Zale Corporation v. Internal Revenue Service: Turmoil in the Disclosure Scheme for Tax Return Information

Robert W. Metzler

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Since its inception, the Freedom of Information Act (FOIA)\(^1\) has played a predominant role in the disclosure scheme for most government records.\(^2\) Under the general rule of the FOIA, any record held by a federal agency must be disclosed unless it falls within one or more of nine specific exemptions.\(^3\) To ensure that agencies do not abuse the exemptions or otherwise frustrate the general rule of disclosure, the FOIA provides individuals requesting information with a number of safeguards against unwarranted agency retention.\(^4\) These safeguards include the right to de novo review in a federal district court of any agency decision to retain information within the ambit of the FOIA.\(^5\) Judicial interpretation of this statutory right to de novo review has established that the government must provide detailed justification for any decision to retain information coming within the FOIA.\(^6\)

Until recently, courts have consistently ruled that the FOIA applies to

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4. For examples of the FOIA safeguards, see notes 44-47 and accompanying text *infra*.
5. 5 U.S.C. § 552(a)(4)(B) (1976). This provision reads as follows:
   (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case, the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.
6. *See* notes 34-40 and accompanying text *infra*. 675
tax return information held by the Internal Revenue Service (IRS).

Accordingly, the FOIA's right to de novo review was available to requesters challenging IRS determinations to withhold tax return information. In Zale Corporation v. Internal Revenue Service, the United States District Court for the District of Columbia broke from this pattern by holding that section 6103 of the Internal Revenue Code, which protects the confidentiality of tax returns and certain information collected by the IRS on taxpayers, is the sole standard governing the disclosure of tax return information. In addition, the court concluded that the applicable standard for reviewing retention of tax return information by the IRS was not de novo review as prescribed by the FOIA, but a standard "highly deferential" to agency determinations as set forth in chapter seven of the Administrative Procedure Act (APA).

Zale Corporation, a large Texas-based retailer, was under investigation for possible civil and criminal violations of the Internal Revenue Code. Before charges were filed, Zale's attorneys submitted an FOIA request to discover what information the IRS had gathered on their client. The

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7. E.g., Barney v. IRS, 618 F.2d 1268 (8th Cir. 1979); Bruehaus v. IRS, 609 F.2d 80 (2nd Cir. 1979); Chamberlain v. Kurtz, 589 F.2d 827 (5th Cir.), cert. denied, 444 U.S. 842 (1979); Librach v. FBI, 587 F.2d 372 (8th Cir. 1978), cert. denied, 440 U.S. 910 (1979); Fruenhaufer v. IRS, 566 F.2d 574 (6th Cir. 1977).


9. I.R.C. § 6103. For a discussion of this provision, see notes 87-94 and accompanying text infra.

10. 481 F. Supp. at 490.

11. Id.


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The total number of records pursued in this request and three subsequent requests on behalf of Zale exceeded 500,000. To process the requests, the IRS had to divert personnel involved in the investigation and thereby jeopardized potential actions against Zale. Approximately 55,000 documents were eventually released. In an attempt to obtain the IRS Special Agent's Report and other retained material, Zale petitioned the United States District Court for the District of Columbia for de novo review of the IRS determination. In the proceeding, the IRS alleged that the records were protected from mandatory disclosure by two FOIA exemptions: exemption seven (the exemption for certain investigatory records) and exemption three (the exemption for certain nondisclosure statutes). The government's exemption three defense claimed that paragraph 7 of section 6103(e) of the Internal Revenue Code authorized the IRS to retain the


14. In many instances, the FOIA imposes a substantial administrative burden upon the agency seeking to protect records from disclosure. Under the FOIA, an agency must release "reasonably segregable" portions of a record containing some exempt information. 5 U.S.C. § 552(b) (1976). To comply with this requirement, an agency must search through each document line by line to ascertain if there are reasonably segregable portions. In cases such as Zale where the number of records involved is in the hundreds of thousands, the administrative burden on the government is obviously great. Moreover, when a disappointed information requester challenges an agency retention in court, the agency must furnish detailed justification. See notes 37-40, 48 and accompanying text infra. Recent congressional review of the administrative burden imposed by the FOIA indicates that expansion and improvement of agency resources is the answer to this problem. OVERSIGHT HEARINGS, supra note 13, at 58-64. This type of solution has been criticized because it lacks any real cost-benefit analysis. See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5:45 (2d ed. 1978).

A problem connected with the administrative burden imposed by the FOIA is the diversion of agency personnel from their normal functions. This manpower diversion frequently hampers law enforcement investigations. Shea, Is Openness Working? A Dissenting View, 38 FED. BAR J. 109, 111-12 (1980); REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES: IMPACT OF THE FREEDOM OF INFORMATION AND PRIVACY ACTS ON LAW ENFORCEMENT AGENCIES (GGD-78-108, Nov. 15, 1978) at 3 [hereinafter cited as COMPTROLLER GENERAL'S REPORT].

15. Through a pretrial stipulation, Zale modified its requests and reduced the number of document pages sought to 11,000. 481 F. Supp. at 487 n.5. By the time the case was decided, only 4,000 pages remained in dispute. Id. at 487.

17. 5 U.S.C. § 552(b)(3) (1976). Exemption three of the FOIA provides:
   This section does not apply to matters that are—specifically exempted from disclosure by statute (other than section 552b of this title), 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.
18. I.R.C. § 6103(e)(7). This provision states:
   Return information—Return information with respect to any taxpayer may be
documents in question.

The IRS's exemption three defense prompted the court to examine anew the statutory framework governing the disclosure of tax return information. The court decided that the government had misinterpreted the relationship between section 6103 and the FOIA. Through an analysis based upon principles of statutory construction, the court reasoned that section 6103 overrides the FOIA and is the sole standard governing the release of tax return information. Consequently, the court did not employ the FOIA's de novo review but simply applied the general standard applicable to informal agency action provided by chapter seven of the APA. Based upon a record composed of detailed affidavits supplied by the IRS and a partial in camera inspection of the documents, the court determined that the IRS had not abused its discretion and that the documents could be retained.

This note will examine the statutory framework governing the disclosure of tax return information and the judicial treatment of that framework. Particular emphasis will be placed on the 1976 amendments to section 6103 of the Internal Revenue Code and exemption three of the FOIA, because judicial interpretation of these amendments has resulted in conflicting views regarding the relationship between section 6103 and the FOIA. A critical evaluation of these statutes and the reasoning behind the
Zale decision will demonstrate that the FOIA’s de novo review rather than the deferential APA standard should be employed by the courts scrutinizing IRS determinations to withhold tax return information from the public.

I. AN OVERVIEW OF THE DISCLOSURE SCHEME FOR TAX RETURN INFORMATION PRIOR TO THE 1976 AMENDMENTS OF SECTION 6103 AND THE FOIA

A. The FOIA: Implementation of A Full Disclosure Philosophy

The FOIA was enacted in 1966 to improve public access to information held by government agencies. Prior to its enactment, access to agency records was governed by section 3 of the APA. Under the APA disclosure scheme, a government agency that did not want to make public a requested record needed only to allege that the record was being withheld for "good cause" or in the "public interest." In addition, individuals seeking information under the APA had the burden of showing that they were "persons properly and directly concerned." Consequently, section 3 of the APA, although labeled a public disclosure section, was in reality a license for agency withholding.

In replacing the ineffective access provisions of the APA, the FOIA embraced a philosophy of full agency disclosure. Interests such as the privacy of medical and personnel information held by the government were protected only if such information fell within one or more of nine specific exemptions. To protect against unwarranted agency retention of records, the Act provided frustrated requesters with a right to de novo review in a federal district court. This right was enhanced by placing upon the government the burden of justifying record retention in any such court action. Through this disclosure scheme, the framers of the FOIA hoped to

27. Id. at 2423.
29. S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965), reprinted in FOIA Source Book supra note 28, at 38. "It is the purpose of the present bill to... establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." Id.
30. Id. at 38, 43-44.
32. Id.
provide a "workable formula which encompasses, balances, and protects all the interests yet places emphasis on the fullest responsible disclosure."\textsuperscript{33}

B. The Vaughn Decision and the 1974 Amendments of the FOIA: Putting Teeth into the FOIA

Seven years after enactment of the FOIA, the United States Court of Appeals for the District of Columbia Circuit decided the landmark case of \textit{Vaughn v. Rosen}.\textsuperscript{34} In \textit{Vaughn}, the court formulated a procedure which would allow the government to meet its burden of justifying retention under the Act without requiring the court to perform an in camera inspection of the requested information. Vaughn, a law professor doing research on the Civil Service Commission, exercised his right to de novo review pursuant to the FOIA after the Commission had denied his request for certain information. The Commission submitted to the court an affidavit which did not reveal the contents of the information sought but simply set forth in conclusory terms the opinion of the Director of the Bureau of Personnel Management that the data requested came within three FOIA exemptions. Relying solely upon the affidavit, the trial court ruled for the Commission.\textsuperscript{35} On appeal, the District of Columbia Circuit remanded the case because the record in the decision below was insufficient to permit a determination of whether the documents were subject to disclosure under the FOIA.\textsuperscript{36} In its directions, the court of appeals required the government to furnish what would later become known as a \textit{Vaughn} index.\textsuperscript{37} The government was directed to itemize and index the documents, or portions thereof, in order to show which were subject to disclosure and which were allegedly exempt.\textsuperscript{38} The decision in \textit{Vaughn} explicitly rejected agency justification of nondisclosure through conclusory and generalized

\textsuperscript{34} 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).
\textsuperscript{35} Id. at 823.
\textsuperscript{36} Id. at 828.
\textsuperscript{37} A \textit{Vaughn} index is a type of detailed affidavit often employed by trial courts in FOIA cases as a substitute for in camera inspection. Three indispensible elements of this index have been identified: the index should be contained in one document; the index must describe each item withheld; and the index must state the exemption claimed for each retention and explain why the exemption applies. Founding Church of Scientology v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979). Courts have recognized the large administrative burden imposed by the \textit{Vaughn} index but have consistently deferred to the FOIA's policy in favor of full disclosure when the government has raised the burden as a ground to avoid detailed justification. E.g., Long v. United States, 596 F.2d 362, 365-66 (9th Cir. 1979), cert. denied, 446 U.S. 917 (1980); Mead Data Central, Inc. v. United States Dep't of Air Force, 566 F.2d 242, 261 (D.C. Cir. 1977).
\textsuperscript{38} 484 F.2d at 828.
allegations of exemptions and provided a standard against which the government's burden of justification would be measured.

In 1974, Congress amended the FOIA in an attempt to overcome persisting government roadblocks to the free flow of information. The amendments narrowed the scope of the Act's first and seventh exemptions. In addition, Congress substantially expanded the safeguards in the FOIA for information requesters. The new protections included specific time limits for agency responses to information requests, attorneys fees for plaintiffs who substantially prevail, administrative sanctions against malfeasant government employees, and the availability of "reasonably segregable portions" of records containing some exempt material. The 1974 amendments also granted reviewing courts the discretion to rely upon detailed affidavits, thereby sanctioning the Vaughn decision.

39. Id. at 826.
40. Decisions subsequent to Vaughn have established that the detailed justification requirement can be satisfied by variations of the basic procedure set forth in Vaughn. E.g., Barney v. IRS, 618 F.2d 1268, 1273 (8th Cir. 1980) (generic classification of documents can be substituted for a specific factual showing for each document in certain exemption seven cases); Harvey's Wagon Wheel, Inc. v. NLRB, 550 F.2d 1139, 1142 (9th Cir. 1976) (affidavit without itemization reciting attorney's review of documents); Ash Grove Cement Co. v. FTC, 511 F.2d 815, 817 (D.C. Cir. 1975) (random in camera sampling of documents plus generalized description of the documents in an affidavit). Just how far a court can deviate from the Vaughn index is not clear. The dangers of deviating too far are demonstrated in a recent decision. Stephenson v. IRS, 629 F.2d 1140 (5th Cir. 1980) (unitemized affidavit claiming that IRS special agent had reviewed the documents and determined that they came within exemption three was erroneous and caused trial judge to uphold an improper retention).
47. 5 U.S.C. § 552(b) (1976).
48. After the 1974 amendments to the FOIA, the Act provides that a reviewing court "may examine the contents of . . . agency records in camera." 5 U.S.C. § 552(a)(4)(B) (1976) (emphasis added). The conference report accompanying the 1974 amendments indicates that before an in camera inspection is ordered, the government should be given an opportunity through detailed affidavits or testimony to demonstrate that records are exempt from disclosure. S. REP. No. 1200, 93d Cong., 2d Sess., printed in [1974] U.S. CODE CONG. & AD. NEWS 6285, 6287-88.
C. The Disclosure Restrictions of Section 6103 and the FOIA's Exemption for Nondisclosure Statutes

More than half a century before enactment of the FOIA, Congress created a statutory framework restricting the disclosure of tax returns. In the Tariff Act of 1913, tax returns were described as "public records." Public access to tax returns was not, however, automatic. These so-called public records were "open to public inspection upon order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President." In 1954, this basic pattern with a few minor alterations was codified into section 6103 of the Internal Revenue Code.

No appellate court ruled on the relationship between the access-restricting section 6103 and the FOIA until 1974. In that year, the United States Court of Appeals for the District of Columbia Circuit in *Tax Analysts & Advocates v. Internal Revenue Service* determined that original section 6103 could be reconciled with the FOIA through the FOIA's third exemption. At issue in *Tax Analysts* was an IRS determination to retain two types of records: letter rulings and technical advice memoranda. The court decided that the letter rulings were not a kind of material coming within original section 6103. Therefore, this statute could not be used to justify nondisclosure of letter rulings. When the court considered the retention of technical advice memoranda, it reached a different result. Because these memoranda dealt with information contained in tax returns, the court ruled that the access-restricting section 6103 applied to them. However, the question of reconciling this nondisclosure statute with the...
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FOIA's general disclosure rule remained. The court relied on exemption three of the FOIA to answer this question. As originally enacted, this exemption protected material "specifically exempted from disclosure by statute."56 The court held that the material coming within original section 6103 was such material and was therefore exempt from the FOIA's general disclosure rule.57

In other contexts, however, courts did not always find that the FOIA and statutes authorizing nondisclosure could be reconciled through exemption three as originally enacted. For example, in *Stretch v. Weinberger*,58 the Department of Health, Education and Welfare withheld reports concerning the performance of nursing homes receiving federal funds under Medicare. Section 1106(a) of the Social Security Act prohibited disclosure of "any . . . report obtained at any time by the Secretary of Health, Education and Welfare . . . in the course of discharging . . . [his] duties . . . except as the Secretary . . . may prescribe by regulations."59 The Third Circuit ruled that an exempting statute under the original exemption three must "prescribe some basis" to guide an administrator with discretion on disclosure and that section 1106(a) did not prescribe such a basis.60 Therefore, the nursing home performance reports were not exempt from the FOIA's general rule requiring disclosure.61 The *Stretch* decision implicitly repealed section 1106(a) to the extent that it was in conflict with the FOIA.

In 1975, the Supreme Court rejected the restrictive view of exemption three typified by *Stretch*. In *Federal Aviation Administration v. Robert-

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56. Pub. L. No. 90-23, § 1, 81 Stat. 54 (1967). Exemption three of the FOIA, prior to its 1976 amendment, will hereinafter be referred to as original exemption three.
58. 495 F.2d 639 (3d Cir. 1974).
60. 495 F.2d at 640-41.
61. *Id.*
the Court was asked to determine whether section 1104 of the Federal Aviation Act of 1958 met the criterion of original exemption three. Section 1104 allowed the Federal Aviation Administrator to withhold requested records if he determined that disclosure would adversely affect the interests of a party objecting to disclosure and if he determined that disclosure was not in the public interest. Unlike the Third Circuit in Stretch, the Supreme Court was not troubled by the agency's broad discretion to disclose or withhold under the statute at issue. From a review of the legislative history of the FOIA, the Court found that Congress did not express an intention to repeal nondisclosure statutes that were in effect at the time the FOIA was enacted. Moreover, the Court ruled that there was no "inevitable inconsistency" between the congressional intent to replace the broad standard of section 3 of the APA with the FOIA and the intent of section 1104 to give the Administrator broad discretion. The Court concluded that the FOIA did not repeal section 1104 by implication and that this section came within original exemption three. The Supreme Court's inclusion of this liberal nondisclosure statute within original exemption three indicated that virtually any nondisclosure statute came within the scope of this exemption.

II. THE 1976 AMENDMENTS TO THE FOIA AND SECTION 6103

A. Narrowing the Scope of Exemption Three

In 1976, Congress amended exemption three of the FOIA specifically to overrule the broad interpretation set forth in Robertson. The new version of this exemption distinguishes between two types of nondisclosure statutes. The first type does not allow an agency any discretion regarding disclosure and automatically qualifies under exemption three. The second type of statute permits an agency to exercise discretion on disclosure. To qualify under exemption three, however, a discretionary nondisclosure statute must refer to "particular criteria" to be used by an agency in exercising its discretion. Since certain nondisclosure statutes enacted prior to

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64. Id.
65. 422 U.S. at 263-65.
66. Id. at 266-67.
67. Id. at 267.
69. See note 17 supra for the text of exemption three.
1976 do not meet these requirements, the revised scheme of exemption three represents a limited endorsement of repeal by implication.

The legislative history accompanying the amendment to exemption three does not provide extensive guidance regarding the degree to which the amendment narrowed the exemption. The conference report gives two examples of nondisclosure statutes which do not come within the revised exemption: section 1104 of the Federal Aviation Act and section 1106 of the Social Security Act. Each of these statutes grants its respective agency considerable discretion to disclose or retain information. Consequently, disqualification of these two statutes under exemption three is not particularly instructive in determining the degree of specificity required by the revised exemption.

Other portions of the legislative history list several nondisclosure statutes qualifying or nonqualifying under amended exemption three. Yet these references also provide insufficient guidance. The various changes

70. See notes 72-74, 76 and accompanying text infra.
71. For a thorough discussion of the revision of exemption three, see Note, The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act, 76 COLUM. L. REV. 1029 (1976) [hereinafter cited as Note, Exemption Three].
72. HOUSE REPORT 1441, supra note 68, at 2260-61.
73. Section 1104 of the Federal Aviation Act was ruled within the scope of original exemption three by the Supreme Court. See notes 62-67 and accompanying text supra.
74. The Third Circuit disqualified § 1106 of the Social Security Act under original exemption three. See notes 58-61 and accompanying text supra.
75. See notes 59 & 64 and accompanying text supra.

that occurred in the formulation of the wording for exemption three\textsuperscript{77} and the conference report's failure to mention any of these statutes\textsuperscript{78} obscure the final congressional intent regarding all but one of these potential guides. The one remaining statute, section 6 of the Central Intelligence Agency Act of 1949,\textsuperscript{79} was cited in the House debate just before the final vote by the House on the amendment of exemption three as qualifying and, thus, provides an accurate indicator of the House's intent.\textsuperscript{80} There is no evidence, however, that the Senate shared this intent. Hence, section 6 of the Central Intelligence Act of 1949 is also only of limited use in ascertaining what Congress had in mind when it amended exemption three of the FOIA.

\textbf{B. The Bifurcation of Section 6103}

While Congress was at work narrowing the scope of exemption three, it was also revamping the disclosure scheme of section 6103 as part of the Tax Reform Act of 1976.\textsuperscript{81} Under the revised scheme, disclosure of tax

\textsuperscript{77} Exemption three of the FOIA was amended through a rider to the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976). The amendment was first proposed by the House Subcommittee on Government Information and Individual Rights of the Committee on Government Operations headed by Rep. Abzug. \textit{See Legislative History of the Government in the Sunshine Act- S.5 (Pub. L. No. 94-409), COMM. ON GOV'T OPER., GOVERNMENT IN THE SUNSHINE ACT SOURCE BOOK 3-4 (Comm. Print 1980) [hereinafter cited as SUNSHINE SOURCE BOOK]. As initially proposed, the amendment would have exempted only material “required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information.” H.R. 11656, 94th Cong., 2d Sess. § 552(b)(3) (1976), \textit{reprinted in} SUNSHINE SOURCE BOOK, supra at 477. Subsequently, the proposed amendment went to the House Committee on the Judiciary, which expressed concern that the proposed amendment would exclude all discretionary nondisclosure statutes. H.R. REP. No. 880 (PART II), 94th Cong., 2d Sess. 7, reprintedin \textit{[1976] U.S. CODE CONG. & AD. NEWS}, 2212, 2216-17. Consequently, the words “or permitted” were inserted into the proposed language after “required.” \textit{Id.} at 2218. When the revised language was debated on the House floor, Rep. McKloskey proposed, and the House adopted, language that would eliminate the particular criteria test and the particular types of information test from statutes giving an agency no choice on retention. 122 \textit{CONG. REC.} 24211-13 (1976). In conference, the language was polished, \textit{HOUSE REPORT 1441, supra note 68, at 2260-61, and the conference version was finally enacted into law.}

Since the Government Operations Committee Report, \textit{HOUSE REPORT 880 (PART I), supra note 76}, was issued prior to any of the changes in the language of proposed revision of exemption three, and since the July 29, 1976 remarks of Rep. Abzug, see note 76 \textit{supra}, were made prior to the McKloskey amendment, the final congressional intent regarding the statutes cited by these sources is unclear.

\textsuperscript{78} The omission of these statutes from the conference report, which lists two examples of nonqualifying statutes, \textit{HOUSE REPORT 1441, supra note 68, at 2260-61, suggests a congressional abandonment of these preconference report guides.}

\textsuperscript{79} 50 U.S.C. § 403g (1976).

\textsuperscript{80} 122 \textit{CONG. REC.} 28473 (1976).

returns and return information is governed by an amended version of section 6103. Disclosure of IRS written determinations is controlled by a new provision, section 6110.

The newly created section 6110 was designed to open up the body of law contained in IRS private letter rulings, technical advice memoranda, and determination letters. Under this section's general rule, written determinations and their background files are open to public inspection after the IRS deletes details identifying a particular party and information similar to that protected by several of the FOIA exemptions. Moreover, because of an exclusive remedy provision in this section, disclosure of written determinations is not subject to the FOIA.

82. Returns and return information are defined in I.R.C. § 6103(b), as follows:

(1) Return—The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) Return information—The term "return information" means: (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, overassessments, or tax payments whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible 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 indirectly, a particular taxpayer.

83. I.R.C. § 6110.


85. I.R.C. § 6110(a). The items that must be deleted to "sanitize" written determinations before they are open to the public are stated in I.R.C. § 6110(c).

86. I.R.C. § 6110(/). The exclusive remedy provision provides:

(1) Exclusive remedy—Except as otherwise provided in this title, or with respect to a discovery order made in connection with a judicial proceeding, the Secretary shall not be required by any court to make any written determination or background file document open or available to public inspection, or to refrain from disclosure of any documents.

Unlike the creation of section 6110, the revision of section 6103 was not designed to promote increased access to information. The goal of the amended section 6103 was to balance the needs of a variety of government bodies for tax return information against "the citizen's right of privacy and the related impact of disclosure upon our country's voluntary tax assessment system." Additional concerns prompting the revision of section 6103 included the IRS practice of indiscriminately releasing tax returns to other government agencies for reasons unrelated to tax administration and White House abuse of tax returns.

The structure of the revised section 6103 presents a marked contrast to that of its predecessor. Prior to the amendment, disclosure of tax returns was controlled to a large extent by the discretion of the President and various executive officers. In its amended form, subsection 6103(a) states the general rule that tax return information is confidential and can be disclosed only if its release is specifically authorized in the Internal Revenue Code. Specific authorizations are provided in other subsections, most of which designate the various government bodies that may receive tax returns and return information with attendant conditions for receipt. Two other provisions regulate disclosure to limited segments of the public. Authorizations for parties designated by the taxpayer are contained in subsection 6103(c). Subsection 6103(e) governs release to persons having a material interest in the information. Release of return information under these two subsections is restricted to situations where the Secretary of the Treasury has determined that disclosure will not seriously impair federal tax administration. In sum, unlike its predecessor, revised section 6103 provides a detailed scheme controlling the dissemination of tax returns and return information.

87. Senate Report 938 (Part I), supra note 84, at 3747. When the House initially proposed its version of the Tax Reform Act of 1976, it did not include a proposal to amend § 6103. Under the original House version, the issue of tax return confidentiality was left to further legislation. House Report 658 supra note 84, at 2911. Thus, the amended version of § 6103 is largely the work of the Senate.
88. Senate Report 938 (Part I), supra note 84, at 3746-47.
89. See notes 49-52 and accompanying text supra.
90. I.R.C. § 6103(a).
91. I.R.C. § 6103(d), (f)-(o).
92. I.R.C. § 6103(c).
93. I.R.C. § 6103(e).
94. The pertinent portion of § 6103(c) provides "return information shall not be disclosed . . . if the Secretary determines that such disclosure would seriously impair Federal tax administration." In § 6103(e), the restriction on the release of return information is stated differently. For the text of the relevant portion of this section, see note 18 supra.

The two subsections do not place a similar restriction on the release of "returns." For the definition of "returns" and "return information," see note 82 supra.
One area not clarified by either the 1976 amendment to section 6103 or the revision of the FOIA's third exemption was the precise relationship between section 6103, the FOIA, and exemption three. Although the amendments represented significant changes to their respective disclosure schemes and were enacted within one month of each other, neither the language nor the legislative reports of the two amendments specifically refer to each other. Only a brief reference in the conference report for section 6110, a remark by Senator Haskell in the Senate debates, and exemption three, itself, provide some indication that the FOIA governs return information, the subject matter of section 6103. Due to congressional default, the task of deciphering the relationship between the two statutes was apparently left to the courts.

III. PLACING AMENDED SECTION 6103 WITHIN AMENDED EXEMPTION THREE: FRUEHAUF AND CHAMBERLAIN

Before the Zale decision, courts examining the relationship between the FOIA and section 6103 after their 1976 amendments viewed this process as one of determining whether particular provisions of section 6103 met the requirements of exemption three. The critical questions were whether subsection 6103(a) came within the provision of exemption three excepting mandatory nondisclosure statutes and whether subsections 6103(c) and 6103(e)(6) met the test of exemption three for statutes allowing discretion on disclosure.

A. Subsection 6103(a) and the Fruehauf Decision

In Fruehauf Corporation v. Internal Revenue Service, the Sixth Circuit became the first United States Court of Appeals to rule that subsection 6103(a) is a statute granting an agency no discretion on disclosure within the meaning of exemption three. At issue in Fruehauf was the IRS's nondisclosure of various private letter rulings, technical advice memoranda, related background files, indexing systems, and communications with outside parties regarding the federal excise tax on automobile and truck

95. The amendment to exemption three was passed on Aug. 31, 1976. [1976] U.S. Code Cong. & Ad. News 2183. The revision of § 6103 was enacted on Sept. 16, 1976. Id. at 2897.
96. See notes 157-67 and accompanying text infra.
97. See American Jewish Congress v. Kreps, 574 F.2d 624, 628 (1978) (Congress left task of sorting out which nondisclosures statutes come within exemption three to the courts).
98. For a partial list of these courts, see note 7 supra.
100. 566 F.2d 574 (6th Cir. 1977).
sales. Previously, in 1975, the Sixth Circuit had ruled on this very question. At that time, however, the controlling statutes were the original versions of section 6103 and exemption three. In the earlier decision, the court ruled that none of the requested information fell within original section 6103 and that all the records, therefore, had to be disclosed under the FOIA's general rule unless an exemption other than exemption three applied. Subsequently, the IRS petitioned for and was granted certiorari. The Supreme Court vacated the judgment and remanded the case for further consideration in light of the 1976 changes in the Internal Revenue Code's disclosure scheme. Prior to the rehearing, the IRS released all the items except the background files and indexing systems. On remand, the IRS alleged that the remaining information was return information under section 6103 and therefore exempt from disclosure under the FOIA. The court ruled that the information at issue was not return information, thus eliminating the need to reach the second half of the IRS's argument. To provide guidance for future courts, however, the Fruehauf court determined that "in general the language of section 6103 contains a mandatory requirement that returns and return information be withheld from the public." Consequently, the court concluded that subsection 6103(a) met the test of exemption three for statutes giving an agency no discretion of disclosure. The court suggested, however, that it was not ruling on whether the discretionary provisions, subsections 6103(c) and 6103(e)(6), met the requirements of exemption three. Therefore, a question remained whether these two subsections came within exemption three.

B. The Discretionary Nondisclosure Provisions of Section 6103 and the Chamberlain Decision

In Chamberlain v. Kurtz, the Fifth Circuit addressed the question left open in Fruehauf. Chamberlain, a taxpayer under investigation for underpayment of his taxes and possible fraud, filed an FOIA request with the

102. 522 F.2d at 287-90.
104. IRS v. Fruehauf Corp., 429 U.S. 1085 (1977). Upon remand, the Sixth Circuit also considered the 1976 amendment to exemption three. 566 F.2d at 578.
105. Id. at 579-80.
106. Id. at 578 n.6.
107. Id.
108. Id. For cases following Fruehauf, see Long v. United States, 596 F.2d 362 (9th Cir. 1979), cert. denied, 446 U.S. 917 (1980); Bruehaus v. IRS, 609 F.2d 80 (2d Cir. 1979).
IRS in 1973 seeking approximately 400 pages of documents compiled during the investigation of Chamberlain and the IRS manual outlining internal operating procedures. At the administrative level, the taxpayer and the Service narrowed the number of disputed documents to ninety-one, but neither party made any concessions on the manual. The district court, through an application of the original version of exemption three and several other FOIA exemptions, ruled that various documents could be withheld in their entirety and that portions of the remaining files could be retained.110 Both parties to the litigation appealed on a variety of grounds. Among the IRS claims was a contention not raised in the prior litigation. Between the district court's order and the appeal, the 1976 amendments to exemption three and section 6103 became law. In light of the amendments, the Service alleged that fifty-eight of the documents involved in the complicated cross-appeal were return information protected by section 6103, which the IRS claimed was a qualifying statute under exemption three. The Fifth Circuit narrowed the issue to whether subsections 6103(c) and 6103(e)(6)111 were "sufficiently specific to satisfy the requirements of Exemption 3 of the FOIA."112 In deciding this question in the affirmative, the Chamberlain court articulated the view that the discretionary provisions of section 6103 come within exemption three.113

The court's analysis began with an examination of the language of exemption three and the two subsections of section 6103. The court first posited the rule of exemption three for statutes affording agencies discretion on disclosure: that a statute must either establish particular criteria or refer to particular types of matters. In the court's opinion, the criterion guiding the discretion granted by the two subsections, namely a serious impairment of federal tax administration, was sufficiently particular to satisfy exemption three.114 In addition, the court held that the discretionary provisions of section 6103 met the alternative (particular types of matter) test of exemption three,115 reasoning that the "subsections apply only to a particular type of matter, return information, which is carefully defined by statute."116

111. I.R.C. § 6103(e)(7) (formerly I.R.C. § 6103(e)(6)). See note 18 supra.
112. 589 F.2d at 838.
113. Numerous courts have cited Chamberlain as precedent for holding that § 6103(c) or § 6103(e)(6) meets the requirements of exemption three. E.g., Barney v. IRS, 618 F.2d 1268, 1274 n.15 (8th Cir. 1980); Solomon v. IRS, 45 A.F.T.R.2d 80-353, 80-355 (D.D.C. 1979).
114. 589 F.2d at 839.
115. Id.
116. The Court's statement is technically incorrect. Although the rule of § 6103(e)(6) is limited to "return information," § 6103(c) governs both "returns" and "return information."
The court supported its interpretation of the statutes at issue through a review of the legislative history of exemption three. Citing the Government Operations Committee report and the conference report, the court decided that when Congress amended exemption three, it was trying to reach the problem of unfettered agency discretion to disclose or retain information.\textsuperscript{117} Having established the basic goal of the amendment, the court concluded, with minimal explanation,\textsuperscript{118} that Congress did not intend to eliminate all agency discretion on disclosure.\textsuperscript{119} Rather, the court determined that Congress sought to restrict this discretion only if it was not limited by certain defined matters or informed by established criteria.\textsuperscript{120}

Intertwined in the Chamberlain court's discussion of exemption three's legislative history was a comparison of subsections 6103(c) and 6103(e)(6) to other statutes that the court considered qualifying or nonqualifying under exemption three. Section 1104 of the Federal Aviation Act, a nonqualifying statute,\textsuperscript{121} was distinguished from the two subsections of section 6103 on the ground that the discretion permitted in the subsections was limited to certain defined matters and informed by established criteria.\textsuperscript{122} The court also compared the Atomic Energy Act of 1954 to the subsections.\textsuperscript{123} This Act had been cited in the Government Operations Commit-
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The court noted that the matter referred to in this Act was "Restricted Data" and that the criteria guiding agency discretion on disclosure in the Act was "undue risk to the common defense and security." In the court's opinion, the matter and criteria of the Atomic Energy Act of 1954 was no more narrow or specific than the matter and criteria of subsections 6103(c) and 6103(e)(6). To buttress this holding, the court found without explanation that certain nondisclosure statutes, adjudged qualifying under exemption three by other circuits, were also analogous to subsections 6103(c) and 6103(e)(6).

The final step in the Chamberlain analysis relied upon the well-established principle of statutory construction that statutes should be reconciled wherever possible. In applying this principle, the court first recognized that the amendments to exemption three and section 6103 were enacted within one month of each other. The court then noted that the drafters of section 6103 must have been aware of the FOIA since the Act was frequently mentioned in the portion of the Senate Finance Committee report for the Tax Reform Act of 1976 explaining section 6110, the companion provision of section 6103. Therefore, the court concluded, Congress could not have "enacted a comprehensive scheme for releasing information to taxpayers with the intention that it have no further applicability once the taxpayer files an FOIA suit."

The Sixth Circuit's decision in Fruehauf and the Fifth Circuit's decision in Chamberlain placed the provisions of section 6103 governing public disclosure within the FOIA's exemption for nondisclosure statutes. Both of these courts apparently assumed that this placement was sufficient to reconcile section 6103 and the FOIA after their 1976 amendments. Neither congressional intent is open to question. See notes 76-78 and accompanying text supra; see also Note, Exemption Three, supra note 71, at 1042.

124. See note 76 supra.
125. 589 F.2d at 838 n.38.
126. Id.
129. 589 F.2d at 840. For the enactment dates, see note 95 supra.
130. 589 F.2d at 840.
131. Id.
court considered whether section 6103 and the FOIA were irreconcilable regardless of section 6103's status under exemption three. In short, these courts did not consider the possibility that section 6103 had implicitly repealed the FOIA in the area of tax return information.

IV. *Zale Corporation v. Internal Revenue Service*: Removing Tax Return Information from the Ambit of the FOIA

A. The Zale Decision: An Application of Statutory Canons

In *Zale Corporation v. Internal Revenue Service*, Judge Gesell of the United States District Court for the District of Columbia determined that section 6103 was the sole standard governing the disclosure of tax returns and return information. In so ruling, the court did not dispute that section 6103 was a nondisclosure statute within the scope of exemption three. Rather, the court arrived at its decision through an application of principles of statutory construction in which section 6103's status under exemption three was of no consequence.

The *Zale* court purported to rely upon four principles of statutory construction to ascertain the statutory framework controlling the disclosure of tax return information. First, the court recited the well-established principle that statutes should be construed harmoniously where it is reasonable to do so. The court's second and third canons were set forth in a single statement: "absent a clear indication to the contrary, . . . specific legislation will not be controlled by the more general, . . . nor will the later provision be nullified in light of the earlier." The final principle cited by

132. 481 F. Supp. at 490.
133. Id. at 490 n.13. The court specifically noted that § 6103 met the requirements of exemption three.
134. Id. at 488. The *Chamberlain* court also employed this principle in arriving at its decision. See notes 128-31 and accompanying text supra.
135. 481 F. Supp. at 488. The court's statement paraphrased two long-standing canons of statutory construction. The first principle states that if two statutes are in conflict, a specific statute controls a general one, absent an indication from the legislature that the general one should control. See Sands, supra note 128, at § 51.05. The *Zale* court's paraphrasing of this principle, while technically correct, does not explain an important corollary of this principle, namely that specific and general statutes must be construed together absent conflict. Id. Consequently, the statement that a general statute does not control a specific one does not imply that the general one is negated, at least in the absence of conflict. E.g., Utah v. Kleppe, 586 F.2d 756, 768-69 (9th Cir. 1978), rev'd on other grounds, 446 U.S. 500 (1980) ("absolute incompatibility" required before a specific statute nullifies a general act).

The second principle proclaims that if two statutes are in conflict, a later provision controls the earlier absent an appropriate signal from the legislature to the contrary. See Sands, supra note 128, at § 51.03. As was the case in the principle for specific and general statutes, there must be conflict before any negation occurs under this principle. E.g., Northern Natural Gas Co. v. Grounds, 441 F.2d 704, 719-20 (10th Cir. 1971).
the Zale court pointed out that the duty to reconcile statutes becomes “virtually irresistible” when the same Congress enacts the statutes at issue.\textsuperscript{136}

The court did not apply these principles in a systematic fashion. Instead, the court randomly compared various aspects of section 6103 and the FOIA. Through these comparisons, the court attempted to establish that its second and third canons dictate section 6103 negation of the FOIA. Initially, the court determined that section 6103 is a specific and later statute while the FOIA is a general and earlier act.\textsuperscript{137} Next, an explanation of the purposes of the statutes at issue was undertaken. The court pointed out that Congress did not intend to foster disclosure when it amended section 6103.\textsuperscript{138} Rather, Congress sought to abolish the executive order scheme governing the disclosure of tax returns prior to the amendment and to “carve out a special protection for . . . a unique and highly sensitive type of information.”\textsuperscript{139} The court decided that this purpose stood in sharp contrast to the FOIA’s preference for disclosure to the public at large.\textsuperscript{140} The court also found that the structures of the FOIA and section 6103 were markedly different.\textsuperscript{141} Section 6103 specifies in detail the groups to which disclosure is warranted and the types of information that can be disclosed.\textsuperscript{142} The court compared these detailed disclosure rules to the FOIA’s general mandate calling for the release of information to the public without any showing of need.\textsuperscript{143} From its examination of the structures and purposes of the two statutes, the court concluded that there is “no evidence of an intention to allow . . . the FOIA to negate, supersede, or otherwise frustrate the clear purpose and structure of 6103.”\textsuperscript{144} Relying on its second and third principles, the court then ruled that the generalized strictures of the FOIA could not prospectively preempt the subsequently enacted particularized disclosure scheme of section 6103.\textsuperscript{145} From this holding, the court drew the additional conclusion that section 6103 was the sole standard governing the release of tax return information.\textsuperscript{146}

\begin{itemize}
  \item \textsuperscript{136} 481 F. Supp. at 488.
  \item \textsuperscript{137} Id.
  \item \textsuperscript{138} Id.
  \item \textsuperscript{139} Id. See notes 87-88 and accompanying text \textit{supra} for a discussion of the legislative history of the 1976 amendment to § 6103.
  \item \textsuperscript{140} 481 F. Supp. at 489.
  \item \textsuperscript{141} Id.
  \item \textsuperscript{142} Id. See notes 90-94 and accompanying text \textit{supra} for a discussion of the structure of § 6103.
  \item \textsuperscript{143} 481 F. Supp. at 489. See note 3 and accompanying text \textit{supra} for a discussion of the FOIA’s disclosure rule.
  \item \textsuperscript{144} Id.
  \item \textsuperscript{145} Id.
  \item \textsuperscript{146} Id. at 490.
\end{itemize}
B. The Deficiencies in the Zale Analysis

The decision ultimately reached in Zale, that section 6103 alone governs the disclosure of tax return information, cannot be justified by the canons upon which the court relies. The court based its decision upon its second and third principles. These two critical canons indicate that a general and earlier statute such as the FOIA should not nullify or modify a specific and later statute such as section 6103 absent a clear contrary signal from Congress. These principles, however, do not automatically equate the inability of the earlier and general FOIA to override section 6103 with section 6103 nullification of FOIA. Only if conflict is established will nullification of the FOIA be mandated by the two principles. In Zale, the court found that the purposes and structures of the FOIA and section 6103 were different. It did not, however, specifically identify any conflicting provisions in the two acts. At most, the court established that the specific and later section 6103 was juxtaposed against the general and earlier FOIA in a situation where there was insufficient evidence that Congress intended the FOIA to control. Although this showing, when applied to the court's second and third principles, will justify a ruling that the FOIA does not preempt section 6103, it will not justify a ruling that section 6103 overrides the FOIA. Unless conflict is demonstrated, FOIA and

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147. See notes 137-46 and accompanying text supra.

The court's first and fourth principles are principles of reconciliation. These rules are not authority for the negation of statutes. See notes 134 & 136 and accompanying text supra.

148. See note 135 and accompanying text supra.

149. Id.

150. Id.

151. 481 F. Supp. at 489. See notes 139-44 and accompanying text supra.

152. The Zale court contrasted the structures and purposes of the FOIA and § 6103. See notes 137-44 and accompanying text supra. The court, however, did not say which provisions of the two statutes were in conflict. If, by contrasting the purposes of the two Acts, the court intended to show that the general rule of disclosure in the FOIA, 5 U.S.C. § 552(a) (1976), is in conflict with the provisions of § 6103 restricting public disclosure, I.R.C. § 6103(a), (c) & (e), the court failed in its endeavor. The court did not explain why exemption three, the FOIA's exemption for nondisclosure statutes, did not reconcile any such conflict.

It should also be noted that the two standards of review mentioned in Zale are not a source of conflict between § 6103 and the FOIA. Although the FOIA contains a provision calling for de novo review of certain agency actions, 5 U.S.C. § 552(a)(4)(B) (1976), § 6103 contains no provision for judicial review of agency action pursuant to it. Rather, the arbitrary and capricious standard of review utilized in Zale is authorized by chapter seven of the APA, 5 U.S.C. §§ 701-706 (1976). If there is any conflict, it is between the FOIA and the APA.

153. See notes 137-44 and accompanying text supra.

154. See note 135 supra.
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section 6103 coexistence is not foreclosed. Given this possibility, the court's first and fourth principles, which express a strong preference for statutory reconciliation, dictate a holding of coexistence. Consequently, the court's holding that section 6103 is the sole standard governing the release of tax return information is, upon close examination, unsupported by the very canons used to arrive at the result.

Another deficiency in the Zale court's analysis is its failure to consider certain evidence suggesting FOIA control of section 6103. One example of such evidence is the portion of the conference report for the Tax Reform Act of 1976 which explains section 6110, the companion provision of section 6103. The report states that memos of particular investigations and certain other correspondence passing between the Justice Department and the Internal Revenue Service will not be information controlled by the access provisions of section 6110. To provide guidance on how this information should be released, the report added: "the question of the availability of these documents is to be governed by other provisions of law including the Freedom of Information Act." Since much of the information under consideration meets the definition of return information covered by section 6103, and since the discussion of section 6110 appears in the conference report just prior to the discussion of section 6103, the statement arguably expresses congressional intent that return information, and hence, section 6103, should come within the ambit of the FOIA.

A second indication that the FOIA rules apply to section 6103 material is a remark by Senator Haskell during the Senate debates on section 6103. Senator Haskell introduced an amendment designed to insure that statistical studies and other compilations of data by the IRS which were subject to disclosure under original section 6103 would be available to the public under the amended version of this section. In his proposal, the Senator stated, "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." The Haskell amendment was adopted without fur-

155. Id.
156. See notes 134 & 136 and accompanying text supra.
158. Id. at 4180.
159. For the definition of "return information," see note 82 supra.
160. See HOUSE REPORT 1515, supra note 157, at 4179-80.
161. 152 CONG. REC. 24012 (1976).
162. Id.
ther discussion by the Senator's colleagues.\textsuperscript{163} Moreover, the amendment is not mentioned in any of the committee or conference reports.\textsuperscript{164} Thus, the Senator's remark is uncontradicted and provides an indication that Congress did not intend section 6103 to override the FOIA.\textsuperscript{165}

Perhaps the clearest sign that Congress designed the FOIA to govern material written in section 6103 is exemption three itself. The \textit{Zale} court noted that section 6103 meets the requirements of exemption three.\textsuperscript{166} The court, however, did not consider whether Congress, by including in the FOIA an exemption for data covered by certain types of nondisclosure statutes, expressed an intention that the FOIA should control all nondisclosure statutes meeting the requirements of the exemption. The \textit{Zale} court's failure to explain this evidence of congressional intent undermines its ruling that there is no indication that Congress intended for the FOIA to take precedence over the specific and subsequently enacted section 6103.\textsuperscript{167}

A final shortcoming in the \textit{Zale} analysis is the omission of a relevant canon from the court's catalogue of statutory principles. The omitted principle states that the expression of one thing is the exclusion of another.\textsuperscript{168} Since section 6110 and the amendment of section 6103 were enacted as part of the Tax Reform Act of 1976\textsuperscript{169} and since section 6110 contains an exclusive remedy provision,\textsuperscript{170} the principle is relevant to the status of section 6103 as a sole standard. According to the maxim, the express inclusion of an exclusive remedy provision in section 6110, coupled with the omission of such a provision in section 6103, indicates that section 6103 was not designed to be an exclusive disclosure provision. However, since

\textsuperscript{163.} \textit{Id.}


\textsuperscript{165.} Since the revision of § 6103 is largely the work of the Senate, the value of Senator Haskell's remark as an indicator of congressional intent is not significantly diminished by the failure of the House to consider his remarks. See note 87 \textit{ supra}.

\textsuperscript{166.} 481 F. Supp. at 490 n.13.

\textsuperscript{167.} \textit{Id.} at 489.

\textsuperscript{168.} This principle is also referred to as the \textit{expressio unius est exclusio alterius} principle. See \textit{Sands}, \textit{ supra} note 128, at § 47.23.

\textsuperscript{169.} \textit{See} note 81 and accompanying text \textit{ supra}.

\textsuperscript{170.} \textit{See} note 86 and accompanying text \textit{ supra}.
principles of statutory construction in the final analysis are only guides to congressional intent, the omission of this maxim is not necessarily fatal to the *Zale* holding. Nevertheless, the court's failure to consider the maxim weakens the court's purported reliance upon canons of statutory construction.

C. A Remedi at Hypothesis for Certain Zale Deficiencies and Its Efficacy

The deficiencies in the court's application of its second and third canons could arguably be cured by a holding that the provisions of section 6103 do not come within exemption three. Under this hypothesis, the general rule of the FOIA mandating disclosure unless a specific exemption applies would conflict with the provisions of section 6103 that either dictate nondisclosure or authorize discretionary disclosure by the Secretary of the Treasury. Since coexistence would no longer be a possibility, section 6103 as a specific and later statute would override the earlier and general FOIA unless Congress clearly indicated that the FOIA should be the overriding statute.

However, this remedial hypothesis requires a rejection of the *Fruehauf* and *Chamberlain* decisions whereby the Fifth and Sixth Circuits placed three provisions of section 6103 within exemption three. The *Fruehauf* decision is a straight-forward application of the statutory language of subsection 6103(a) and exemption three. The court simply pointed out that exemption three automatically includes mandatory nondisclosure statutes and that subsection 6103(a) mandates nondisclosure. Rejection of this decision, therefore, would be spurious. Similarly, repudiation of the *Chamberlain* decision, which placed subsections 6103(c) and 6103(e)(6) within exemption three, would be untenable. The *Chamberlain* court anchored its decision upon four bases: the language of both exemption three and the subsections; the legislative history of exemption three; the principle that statutes should be reconciled wherever possible; and a process whereby the court distinguished the two subsections of section 6103 from a statute outside the scope of exemption three and likened them to statutes arguably coming within exemption three. Cogent arguments

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171. See Sands, *supra* note 128, at § 45.05.
172. See notes 89-94 and accompanying text supra.
173. Although this hypothesis eliminates the possibility of FOIA and § 6103 coexistence, it would not require a ruling that the FOIA is negated by § 6103 to the extent they are in conflict. There is still evidence which arguably establishes a congressional intent of FOIA control. See notes 157-67 and accompanying text supra.
174. See notes 100-31 and accompanying text supra.
175. See notes 106-08 and accompanying text supra.
176. See notes 114-31 and accompanying text supra.
can be made that the language and legislative history of the amendment to exemption three are susceptible to more than one interpretation and that the *Chamberlain* holdings relying on these factors are not mandated.\footnote{177} Even if these arguments are accepted, however, they would not be fatal to the *Chamberlain* decision. The court's principle of reconciliation dictates that when two interpretations are possible, the interpretation which construes the statutes harmoniously should be favored.\footnote{178} Since inclusion of subsections 6103(c) and 6103(e)(6) within exemption three harmonizes the statutes while exclusion produces conflict, the principle of reconciliation mandates inclusion.\footnote{179} In sum, because the *Chamberlain* and *Fruehauf* decisions are correctly decided, the *Zale* decision cannot be cured by holding that section 6103 does not come within exemption three.

**D. The Questions Looming in Zale: The Court's Ulterior Motives and the Decision's Practical Effect**

The substantial flaws in the *Zale* statutory analysis suggest that the court's decision may have been result-oriented. In all likelihood, the court was concerned about *Zale* Corporation's use of the FOIA as a device to circumvent the discovery rules, the huge administrative burden imposed on the IRS by *Zale*'s FOIA requests, and the detriment to the IRS's investigative capabilities caused by the processing of the massive requests.\footnote{180} Removing tax return information from the FOIA also removed the strin-

\footnote{177} See notes 116, 120 & 123 and accompanying text *supra*.

\footnote{178} See note 128 and accompanying text *supra*.

\footnote{179} The *Chamberlain* decision also finds support in the decisions of other courts which have placed nondisclosure statutes other than § 6103 within exemption three. See Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980); see also note 127 *supra*; but see American Jewish Congress v. Kreps, 574 F.2d 624 (D.C. Cir. 1978) (Export Administration Act of 1969, 50 U.S.C. App. 2401-2413 (1976), held nonqualifying under exemption three); Charlotte-Mecklenburg Hosp. Auth. v. Perry, 571 F.2d 195 (4th Cir. 1978) (court held that the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) (1976), did not qualify under exemption three).

\footnote{180} See notes 13 & 14 and accompanying text *supra*.

A good explanation of the problems that agencies encounter in handling FOIA requests in cases such as *Zale* appears in a letter from Richard J. Davies, Assistant Secretary of the Treasury, to Victor L. Lowe, Director of the General Government Division of the General Accounting Office. Excerpts from this letter follow:

There are other significant but intangible costs of processing Freedom of Information requests. For instance, when a request is made for an open investigative file, the steps necessary to process that request will tend to disrupt the investigation. Records in open cases are generally exempt from disclosure under the Freedom of Information Act. However, the tasks of locating, indexing, and defending the records from disclosure under the Act can complicate law enforcement activity. Enforcement personnel must be diverted from their investigative activities to spend
gent processing requirements imposed by the FOIA's de novo review.\textsuperscript{181} Substitution of the APA's arbitrary and capricious standard for the FOIA's de novo review, therefore, might have been viewed as a means of lightening the administrative burden on the IRS and reducing the drain of investigative manpower resulting from the processing of the FOIA's requests. In short, the court's statutory analysis may have been colored by a desire to correct certain abuses of the FOIA.\textsuperscript{182}

Whatever the merits of or motives behind the \textit{Zale} decision, its immediate result is the substitution of the APA standard of review for the FOIA's de novo review in judicial overseeing of IRS refusals to disclose tax return information. According to \textit{Zale}, the APA standard is highly deferential to agency determinations.\textsuperscript{183} Under this standard, the reviewing court merely has to assure itself that the challenged IRS determination to withhold is "not an arbitrary or unconscionable abuse of discretion" and that the determination is rational and has support in the record.\textsuperscript{184} The \textit{Zale} court, however, did not indicate the extent to which the showing required of the IRS under the APA standard differed from that required under the time analyzing the releasability of material in the investigative file, and the file itself becomes temporarily unavailable for the purpose for which it is maintained.

One of the effects of this Amendment [1974 Amendment of the FOIA] has been to offer to subjects of criminal investigations a viable alternative to the discovery procedures available in each of the various judicial forums. The structure of the Freedom of Information Act, \ldots{} encourages court tests of agency decisions to withhold information regardless of the obvious applicability of the claimed exemption. \ldots{} \[The judicially recognized methods of sustaining this burden \[on the agency\] in many instances afford the plaintiff at least indirect relief. \] In this regard, it has become commonplace for courts to require agencies to submit detailed affidavits regarding the claimed exemptions and/or indices of the documents or portions thereof with respect to which exemption claims have been asserted. \ldots{} Should large numbers of individuals who are subject to pending criminal proceedings institute actions of this type, the Department would find it extremely difficult to meet the increased workload requirements.


\textsuperscript{181} For a discussion of the processing requirements under the FOIA, see notes 37-40 and accompanying text \textit{supra}.

\textsuperscript{182} If the \textit{Zale} court's construction of the statutes at issue was influenced by a desire to correct what the court considered to be an ill-advised statute, the decision is open to charges of judicial legislation. \textit{See} Scales v. United States, 367 U.S. 203, 211 (1961). The charge of judicial legislation in the context of the FOIA is not new. \textit{See} Ginsburg, Feldman, & Bress v. Federal Energy Administration, 591 F.2d 717, 737 (D.C. Cir. 1978) (Wilkey, J., dissenting).

\textsuperscript{183} 481 F. Supp. at 490.

\textsuperscript{184} \textit{Id}.
FOIA. For instance, the court did not state that the IRS would never have to furnish a *Vaughn* index under the APA standard or that the Service could simply rely on conclusory affidavits. Rather, the court only decided that the detailed affidavits supplied by the IRS and the partial in camera inspection performed by the court satisfied the APA standard. Consequently, the *Zale* decision provides courts scrutinizing IRS retentions of tax return information with an alternative to the FOIA’s de novo review and suggests that the alternative standard would be less burdensome than the FOIA’s review criteria. The decision does not, however, delineate the practical scope of the new standard.

V. BEYOND ZALE: UNCERTAINTY OVER THE STANDARD FOR REVIEWING AGENCY RETentions OF TAX RETURN INFORMATION

A. An Overview of the Judicial Response to Zale

Since the *Zale* decision in late 1979, numerous federal courts have reviewed agency refusals to disclose tax return information. A significant number of district courts have followed the *Zale* view that section 6103 is the sole standard governing the release of tax return information. Two
other district court decisions, however, have rejected this view.\textsuperscript{9} A third group of courts has ignored the \textit{Zale} decision and applied the FOIA's de novo review in accordance with \textit{Chamberlain} and \textit{Fruehauf}.
\textsuperscript{191} Still, other federal courts have recognized the two possible standards for reviewing tax return information retentions but have not ruled on which standard is preferable.\textsuperscript{192} The only circuit courts to mention \textit{Zale} have not been presented with the issue of the appropriate standard for reviewing tax return information retentions and have not chosen to express an opinion on this issue.\textsuperscript{193} Consequently, considerable confusion exists in the federal courts over the appropriate standard for reviewing agency refusals to disclose tax return information.

\textit{Zale}); Moody v. IRS, 45 A.F.T.R.2d 80-1035, 80-1 U.S.T.C. ¶ 9254 (D.D.C. 1980) (\textit{Zale} does not preclude IRS from asserting FOIA exemptions other than exemption three to justify nondisclosure of tax return information).


\textsuperscript{192} Perkins v. IRS, No. 80-8-MAC, slip op. at 1-2 (M.D. Ga. Oct. 24, 1980) (§ 6103 is the sole standard if there is any conflict between it and the FOIA); Good Hope Indus. v. IRS, No. 80-0123-F (D. Mass. Aug. 21, 1980) (IRS failed both FOIA and APA standard); Bernal v. IRS, 46 A.F.T.R.2d 80-5040, 80-2 U.S.T.C. ¶ 9572 (D.C. Cal. 1980) (either rule of \textit{Zale} or rule of \textit{Chamberlain} exempts the return information at issue). \textit{Cf.} Kerner v. IRS, No. 79-0114, slip op. at 3-4 (D.D.C. Sept. 8, 1980) (court ruled on basis of IRS argument that § 6103 and exemption three exempted information at issue but noted the \textit{Zale} standard without expressing an opinion).

\textsuperscript{193} Church of Scientology of Cal. v. United States Postal Serv., 633 F.2d 1327, 1333 (9th Cir. 1980) (distinguished the Postal Reorganization Act, 39 U.S.C. § 410(c)(6) (1976), from § 6103 when the government argued the \textit{Zale} principles to justify nondisclosure under 39 U.S.C. § 410(c)(6)); United States v. First Nat'l State Bank of New Jersey, 616 F.2d 668, 672 n.6 (3rd Cir. 1980) (explains that \textit{Zale} prevents litigants from circumventing the discovery rules through the FOIA).

Since \textit{Zale}, two circuit courts of appeal, Neufeld v. IRS, [1981 Transfer Binder] \textit{FED. TAXES} (P-H) (47 A.F.T.R.2d) 81-970 (D.C. Cir. Mar. 9, 1981) and Stephenson v. IRS, 629 F.2d 1140 (5th Cir. 1980), have applied the FOIA standard in reviewing retentions of tax return information by the IRS. In both cases, however, the IRS contended that the records at issue were exempted from the FOIA's disclosure rule through exemption three and § 6103 and did not argue the \textit{Zale} rule that § 6103 is the sole standard governing the release of tax return information. Since \textit{Zale} was not put at issue, the two circuit court rulings, although not in accord with \textit{Zale}, are not necessarily a rejection of \textit{Zale}.
B. Developments in the Arguments For and Against Zale

Despite the substantial judicial activity regarding agency retentions of tax return information since Zale, only two courts have elaborated on the Zale statutory analysis to any significant degree. In Cal-Am Corporation v. Internal Revenue Service, the United States District Court for the Central District of California attempted to bolster the Zale interpretation of section 6103. The IRS had performed an administrative audit of Cal-Am Corporation, a promoter of tax shelters. Cal-Am submitted an FOIA request seeking the administrative audit file. The IRS denied the request in part and Cal-Am instituted a court action for disclosure. The district court ruled that the IRS's retention was proper. Among the bases for the court's decision, was a determination that the records at issue were return information whose retention was authorized by subsection 6103(e)(6).

The Cal-Am court indicated full agreement with Zale's ruling that section 6103 is the sole standard governing the release of tax return information. The court explained, however, that section 6103 "supercedes the FOIA to the extent that there may be conflict between the two statutes." The court determined that in the comprehensive scheme of section 6103, six separate subsections require the Secretary of the Treasury to withhold documents solely on his determination that their release would in some manner seriously impair federal tax administration. After citing two provisions of section 6103 as examples, the court ruled that "it would be incongruous for the target of a criminal tax investigation to be able to avoid the strictures of section 6103 by resort to an FOIA suit, to the extent that the FOIA would require more liberal disclosure." The Cal-Am court then buttressed its conclusion that section 6103 controls the FOIA to the extent of any conflict by noting that Congress has continuously recognized that federal tax administration is a vital government interest which should receive minimal preenforcement scrutiny.

195. Id. at 80-1578, 80-1 U.S.T.C. at 84,146.
196. Id. See note 18 supra for the text of § 6103(e)(6).
197. 45 A.F.T.R.2d at 80-1578, 80-1 U.S.T.C. at 84,146.
198. Id.
199. 45 A.F.T.R.2d at 80-1578, 80-1 U.S.T.C. at 84,146. The court specifically cited I.R.C. § 6103(i)(1)(B), (h)(4) & (e)(7) (formerly I.R.C. § 6103(e)(6)).
200. The two provisions were I.R.C. §§ 6103(i)(1)(B) & 6103(a)(4).
201. 45 A.F.T.R.2d at 80-1578, 80-1 U.S.T.C. at 84,146.
202. Id. The court cited three cases to support its claim that federal tax administration is entitled to a minimum of preenforcement scrutiny. The cases are Bob Jones University v. Simon, 416 U.S. 725 (1974); Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962); and Bull v. United States, 295 U.S. 247 (1935). Since none of these cases involve disclosure issues, the Cal-Am court's assertion can be challenged for taking these decisions
In contrast to the Zale court, the Cal-Am court did not avoid the question whether conflict is necessary before section 6103 overrides the FOIA. This court specifically held that section 6103 supercedes the FOIA only to the extent of the conflict between the two statutes. The court, however, failed in its attempt to identify the conflict. Although provisions of section 6103 were cited, apparently to illustrate the conflict, the court did not explain why the cited provisions could not be reconciled to the FOIA through exemption three. The only explanation of the conflict provided by the court was that the FOIA may require “more liberal disclosure” than the provisions of section 6103. This explanation, however, overlooks the fact that the FOIA requires no additional disclosure if a nondisclosure statute comes within exemption three. The Cal-Am court determined that subsection 6103(e)(6), the only provision of section 6103 at issue, came within exemption three. Moreover, the court gave no indication that any other provision of section 6103 restricting disclosure to the public would not meet the requirements of the exemption. Consequently, the Cal-Am decision does not establish the conflict needed for any section 6103 nullification of the FOIA.

The only decision critical of the Zale court’s statutory analysis was issued by Judge Parker of the United States District Court for the District of Columbia. In Tigar & Buffone v. Central Intelligence Agency, an FOIA request for records regarding an investigation of Castle Bank, an alleged conduit for CIA funds, was denied by the Tax Division of the Justice Department. Because of this denial and a related one by the Central

out of their context. Moreover, even if the court’s ruling is valid, it would not apply to § 6103 in all situations since § 6103 is not limited to preenforcement situations.

203. For a discussion of the Zale court’s failure to address the conflict issue, see notes 149-56 and accompanying text supra.

204. 45 A.F.T.R.2d at 80-1578, 80-1 U.S.T.C. at 84,146.

205. See notes 199-201 and accompanying text supra.

206. 45 A.F.T.R.2d at 80-1598, 80-1 U.S.T.C. at 84,146. See also notes 199-201 and accompanying text supra.

207. If a nondisclosure statute comes within exemption three, the FOIA’s general disclosure rule does not apply. 5 U.S.C. § 552(b)(3). Thus, no additional disclosure is required by the FOIA. Only if the nondisclosure statute does not come within exemption three does the FOIA require more disclosure. See note 3 and accompanying text supra.

208. 45 A.F.T.R.2d at 80-1579 to 80-1581, 80-1 U.S.T.C. at 84,149. Although the Cal-Am court upheld the IRS retention through the Zale approach, the court protected itself against reversal by ruling in the alternative that § 6103(e)(6) met the requirements of exemption three and that the retention at issue could be justified under the FOIA rules. Id.

209. See note 135 supra.

210. Judge Gesell who wrote the Zale opinion is also a judge of the United States District Court for the District of Columbia.

Intelligence Agency, the requester instituted an action for de novo review under the FOIA. At trial, the Justice Department, relying on the *Zale* approach, contended that certain retained records were return information covered by section 6103 and, thus, outside the FOIA. The requester countered that the information at issue was not return information and that de novo review was mandated in any event. The court ruled that de novo review under the FOIA was required and ordered the Justice Department to produce a *Vaughn* index so that the review could be performed.\(^{212}\)

In its ruling, the court rejected the *Zale* holding that section 6103 is the sole standard governing the release of tax return information.\(^{213}\) The court reasoned that Congress intended the FOIA to apply to all agency records and that it was unlikely that the enactment of section 6103 subsequent to the latest FOIA amendments negated that intention.\(^{214}\) The court also ruled that exemption three is an indicator of congressional design to bring nondisclosure statutes enacted after the FOIA within the purview of the FOIA.\(^{215}\) Moreover, the court implied that the *Zale* decision did not contradict this design in the case of section 6103 because the nondisclosure at issue in *Zale* was ruled proper under exemption three.\(^{216}\) Therefore, the *Tigar & Buffone* court refused to discard the FOIA's safeguard of de novo review in scrutinizing agency nondisclosure of tax return information.

Judge Parker's decision in *Tigar & Buffone* did not contain an exhaustive listing of the deficiencies in the *Zale* analysis.\(^{217}\) The court, nonetheless, recognized the *Zale* misapplication of the principle governing the repeal of earlier enacted statutes by later ones.\(^{218}\) More important, the court pointed out that exemption three embodies a congressional intent to bring subsequently enacted nondisclosure statutes within the ambit of the FOIA.\(^{219}\) The *Tigar & Buffone* court thereby contradicted the *Zale* ruling that there is no evidence of congressional intent that the FOIA take precedence over section 6103.\(^{220}\) Thus, *Tigar & Buffone* is at least a starting point for judicial recognition of the flaws in the *Zale* decision.

\(^{212}\) *Id.* at 81-1311.

\(^{213}\) *Id.*

\(^{214}\) *Id.*

\(^{215}\) *Id.*

\(^{216}\) *Id.*

\(^{217}\) See notes 147-71 and accompanying text *supra* for a discussion of the deficiencies in *Zale*.

\(^{218}\) See notes 147-56 and accompanying text *supra*.

\(^{219}\) See notes 166 & 167 and accompanying text *supra*.

\(^{220}\) 481 F. Supp. at 489.
C. Application of the New APA Standard: Judicial Review in Disarray

The district courts which have applied the APA standard of review espoused by Zale have not arrived at a consensus regarding the practical scope of this standard. Some of these courts have performed their own in camera inspections of the disputed documents. Others have simply ruled that a Vaughn index is not required by the APA standard. In other cases, the standard has been satisfied by government affidavits which state that the records in dispute are return information whose release would seriously impair tax administration. One court, however, has ruled that the APA standard cannot be satisfied by such affidavits. Thus, the post-Zale decisions have not substantially clarified how the APA standard differs in application from the FOIA's de novo review.

D. Litigation on the Horizon?

An additional consequence implicit in the Zale decision, the removal of the FOIA safeguards other than the right of de novo review from tax return information disclosure requests, has not, to date, produced any litigation. For example, the FOIA contains a requirement that agencies respond to requests within ten working days of the initial filing. Because the FOIA does not apply to tax return information under the Zale interpretation, the IRS would not have to meet this deadline when return information is requested. If the Zale decision gains support at the circuit court level, litigation over the FOIA safeguards other than de novo review can be expected.

VI. CONCLUSION

The FOIA strives to ensure full agency disclosure whenever important interests specifically designated by Congress do not dictate otherwise. In Zale, the United States District Court for the District of Columbia re-
moved a particular category of records, tax return information, from the ambit of the FOIA. Through a rationale based upon principles of statutory construction, the Zale court determined that section 6103 of the Internal Revenue Code alone governs the disclosure of this information. Unlike the earlier Fruehauf and Chamberlain decisions, the Zale decision did not consider section 6103's falling within the FOIA's exemption for nondisclosure statutes to be of any consequence in determining whether tax return information is subject to the FOIA rules. Questionable rulings in the Zale court's statutory analysis suggest that the decision was result-oriented. Apparently, the court sought to cure certain abuses of the FOIA by substituting the APA's highly deferential standard of review for the rigorous de novo review required by the FOIA. To date, this substitution has produced confusion in the federal courts not only regarding which of the two standards applies in judicial review of agency retention of tax return information but also regarding the practical scope of the APA standard of review when this standard has been employed. Because of the deficiencies in the Zale rationale, the judiciary should ultimately end this confusion by repudiating the Zale approach and completely restoring the FOIA and its safeguards to the area of tax return information.

Robert W. Metzler