remarks did not support the plaintiff's "identity test."106 Rather, but without offering explicit reasons for its conclusion, the court found Senator Haskell's remarks to be "highly consistent" with permitting the disclosure of "return information" only if it is in a non-identifying statistical study.107 The court could have been relying on the five separate times that the Senator mentioned statistical studies and compilations.108 However, these statements provide support only for the fact that § 6103 does not pre-

101. Id.
102. See supra text accompanying notes 51-55.
103. The court determined that if the plaintiffs' interpretation were correct and "return information" included only identifiable information, every time a committee requested "return information" it would have to sit in closed executive session. King, 688 F.2d at 492. The court also determined that this interpretation would render portions of (f)(1) and (f)(2) superfluous. Id.
104. Id.
105. The plaintiff argued that the remarks were made in the context of questioning whether the IRS "could evade its previously existing obligation to disclose statistical studies simply by adding identifying information." Id. at 493. For full remarks see supra text accompanying note 26.
106. King, 688 F.2d at 493.
107. Id.
108. Senator Haskell commented:
The purpose of this amendment is to insure that statistical studies [and compilations] now prepared by the IRS and disclosed by it to outside parties will continue [to be disclosed] . . . . The IRS can continue to release for research purposes statistical studies and compilations of data, such as the tax model, which do not identify individual taxpayers . . . . The definition of 'return information' was intended to neither enhance nor diminish access now obtainable under the Freedom of Information Act to statistical studies and compilations of data by the Internal Revenue Service . . . . [T]he addition by the Internal Revenue Service of easily deletable identifying information to the type of statistical studies and compilation of data . . . . will not prevent disclosure of such study or compilation . . . . In such instances, the identifying information would be deleted and disclosure of [sic] statistical study or compilation be made.
clude statistical studies and compilations of data from being disclosed simply because they contain items listed in § 6103(b)(2)(A). These statements do not support the court's contention that § 6103 was directed exclusively at statistical studies. To the contrary, Senator Haskell referred to the tax model which is not a statistical study or compilation of data. The Senator's remarks signify Congress' intent to insure that prior IRS disclosure practices under the FOIA would not change.109

In further support of its own interpretation of the Haskell amendment as well as its decision to reject the Long "identity test," the court analyzed the 1981 amendment to § 6103(b)(2)(B).110 The court noted that the "purpose and effect of [this] amendment is to bar the release of the information sought by the plaintiffs in Long."111 The court looked to the language of the committee report112 and determined, by negative implication, that the Haskell amendment protected from disclosure non-statistical data and "return information."113 The

109. Appellant's brief at 13, Church of Scientology of Cal. v. IRS, 792 F.2d 156 (D.C. Cir. 1986) (en bane).
110. King, 688 F.2d at 494. The amendment added to the end of § 6103 the language:

Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

111. The plaintiff in King argued that the reasoning of the Long decision was not affected by the 1981 amendment. King, 688 F.2d at 492 n.2.
112. The committee report stated in relevant part:

Present law restricts the disclosure of tax returns and return information. However, information that cannot identify any particular taxpayer is not protected under the disclosure restrictions. Because of this, questions have been raised concerning whether the IRS can legally refuse to disclose information which is used to develop standards for auditing tax returns.

The House bill provides that nothing in the tax law, or in any other Federal law, will be construed to require the disclosure of standards used, or to be used, for the selection of returns for examination (or data used, or to be used, for determining such standards), if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws. However, it is intended that nothing in this provision be construed to limit disclosure of statistical data or other information (other than of the type that could be used by the IRS to determine criteria for selecting returns for examination) to the extent permitted under the present law. Thus, any information that is currently made available will continue to be available.

113. King, 688 F.2d at 494. The court reasoned: "By reiterating that statistical data and other non-return information will remain available to the extent of prior law, the Com-
court relied on the committee report to draw a negative implication while it ignored the explicit language of that same report. The second sentence of the committee report clearly supports the “identity test” interpretation: “However, information that cannot identify a particular taxpayer is not protected under the disclosure restrictions.”

Although the 1981 amendment disallowed the release of audit reports which were the subject of Long, it explicitly accepted Long’s interpretation of the Haskell amendment. The committee report, having stated in the second sentence that non-identifying information is disclosable, provides that “any information that is currently made available will continue to be available.” The importance of the Long decision was not its result, but that the court interpreted the Haskell amendment in a way that was consistent with the purpose for which it was proposed, that is, the release of non-identifying information.

The court in King, however, specifically refuted the analysis of the court in Long. The King court felt that the Ninth Circuit Court of Appeals erred by importing the policies of the FOIA into the interpretation of § 6103. The court commented that the policies behind 26 U.S.C. § 6103 and 5 U.S.C. § 552 (FOIA) were precisely opposite. That is not the case. The purpose of the FOIA is to allow for the release of information possessed by the federal government while protecting the identity of individuals to whom that information pertains. Section 6103 allows the release of information possessed by the IRS when that information does not identify the individual to whom it pertains. The policy behind both provisions is to minimize the abuse by the government of the information it controls. These two statutes are not “precisely opposite” as the King court contended; on the contrary, they are quite similar.

The court in King determined that even if the FOIA analysis were proper, the Long court misapplied the balancing test. The King court noted that the FOIA’s balancing test overlooks the deleterious impact upon the voluntary system of tax payment which may result if taxpayers know their “return information” is subject to disclosure. In reaching its conclusion the court failed to consider two factors that

115. Id.
116. King, 688 F.2d at 493.
117. In a tax context, the FOIA would seek to balance the public’s interest in disclosure against the taxpayer’s need for protection. Id. at 493.
118. Id. at 494.
would mitigate the risk of a negative effect. First, the information sought to be released under the Haskell amendment would not identify anyone. Second, even if there is a risk of an "informed requester," there are civil and criminal penalties imposed on taxpayers for failing to file tax returns. These penalties and the non-identifying nature of the information combine to minimize the risk of a negative effect on the tax assessment system.

C. *Church of Scientology of California v. IRS and the "Reformulation" Approach*

On May 16, 1980, the Church of Scientology of California requested information from the IRS "relating to or containing the names of Scientology, Church of Scientology, any specific Scientology church or entity identified by containing the names, L. Ron Hubbard or Mary Sue Hubbard." It also requested "all documents generated, reviewed or which otherwise came into the possession of the IRS subsequent to the preparation of an index in a tax case involving the Church of Scientology of California pending in the United States Tax Court." The plaintiff's request required the IRS to search files in a number of IRS offices.

In January, 1981, the IRS informed the Church that the information sought constituted "return information" of third parties and therefore was not disclosable. The Church then filed a complaint in the District Court for the District of Columbia seeking the release of certain documents the IRS claimed were exempt from disclosure. The court granted the IRS' motion for summary judgment and dismissed the case with prejudice. In a panel opinion for the Circuit Court of Appeals for the District of Columbia, Judge Scalia ordered the district court decision vacated and remanded the case for further

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119. See supra text accompanying notes 94-97; see also infra text accompanying notes 136-41.
120. See infra text accompanying notes 208-10 for discussion of disclosures' effect on tax assessment system.
122. This request refers to Church of Scientology of Cal. v. Commissioner, 83 T.C. 381 (1983).
123. Church of Scientology, 792 F.2d at 148.
125. Id.
126. Justice Scalia was appointed to the Supreme Court of the United States in September, 1986. This note refers to him as Judge Scalia, the position he held at the time of the decision in *Church of Scientology*. 
proceedings.\textsuperscript{127} The Circuit Court of Appeals for the District of Columbia, sitting \textit{en banc},\textsuperscript{128} simultaneously issued another opinion in the same case.\textsuperscript{129} The court addressed the issue of the interpretation of the Haskell amendment,\textsuperscript{130} determining that deleting names and other identifying information from requested IRS documents did not

\textsuperscript{127} Church of Scientology, 792 F.2d 146. The court in the panel opinion addressed three main issues: first, whether the FOIA governed the disclosure of the requested information; second, whether the IRS properly refused to check its regional and district offices for the requested information (although it was not required to, the IRS did search its national office as well as its Los Angeles office); third, whether the IRS erred in limiting its search to files which refer only to the California church. \textit{Id.} at 148-52. The court determined: first, the rules for disclosure promulgated under the FOIA are not superseded by § 6103; second, because the Church did not request the information in accordance with published rules, the IRS was not required to search all district and regional offices; third, the IRS was "not required to search through every file in its possession to see if a reference to Scientology appeared somewhere in it"; and finally, that the IRS must show that all the requested information came within the statutory definition of "return information" before it could rightfully refuse to disclose the information. \textit{Id.} The court held that:

In light of the language of the foregoing discussion the IRS must either conduct a new search for information responsive to the Church's request that refers to third parties or establish through affidavits that all information about third parties in identifiable files requested by the Church is generically protected by section 6103. \textit{Id.} at 152.

\textsuperscript{128} Judge Wald's dissenting opinion in the \textit{en banc} decision expressed concern that "the court's recent practice of issuing \textit{en banc} opinions on legal issues, as opposed to concrete factual scenarios, see also United States v. Foster, 783 F.2d 1082 (D.C. Cir. 1986) (en \textit{banc}), poses problems." Church of Scientology, 792 F.2d 153, 172 n.1 (Wald, J., dissenting). Judge Wald cautioned the court to view the controversy before it, not as a single legal issue but as a full fledged fact-based adversarial proceeding. \textit{Id.} Judge Scalia noted that isolating legal issues from the remainder of the case "reflects the fact that appellate review serves a dual purpose: the correction of legal error and the establishment of legal rules for future guidance." \textit{Id.} at 155 n.1. He continued that at the second appellate level the law clarifying function predominates and that it would be perverse to abandon the efficient practice of \textit{en banc} disposition just as the courts' caseload has increased. \textit{Id.} at 155-56. Judge Scalia concluded that restricting \textit{en banc} considerations would make the judicial function of an appellate court inordinately difficult. \textit{Id.}

\textsuperscript{129} Church of Scientology of Cal. v. IRS, 792 F.2d 153 (D.C. Cir. 1986) (en \textit{banc}).

\textsuperscript{130} The court established that the "newly emerged circuit conflict has induced us to reconsider the position stated in our 1981 panel decision" in Nuefeld v. IRS, 646 F.2d 661 (D.C. Cir. 1981). Church of Scientology, 792 F.2d at 157.

In \textit{Nuefeld} the plaintiff sought access to certain memoranda, logs, forms, and correspondence relating to contacts between high ranking federal officials and the IRS regarding tax matters of third parties. The \textit{Nuefeld} court held, in accordance with \textit{Long}, "that 'return information' properly defined, excludes only information that directly or indirectly identifies a particular taxpayer." \textit{Nuefeld}, 646 F.2d at 665. However, the court did not hold that "mere deletion of names and addresses removes all 'return information' from [the requested data]." \textit{Id.} The court remanded to the district court to determine "what information, other than the name and address, poses a risk of identifying a taxpayer and how great that risk is." \textit{Id.} at 661. See Common Cause v. IRS, 646 F.2d 656 (D.C. Cir. 1981), issued the same day as \textit{Nuefeld} and relating to the same documents.
render those documents disclosable under § 6103.\textsuperscript{131} Rather, non-identifying information must have been reformulated to have been rendered disclosable.

The District of Columbia Circuit Court of Appeals examined § 6103(b)(2) subparagraphs (A) and (B) and began its analysis by refuting the \textit{Long} court's conclusion that "return information" includes only data that can identify a particular taxpayer. The \textit{Church of Scientology} court noted that it was peculiar to list items in § 6103(b)(2)(A) and qualify that list with the Haskell amendment.\textsuperscript{132} The court determined that if \textit{Long} was correct, the Haskell amendment changed the scope of protection under § 6103 from all "return information" listed in § 6103(b)(2)(A) to only that "return information" which identifies a taxpayer.\textsuperscript{133} The \textit{Church of Scientology} court did not believe that the Haskell amendment limited the definition of "return information" in that way. Like the court in \textit{King}, the \textit{Church of Scientology} court opined that had Congress intended to limit "return information" to information which identifies, it could have done so in a more natural way.\textsuperscript{134} The court concluded that the \textit{Long} interpretation also produced a "similarly mindless consequence in subparagraph (B) which lists certain exclusions from . . . FOIA."\textsuperscript{135} The court claimed that it was absurd to incorporate these exclusions so precisely into the body of the definition of "return information" just to write them all back out again in the Haskell amendment.\textsuperscript{136}

The Haskell amendment, the court found, suggests that some-

\textsuperscript{131} \textit{Church of Scientology}, 792 F.2d 153.

\textsuperscript{132} The court noted that:

\begin{quote}
[[I]t was peculiar to catalogue in such detail] the specific items that constitute "return information" (e.g. "income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over assessments, or tax payments . . . or other data, received by, prepared by, furnished, or collected by the Secretary with respect to a return") while leaving as an afterthought the major qualification that none of these items counts unless it identifies a taxpayer.
\end{quote}

\textit{Id.} at 157. \textit{See supra} text accompanying note 13 for the language of § 6103(b)(2).

\textsuperscript{133} \textit{Church of Scientology}, 792 F.2d at 159.

\textsuperscript{134} Judge Scalia stated: Such intent would more naturally have been expressed not in an exclusion ("but such term does not include . . . ") but in the body of the definition—by stating, for example, that "the term 'return information' means the following information that can be associated with or identify a particular taxpayer . . . ." \textit{Id.} at 157. \textit{Cf. supra} text accompanying notes 90-91.

\textsuperscript{135} That section states that "return information" includes: "any part of any written determination or any background file document relating to such written determination (as such terms are defined in 6110(b)) which is not open to the public inspection under 6110." 26 U.S.C. § 6103(b)(2)(B) (1982).

\textsuperscript{136} \textit{Church of Scientology}, 792 F.2d at 157.
thing more than the mere fact of non-identifiability is needed before “return information” can be disclosed. In focusing on the language of the Haskell amendment, the court concluded that the phrase “in a form” requires that “return information” be reformulated before that information can be disclosed.\footnote{137}{Id. at 154. The court further determined that the phrase “in a form” would be superfluous if the \textit{Long} interpretation were correct. In other words, the phrase could be deleted without changing the meaning of the statute. Hence the amendment would say return information “does not include data . . . which cannot be associated with or otherwise identify, directly or indirectly, a particular taxpayer.” \textit{Id.} at 157. This determination is similar to the one made by the Seventh Circuit Court of Appeals in \textit{King}. \textit{See supra} text accompanying notes 84-85.}

The court reasoned that the legislative intent of the Haskell amendment further supported the rejection of the \textit{Long} interpretation.\footnote{138}{\textit{Church of Scientology}, 792 F.2d at 160.} The court conceded that although there was no reason why Congress would object to the release of non-identifying information, the assessment that information is not identifying would not eliminate the risk of a privacy breach.\footnote{139}{\textit{Id.} at 158.} The court explained that non-identifying information, when combined with certain extrinsic information held by the requester, could identify a taxpayer.\footnote{140}{For example, the court described a FOIA request “for the amounts and beneficiaries of all charitable deductions claimed by taxpayers within a particular postal ZIP code area during a particular tax year.” \textit{Id}. The court noted that “that information would normally not identify the charitable gift [or beneficiary] of any particular taxpayer but it would do so if the requester had been told by his neighbor that the latter made a charitable gift last year of 2,775 [dollars].” \textit{Id.}} The court concluded, in light of the “informed requester” problem, that the “identity test” proposed in \textit{Long} was inconsistent with the Haskell amendment.\footnote{141}{\textit{Id.} at 158-59.}

The majority determined that Congress intended “heightened protection” with regard to tax information and that the FOIA’s non-identification standard as accepted by \textit{Long} does not afford this protection.\footnote{142}{Before information is disclosed under the FOIA, identifying information must be deleted so as to render the document non-identifying. \textit{See} 5 U.S.C. § 552 (1982).} The court acknowledged Congress’ determination that the occasional unknowing release of information entitled to be withheld under the FOIA is outweighed by the benefits of openness.\footnote{143}{\textit{Church of Scientology}, 792 F.2d at 158.} The court noted, however, that this is not the case in all situations\footnote{144}{\textit{See}, e.g., 50 U.S.C. § 431 (Supp. II 1984) (exempting CIA operational files from the FOIA).} and that the FOIA’s non-identification protection has not been considered...
adequate for the other "major category of personal information," census data. 145 Similarly, according to the court, § 6103's restriction upon the use of tax information within the government itself evidenced Congress' increased protection for tax return information. 146 The court concluded that it would "be absurd to provide such guarantees against disclosure of identifying information while relying upon no more than FOIA's protection [through Long's interpretation of the Haskell amendment] when a request for less publicly important information is received." 147

The court continued its analysis by determining what particular non-identifying data the Haskell amendment excludes from the definition of "return information." The court discussed the phrase "in a form" and found it significant that the phrase does not appear in any

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145. Church of Scientology, 792 F.2d at 158 (citing Baldridge v. Shapiro, 455 U.S. 345 (1982)).

146. The court also discussed 26 U.S.C. § 7213(a)(1) (1982) which imposes a criminal penalty on government employees for unlawful disclosure of tax information. Church of Scientology, 792 F.2d at 159. For the restrictions placed on the government itself by § 6103, see supra note 12 discussing 26 U.S.C §§ 6103(d)-(i),(k),(l).

In detailing other restrictions upon the use of tax information the court examined § 6110. Section 6110 describes the procedures for public inspection of IRS written determinations and background files. The FOIA is normally particularly focused on the disclosure of written determinations in order to prevent government agencies from developing "secret law." However, in the case of tax information, 26 U.S.C. § 6110 (1982) provides greater protection against improper disclosure than that which is provided by the FOIA.

The FOIA requires that written determinations be made available in the agency's reading room. 5 U.S.C. § 552(a)(2) (1982). In contrast, § 6110 details procedures for disclosure of written determinations as well as remedies available to the individual to whom they pertain:

§ 6110(f)(1): "Notice of intention to disclose . . . . The Secretary shall mail a notice of intention to disclose such determinations or document to any person to whom they pertain . . . ." Id.

§ 6110(f)(3)(A):

Any person (1) to whom a written determination pertains (or . . . ) (ii) who disagrees with any failure to make a deletion with respect to that portion of any written determination or any background file document which is to be open to or available to public inspection, and (iii) who has exhausted administrative remedies . . . may . . . file a petition in the United States Tax Court . . . for a determination with respect to that portion of such written determination or background file document which is to be open to public inspection.

Id.

§ 6110(f)(4)(B) provides that: "[a]ny person to whom such determination or background file document pertains may intervene in a proceeding . . ." filed in the United States Tax Court or the United States District Court for the District of Columbia for an order requiring that a written determination or background file document be made available to public inspection. Id.

147. Church of Scientology, 792 F.2d at 159.
§ 6103 provisions which describe all identifying data. Nor is “in a form” found in the provision which deals with not “return information” but material that has already been reformulated. The court noted, however, that the phrase is found in provisions requiring reformulation of “return information.” The court reasoned that because the phrase “in a form” is used in other sections of § 6103 that relate to

148. Section 6103(f)(1) (1982), §§ 6103(f)(4)(A) and (B) (1982) provide for the release of any “return information” to certain government entities.

Section 6103(f)(1) states: “[T]he Secretary shall furnish such committee with any return or return information . . . except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session.” Id. (emphasis added).

Section 6103(f)(4)(A) states, in part: “The Joint Committee on Taxation may also submit such return or return information . . . except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session . . . .” Id. (emphasis added).

Section 6103(f)(4)(B) states: “Any return or return information . . . may be submitted by the Committee . . . except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer, shall be furnished . . . only when sitting in closed executive session . . . .” Id. (emphasis added).

149. In order for the IRS to create statistics the statistical information must have been reformulated. Section 6108(c) states: “No publication or other disclosure of statistics. . . shall in any [way] permit the statistics, study, or any information so published, furnished, or otherwise disclosed to be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.” 26 U.S.C. 6108(c) (1982).

150. Section 6103(i)(7)(A) (1982) provides for the limited disclosure of return information to the General Accounting Office for the purpose of conducting audits. The court noted that here the phrase “in a form” is associated with reformulation. Church of Scientology, 792 F.2d at 160-61. The court interpreted this section as assuring that if the General Accounting Office discloses “return information” it does so in a way “carefully devised to avoid the disclosure of identifying data”; that is, information that is reformulated. Id. (emphasis added).

Section 6103(i)(7)(A) states: “Returns available for inspection- Except no such officer or employee shall . . . disclose to any person . . . any return information in a form which can be associated with or otherwise identify, directly or indirectly, a particular taxpayer.” Id.

The court noted that § 6103(j) also associates “in a form” with reformulation. Church of Scientology, 792 F.2d at 161. 26 U.S.C. § 6103(j) (1982) permits the release of statistical studies, forecasts and surveys that are the “purpose of the permitted disclosures to Commerce, the FTC and Treasury.” Section 6103(j)(4) states:

“Anonymous form” No person who receives a return or return information under this subsection shall disclose such return or return information to any person other than the taxpayer to whom it relates except in a form which cannot be associated with or otherwise identify, directly or indirectly, a particular taxpayer. Id. (emphasis added). The court commented that § 6103(j) clearly indicates that “in a form” “envisions . . . not merely the deletion of an identifying name or symbol on a document that contains return information, but agency reformulation . . . .” Church of Scientology, 792 F.2d at 160-61.
reformulation, the Haskell amendment also relates to reformulation. The court concluded, therefore, that the Haskell amendment requires agency reformulation of return information into statistical studies or some other composite product before it can be disclosed.

The court rejected the IRS' argument that the only type of reformulation the Haskell amendment exempts is that envisioned by § 6108. The court stated that this interpretation would render § 6108 superfluous because that statute already allows for the release of non-identifying statistical studies. The court conceded that any interpretation of the Haskell amendment will create some redundancy, but found no textual basis for limiting the phrase "in a form" to statistical studies or compilations. The IRS pointed to Senator Haskell's remarks, as it had done in King v. IRS, in support of the "statistical studies" interpretation. The court found that these remarks were not intended as a comprehensive expression of the purpose of the amendment and should not be treated as such. The court further rejected the IRS' argument by noting that in addition to statistical studies, Senator Haskell referred to the tax model. The court stated that the tax model is not a statistical tabulation but a sample return, derived from an actual return but reformulated to substitute new figures for certain items. For these reasons, the court rejected the IRS' arguments as well as the interpretation adopted by the Seventh Circuit Court of Appeals in King. The court in Church of

151. Section 6108 permits the release of non-identifying statistical studies and compilations. See supra note 59.
152. Church of Scientology, 792 F.2d at 161.
153. Id. at 163.
154. See supra text accompanying note 27.
155. See supra text accompanying note 109 for discussion by the King court.
156. "The purpose of this amendment... [is to allow] the IRS [to] continue to release for research purposes statistical studies and compilations of data, such as the tax model, which do not identify individual taxpayers." 122 CONG. REC. S24,012 (1976) (statement by Sen. Haskell).
157. Church of Scientology, 792 F.2d at 161.
158. Subsequent to the original opinion, issued in slip form, the American Civil Liberties Union filed with the court a post-motion amicus brief. That brief noted that the Tax Model, in 1976, was an actual tax return with identifying information redacted. As Judge Wald, in dissent, pointed out: "The correct description of the Tax Model at the time of passage definitively demonstrates that both the interpretation advanced by the government and the majority are wrong, and that all that the framers of the Amendment thought necessary in § 6103 was effective redaction." Id. at 175-76 n.7 (Wald, J., dissenting).
159. King determined that the "Haskell amendment provides only for the disclosure of statistical tabulations which are not associated with or do not identify particular taxpayers." Id. at 163 (citing King, 688 F.2d at 493). The court in Church of Scientology reasoned that even if § 6108 were interpreted in such a way that 'statistical' does not modify 'compilations,' the tax model is "by no stretch of the imagination a 'special' compilation
Scientology held that the Haskell amendment requires, "in addition to the fact of nonidentification—some alteration by the government of the form in which the return information was originally recorded." The court noted that reformulation will typically consist of statistical tabulations but is not limited to that form.

The court concluded that the meaning it assigned the Haskell amendment was the "meaning most faithful to the text, most compatible with the remainder of the legislation, and most supportable by a plausible legislative intent." prepared 'upon written request by a party or parties,' as § 6108 requires." Id. at 162. See supra note 86.

160. Church of Scientology, 792 F.2d at 163. The court decided that it need not define all manners of reformulation. It noted, however, "that mere deletion of the taxpayer's name or other identifying data is not enough, since that would render the reformulation requirement entirely duplicative of the non-identification requirement." Id.

161. Id.

162. See supra text accompanying notes 131-36.

163. See supra text accompanying notes 148-50.

164. See supra text accompanying notes 138-47.

165. Church of Scientology, 792 F.2d at 163. Judge Silberman, writing a concurring opinion, stated: "I concur in the majority opinion insofar as it overrules Nuefeld. But I cannot join the opinion insofar as it rejects the agency's interpretation of the statute in favor of the majority's own." Id. at 164 (Silberman, J., concurring). Judge Silberman began by briefly reviewing the varying interpretations of the Haskell amendment set forth by the IRS, the plaintiff, and the majority opinion. Judge Silberman disagreed with the majority's description of the IRS' interpretation of the Haskell amendment. He contended that the IRS interpreted the Haskell amendment as allowing for the disclosure of data "rendered anonymous by amalgamation into general statistics" (citing Appellee's Supplemental Brief at 9, Church of Scientology of Cal. v. IRS, 792 F.2d 153 (D.C. Cir. 1986) (en banc). Id. Judge Silberman noted that "each of these interpretations is ... a reasonable construction of a difficult statute." Id. However, Judge Silberman rejected the majority's decision to treat its own construction as authoritative. He stated:

If the congressional intent of a statute [is not apparent] the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.


Judge Silberman concluded that Chevron's instructions apply to 26 U.S.C. § 6103 (b)(2) (1982) and that no one would be better qualified than the Secretary to decide what information may be released under the Haskell amendment. Id.

Judge Scalia concluded, for the majority, that the court should not defer to the IRS' interpretation because that interpretation was inconsistent with the agency's actions. Judge Scalia noted that the IRS' position was that the Haskell amendment is simply another § 6108 "statistical studies" provision. However, this was inconsistent with the IRS' plans to continue the release of the Tax Model, which is not a statistical study. Because the IRS' actions were inconsistent with its analysis of the Haskell amendment, Judge Scalia decided that the court should not defer to the IRS' interpretation. Id. at 162 n.3.
Judge Wald, in dissent, disagreed with the majority's analysis. She argued that the text and the plausible legislative intent of the Haskell amendment, as well as the relationship between that amendment and other sections of the Code, support a reaffirmance of the interpretation adopted by the court in *Nuefeld*. The dissent concluded that the items listed in § 6103(b)(2) that can be disclosed in a manner that does not identify a taxpayer are not "return information.

In support of the "identity test" interpretation, the dissent analyzed the text of the Haskell amendment and disagreed with the majority's "in a form" analysis on several grounds. First, according to Judge Wald, "in a form" indicates that substantive types of information listed in § 6103(b)(2) are not "return information" if they can be disclosed in a manner that cannot identify a taxpayer. The dissent claimed that Congress intended the amendment to mean that "return information" "does not include data that, by itself or even in conjunction with other information, cannot be used to identify a taxpayer." Second, the dissent asserted that had Congress intended to create a reformulation requirement it would have used much clearer language. The dissent noted that nothing in the Haskell amendment supported the majority's interpretation that the amendment created two requirements, one, non-identification and two, reformulation. Third, the dissent argued that even if Congress did intend to create a reformulation requirement, the majority should not assume that deleting identifying information is not a type of reformulation. In its original form, the dissent argued, the information is in a form that identifies. However, after deletions the information is in a form that does not identify.

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166. *Id.* at 172 (Wald, J., dissenting).
167. *Id.* For purposes of this note the *Nuefeld* approach is synonymous with the "identity test."
168. *Id.* at 178. Judge Wald noted that "even information disclosable under § 6103 is, of course, still subject to possible exemptions under one or more of the nine FOIA exemptions 5 U.S.C. § 552(b)." *Id.* at 178 n.11.
169. *Id.* at 174.
170. *Id.* at 175.
171. *Id.*
172. *Id.*
173. *Id.* The majority took issue with the dissent's analysis of the phrase "in a form." The majority noted that it would be "curious usage" to describe an item of "return information" as having one form when that information contained names and addresses and a different form when the names and addresses were deleted. *Id.* at 157. Judge Scalia held that "in a form" evinces a reformulation requirement. *Id.* See supra text accompanying notes 148-49. In the majority opinion Judge Scalia wrote: "It would be most peculiar to catalogue in such detail, in subparagraph (A) of the body of the definition, the specific items that constitute return information . . . while leaving to an afterthought the major
The dissent also analyzed the plausible legislative intent of the Haskell amendment. The dissent explained that the "identity test" interpretation comports best with Congress' intent to balance the interest in taxpayer privacy with the interest in disclosure, whenever taxpayer's privacy rights are not implicated. 174 As the dissent noted, the majority's interpretation would forbid the disclosure of § 6103(b)(2) data, in its present form, to legitimate groups and scholars even if the IRS were confident that there would be no risk of identification. 175 This result is contrary to Congress' intent in promulgating the FOIA, which was to increase public access to government records. 176 The Church of Scientology interpretation results in a broad exception to the FOIA and limits disclosable information to that which is non-identifying and reformulated.

The dissent also analyzed the broad statutory context of the Haskell amendment. Judge Wald determined that the "identity test" interpretation renders superfluous certain provisions of § 6103. 177 She noted, however, that the majority's interpretation also renders superfluous some provisions. 178 Given the fact that both interpretations render neighboring provisions superfluous, 179 Judge Wald observed qualification that none of those items counts unless it identifies the taxpayer." Church of Scientology, 792 F.2d at 176 (Wald, J., dissenting) (quoting id. at 157) (emphasis added).

Judge Wald, however, believed that the Haskell amendment was an afterthought and that the majority's reliance on the phrase "in a form" ignored legislative reality. Id.

Judge Scalia disagreed with the dissent's analysis. Judge Scalia concluded that since the provisions were enacted simultaneously, there was no justification for relying on the hastily considered nature of the Haskell amendment. Id. at 159. Judge Scalia remarked:

The ... Haskell amendment was not adopted separately and distinctly from the other provisions that we seek to reconcile with it .... [I]t was not an amendment to a preexisting law, but an amendment to the bill as originally presented on the floor. Congress did not pass into law the Haskell amendment by itself, but as part and parcel of an exceedingly detailed and complex legislative scheme, on which it had "labor ed arduously over each choice of word and each comma."

Id.

174. Id. at 172 (Wald, J., dissenting).

175. Id. at 173. The majority's interpretation required that the information be reformulated in addition to being non-identifiable. Id. at 157. See supra text accompanying note 137.

176. See supra notes 2-4 and accompanying text.

177. Church of Scientology, 792 F.2d at 176 (Wald, J., dissenting).

178. Id. (citing 26 U.S.C. § 6103(i)(4) (1982) ("return information" is not to be released "except in a form which cannot be associated with, or otherwise identify . . . "); 26 U.S.C. § 6103(i)(7)(A) (1982) ("return information" is not to be released "except in a form which cannot be associated with, or otherwise identify . . . ").

179. The dissent noted that although the Haskell amendment would appear to render 26 U.S.C. § 6103(b)(2)(A) (1986) superfluous if the "identity test" were to be adopted, that is not the case. Apparently the dissent concluded that if the sole purpose of § 6103(b)(2)(A) were to list items of "return information," then the Haskell amendment
that Congress apparently "did not concern itself with the fact that some of the provisions were being made stylistically inelegant."\textsuperscript{180} The dissent concluded that the "superfluity" argument could not support either the majority's or the dissent's interpretation.\textsuperscript{181}

In addition to analyzing the text, legislative intent, and broad statutory context of the Haskell amendment, the dissent discussed the "informed requester" problem. The dissent acknowledged that although it is difficult to determine just when enough information has been deleted to make the taxpayer unidentifiable,\textsuperscript{182} the IRS should be granted considerable deference in determining, on a case by case basis, what data could lead the informed requester to identify a taxpayer.\textsuperscript{183} Judge Wald noted that the "informed requester" problem is not unique to the IRS. She noted that exemptions four, six, and seven of the FOIA all implicate the "informed requester" problem but, as the majority pointed out, Congress was willing to tolerate the "risk of occasional unknowing disclosure."\textsuperscript{184} The dissent contended that courts have developed standards and procedures that deal with the "informed requester" problem\textsuperscript{185} and that a court could accept document...
tation to aid in preventing indirect identification. Judge Wald noted that this would be similar to the requirement the panel opinion imposed on the IRS with respect to documents not listed in § 6103.  

III. ANALYSIS

Two court of appeals judges, Scalia and Wald, using the same criteria (text, broad statutory context, and legislative history) arrived at two different interpretations of a one sentence amendment, thus illustrating the difficulty in interpreting the Haskell amendment. Both the court in Long and the court in Church of Scientology failed to settle convincingly the question of what is included in “return information.” When the United States Supreme Court decides Church of Scientology it could find that either interpretation is reasonable. Both interpretations attempt to reconcile their results with the broad statutory context of § 6103 and Congress' intent in adopting the Haskell amendment. The results, however, are quite different in that the

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186. Church of Scientology, 792 F.2d at 177 (Wald, J., dissenting) (citing Church of Scientology of Cal. v. IRS, 792 F.2d 146, (D.C. Cir. 1986) (panel opinion)).

187. Id. In the panel opinion that accompanied this case, Judge Scalia wrote that if the Commissioner asserted that the requested information is non-disclosable under § 6103, he or she must make the requisite showings “with an affidavit sufficiently detailed to establish that the document or group of documents in question actually falls into the exempted category.” Id. at 152.

188. Long v. IRS, 596 F.2d 362 (9th Cir. 1979), cert. denied, 446 U.S. 917 (1980).

189. Church of Scientology, 792 F.2d 153.

190. Because the “statistical studies” interpretation adopted in King is not reasonable, this analysis is limited to the interpretations set forth in Long and Church of Scientology. A number of factors contribute to the unreasonableness of the King decision. First, the King court ignored the language of the Haskell amendment which does not contemplate limiting return information to statistical studies. Second, in proposing the amendment Senator Haskell referred to the Tax Model which is not a statistical study. See supra note 158 and accompanying text. Third, the “statistical studies” interpretation renders § 6108 superfluous. See supra text accompanying notes 84-85. Fourth, the narrow interpretation the King court assigns the Haskell amendment is contrary to the purpose of the FOIA. See supra text accompanying notes 116-20.
"identity test" will result in more non-identifying information being released than will the "reformulation" approach.

This difference is illustrated by applying these interpretations to a single set of facts and examining the result. For example, a request for the check sheets used in the Taxpayer Compliance Measurement Program would be treated differently under the two interpretations. Check sheets contain information from individual tax returns including the "taxpayer's name, address, social security number, and all the financial data reported on the tax return." In applying the "identity test" to this request the IRS would redact that information which identifies the individual to whom it pertains. The remaining non-identifying information would then be released. In complying with the "reformulation" requirement the IRS would, at that point, take all the non-identifying information and create a new compilation of data prior to release. The "reformulation" requirement would result in the IRS creating a new document, something which it is under no obligation to do in order to comply with FOIA requests. Therefore, if a compilation of this non-identifying information does not previously exist the IRS is under no obligation to release that information. This approach would result in less non-identifying information being released.

As the dissent in Church of Scientology pointed out, there are some problems with the majority's "reformulation" interpretation. Similarly, as the majority in Church of Scientology pointed out, there are a number of problems with the Long interpretation (adopted by Nuefeld and endorsed by the dissent in Church of Scientology).

The Church of Scientology interpretation produced a result which is incompatible with congressional intent. The court's holding, in effect, requires that "return information" be reformulated twice prior to

191. This request is similar to the one in Long, 596 F.2d 362. See supra text accompanying notes 35-36.
192. Id. at 364.
194. Church of Scientology, 792 F.2d at 172-78 (Wald, J., dissenting). For example, Judge Scalia never stated what type of reformulation was required. He also neglected to determine from what original form the reformulation must be done. See supra text accompanying notes 132-65.
197. See supra text accompanying notes 165-86. For example, the Long interpretation renders a number of § 6103 provisions superfluous. See generally Church of Scientology discussion concerning Long, supra text accompanying notes 133-47.
disclosure; first, when the IRS records, onto a different form, the information from the actual tax return\footnote{Section 6103(a) prohibits the disclosure of actual tax returns, therefore “return information” must be redacted from that original document. 26 U.S.C. § 6103(a) (1982).} and second, when the IRS reformulates that information as suggested by Judge Scalia.\footnote{Church of Scientology, 792 F.2d at 163. This reformulation would occur after the identifying information is deleted from the document.} The theory that reformulation would give added assurance against indirect identification ignores the fact that “return information” will be “reformulated”\footnote{This reformulation would occur when the IRS redacts requested information from the actual tax return.} prior to disclosure even if the Haskell amendment had not so provided. The “reformulation” interpretation provides added assurance of non-identification, but only for informed requesters. For a requester who is not “informed,” reformulation does nothing more than deleting identifying information would do. That is, deletion of identifying information would render other information non-identifying. Since Congress has accepted the risk of an “informed requester,” it is not likely that Congress provided a requirement of reformulation simply to provide added assurance of non-identification in the case of an “informed requester.”

The “identity test” balances the taxpayers’ interest in privacy with Congress’ interest in disclosure under the FOIA. The result of the “identity test,” however, was not intended by Congress. If the “identity test” is the correct interpretation, then Congress, in adopting the amendment, changed “return information” from all items listed in § 6103(b)(2)(A) to those items only when they identify. Congress passed the amendment with no objection or discussion from the Senate floor;\footnote{122 CONG. REC. S24,012 (1976).} congressional intent to effectuate such a major change thus appears implausible. Indeed, Senator Haskell did not mention changing the meaning of “return information” in proposing the amendment.

Examining the broad statutory context arguments which support the “reformulation” as well as the “identity test” interpretations does not aid in determining which interpretation is better. In support of the “reformulation” interpretation, Judge Scalia noted that the phrase “in a form” is used in other subsections of § 6103 only when the provision is referring to reformulated information.\footnote{Church of Scientology of Cal. v. IRS, 792 F.2d 153, 160 (D.C. Cir. 1986), cert. granted, 107 S. Ct. 947 (1987).} However, the logical inference to be drawn from that argument is that Senator Haskell was aware of and remembered the exact language of § 6103(j)(4) and § 6103(i)(7)(A). This is not likely in light of the hurried nature in
which the amendment was proposed and adopted. Judge Scalia opined that it was improper to consider the nature of the legislative history of the amendment because the whole provision was enacted at the same time, but it is reasonable to consider the amendment separately because it was not proposed and adopted at the same time as the bulk of § 6103. The "identity test" interpretation renders portions of § 6103 redundant. As Judge Scalia pointed out, though, any interpretation creates some redundancy. The fact that the amendment has resulted in three separate interpretations and has created areas of superfluity may indicate that the amendment was not well thought out. Both the "identity test" and the "reformulation" interpretations result from an analytic framework filled with valid arguments, yet both are flawed. In determining which of these two interpretations should govern, it is appropriate to look to the policy considerations underlying disclosure.

The FOIA provides a broad rule of disclosure. Congress excluded from that disclosure requirement tax return information. Because taxpayers provide the IRS with many intimate personal and financial details, "taxpayer[s] [have] a legitimate interest in maintaining the confidentiality of such matters." Individuals have the right to control the circulation of information relating to themselves. This right of privacy is not absolute, however, and must be weighed against the government's need to disclose certain information. When the need for information outweighs the right of privacy, the information will be disclosed.

Some believe that a threatened breach of privacy will have a deleterious effect on our voluntary system of tax assessment. How-

203. See supra note 173.
204. See supra note 5.
210. The District Court for the District of Columbia, in Association of American Railroads, held:

The protection of the data contained in Federal tax returns is an essential part of our scheme of taxation. Individuals and corporations have the right to expect that information contained in tax returns will not be made available by the government to the public. The policy of confidentiality for income tax data encourages the full disclosure of income by taxpayers in that the individual or corporate
ever, because information that would be released under the Haskell amendment would not identify a particular taxpayer, the threat of a negative effect on our tax assessment system is lessened. In addition, substantial civil and criminal penalties are imposed for failing to file a completed tax return.\(^{211}\)

**CONCLUSION**

Determining what information would identify an individual taxpayer and deleting that information prior to release would best comport with FOIA policy. There would be more information disclosed by using the “identity test” interpretation than using the “reformulation” interpretation.

Because identifying information will be deleted prior to disclosure and because Congress has determined that the benefits of disclosure outweigh the small risk of privacy breach, the interpretation set forth by the Ninth Circuit Court of Appeals in *Long v. IRS* \(^{212}\) is best suited to achieve the results intended by Congress in promulgating § 6103 of the Tax Reform Act of 1976. The Supreme Court, therefore, should endorse the “identity test” interpretation created in *Long v. IRS* and proffered, in dissent, by Judge Wald in *Church of Scientology of California v. IRS*.

*Elena M. Gervino*

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\(^{211}\) See I.R.C. §§ 6651-52 (consequences of failure to file); 7201-15 (criminal sanctions concerning obligation to file return and to pay taxes).

\(^{212}\) *Long v. IRS*, 596 F.2d 362, 369 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980).