



ATTORNEY GENERAL OF MISSOURI
ANDREW BAILEY

May 17, 2024

Commissioner Danny Werfel
Internal Revenue Service
GLDS Support Services
Stop 211
PO Box 621506
Atlanta, GA 30362-3006
Sent via certified mail

Re: FOIA request for Internal Revenue Service records – Suspension of the Employee Retention Credit (ERC)

Dear FOIA Officer,

This records request by the State of Missouri, through its Attorney General's Office, under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, is for information related to any Internal Revenue Service ("IRS") activity regarding the suspension of the Employee Retention Credit (ERC) or any efforts to postpone, delay or otherwise impede its lawful implementation.

If any responsive record or portion thereof is claimed to be exempt from production under FOIA, sufficient identifying information (with respect to each allegedly exempt record or portion thereof) must be provided to allow the assessment of the propriety of the claimed exemption. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Additionally, any reasonably segregable portion of a responsive record must be provided after redaction of any allegedly exempt material, as the law requires. *See* 5 U.S.C. § 552(b).

This request asks that you waive any fees because the requested records are of great importance to the public about the activities of the federal government and the Attorney General's Office plans to make them publicly available. *See infra* Part IV. In the event that this request to waive fees is denied, the Attorney General's Office is

willing to pay fees up to the amount of \$500. If the fees will exceed this amount, please inform us before fees are incurred. We can be reached at FOIArequests@ago.mo.gov to discuss any aspect of this request if necessary.

I. Background

Upon information and belief, the IRS has formally or informally suspended or impeded the implementation of an important economic lifeline to thousands of small businesses that allowed them to keep their employees on the payroll during the worst days of the pandemic. This program is known as the Employee Retention Credit (ERC) and was passed by the United States Congress as part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (later amended by the Taxpayer Certainty and Disaster Tax Relief Act (Relief Act), as well as Section 3134 of the IRS Code¹). Under this legislation, businesses have relied on having a portion of their federal taxes refunded in exchange for keeping employees on the payroll during the state of emergency declared by the President in 2020 and 2021. The IRS' decision to suspend this tax credit has caused financial harm to a significant number of Missouri-based businesses.

The COVID policies and lockdowns pushed by the federal government caused acute supply chain disruptions and created tremendous loss of economic activity. These policies were a critical factor in causing many Missouri businesses to close their doors permanently. The small businesses that were able to weather the initial storm continue to struggle. The policy passed by Congress in the form of the ERC is an important lifeline that sustained many businesses during the pandemic despite government policies that led businesses to close their doors. Missourians have a right to know if this lawful tax break's implementation has been impeded in any way by the IRS.

Based on the facts outlined above, please promptly provide the following information.

¹ <https://www.irs.gov/newsroom/to-protect-taxpayers-from-scams-irs-orders-immediate-stop-to-new-employee-retention-credit-processing-amid-surge-of-questionable-claims-concerns-from-tax-pros>

II. Requests for records

A. Definitions

The following definitions apply to the requests:

1. “Any,” “each,” “every,” and “all” shall be read to be inclusive and to require the production of each and every Document (hereinafter defined) responsive to the particular request.

2. “And,” “or” and “and/or” and any other conjunctions or disjunctions used herein shall be read both conjunctively and disjunctively so as to require the production of all Documents (as hereinafter defined) responsive to all or any part of each particular request.

3. The term “Communications” means any disclosure, transfer, or exchange of information or opinion, however made, including oral, graphic, written, or electronic transmittal of information.

4. The term “Document” or “Documents” means any written, photocopied, transcribed, recorded or otherwise produced information however produced or reproduced in the possession of the IRS including, but not limited to, inter-office communications; memoranda; reports; correspondence; manuals; guidelines; meeting agendas; minutes of meetings; calendar appointments; records; instructions; notes; diaries; plans; photographs; photocopies; charts; descriptions; drafts, whether or not they resulted in a final document; agreements; letters; conferences; records or notes of telephone or other conversations or communications; publications; directives; statements; proposals; studies; working papers; indices; recordings or materials similar to any of the foregoing.

5. The term “person” means any natural individual, corporation or partnership in any form, associations (whether incorporated or unincorporated), or any group or organization of the foregoing.

6. “Relates to” or “relating to” means involving, concerning or in any way touching upon the matter sought.

B. Requests

1. All communications and documents relating to the decision to issue guidance on or about September 14, 2023, ultimately released to the public in the form of a document entitled **“To protect taxpayers from scams, IRS orders immediate stop to new Employee Retention Credit processing amid surge of questionable claims; concerns from tax pros”**. <https://www.irs.gov/newsroom/to-protect-taxpayers-from-scams-irs-orders-immediate-stop-to-new-employee-retention-credit-processing-amid-surge-of-questionable-claims-concerns-from-tax-pros> (This search may be limited in time from May 1, 2023 to September 30, 2023).
2. All communications and documents relating to the decision to issue guidance on or about February 13, 2024, ultimately released to the public in the form of a document entitled **“IRS shares 7 warning signs Employee Retention Credit claims may be incorrect; urges businesses to revisit eligibility, resolve issues now before March 22”**. <https://www.irs.gov/newsroom/irs-shares-7-warning-signs-employee-retention-credit-claims-may-be-incorrect-urges-businesses-to-revisit-eligibility-resolve-issues-now-before-march-22> (This search may be limited in time from January 1, 2024 to February 29, 2024).
3. Both Request No. 1 and Request No. 2 above may be further limited to include only communications and documents that include one or more of the following terms:
 - i. “White House”
 - ii. “Executive Office of the President” or “EOP”
 - iii. “Daniel Werfel”
 - iv. “Commissioner”
 - v. “intimidate”; “intimidates”; “intimidated”
 - vi. “discourage”; “discourages”; “discouraged”
 - vii. “tsunami”
 - viii. “supply chain” or “supply chain disruption”

ix. “government order” or “governmental order”

III. Fee Waiver Request

The State of Missouri requests information on the federal government’s activities that is of current interest to the public generally and to the people of Missouri specifically because it impacts the sovereignty of the State of Missouri.

This request meets the criteria for a fee waiver set forth by the U.S. Department of Justice (DOJ) in its policy guidance of April 1987², the IRS fee waiver guidance³, and 2013 Guide to the Freedom of Information Act,⁴ and as recognized by the federal courts. *See, e.g., Project on Military Procurement v. Dep’t of the Navy*, 710 F. Supp. 362, 365 (D.D.C. 1989). Section 552(a)(4)(A)(iv)(II) provides that the first 100 pages are free from charge. The State of Missouri is requesting a waiver of all fees (including search fees) because the requested information is in the public interest—i.e., it will contribute significantly to public understanding of the operations or activities of the government—and is not primarily in the office’s commercial interest. 5 U.S.C. § 552(a)(4)(A)(iii).

This FOIA request concerns the operations or activities of government. The request concerns the operations or activities of the federal government because the IRS has undertaken a program that impacts the sovereignty of the State of Missouri and impacts Missouri citizens by imposing on them increased financial costs.

This FOIA request seeks information with significant informative value. The Supreme Court has explained that FOIA is “a means for citizens to know what their Government is up to,” *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004), and stated that such means are “a structural necessity in a real democracy.” *Id.* This request seeks specific information concerning the operations and activities of government that is not already available in the public domain.⁵ Very little

² Available at <https://www.justice.gov/oip/blog/foia-update-new-fee-waiver-policy-guidance>.

³ Available at <https://www.irs.gov/privacy-disclosure/freedom-of-information-act-foia-guidelines#:~:text=A%20request%20for%20a%20waiver,the%20commercial%20interest%20of%20the>

⁴ Available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fees-feewaivers.pdf>.

⁵ *See In Def. of Animals v. Nat’l Institutes of Health*, 543 F. Supp. 2d 83, 111 (D.D.C. 2008) (“courts have been reluctant to treat information that is technically available, through a reading room or upon a FOIA request, as part of

information has been publicly released regarding the suspension of the ERC program or any efforts to postpone, delay or otherwise impede its lawful implementation.

This FOIA request will contribute significantly to public understanding of the operations or activities of government. The Attorney General's Office regularly disseminates information it learns to a broad audience. The Office maintains a public website that regularly posts news and press releases⁶ that are routinely picked up by major news organizations.⁷ Furthermore, the Attorney General's official X and Facebook accounts update the public on what the Attorney General's Office is doing.⁸ The release of this information will contribute significantly to public understanding because the IRS is unlikely to hold public meetings or engage with citizen stakeholders, nor would such after-the-fact meetings adequately explain why IRS effectively terminated the program without seeking such input in the first instance.

Finally, the State of Missouri does not have a commercial interest of any kind in this FOIA request. The State of Missouri requests this information in its sovereign capacity.

Sincerely,

/s/ Andrew Bailey
Missouri Attorney General

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the public domain"); *see also Elizabeth Eudey v. Central Intelligence Agency*, 478 F. Supp. 1175 1176 (D.C.D. 1979) (even a single document has the potential for contributing to public understanding).

⁶ Available at <https://ago.mo.gov/press-releases/>.

⁷ *See, e.g.*, <https://www.kctv5.com/2024/03/05/missouri-ag-breaks-down-top-consumer-complaints-2023/>; <https://www.foxnews.com/politics/gop-ags-asks-supreme-court-to-peel-back-content-moderation-from-big-tech-in-landmark-first-amendment-case>; <https://www.foxnews.com/politics/missouri-attorney-general-sues-biden-admin-approving-shipment-chemical-abortion-pills-mail>.

⁸ Available at <https://twitter.com/AGAndrewBailey>; <https://www.facebook.com/agandrewbailey>.

Request for Expedited Processing

The State of Missouri urgently requires the information sought by this request in order to inform the public of federal government activity. Under 5 U.S.C. § 552(a)(6)(E)(v)(II) and 26 CFR 601.702(c)(6), the State of Missouri has a compelling need for this information because (1) without information about this IRS program thousands of Missouri businesses are uncertain of their potential tax liability and may stand in legal jeopardy; (2) the State of Missouri may suffer financial impacts, including a loss of tax revenue from businesses placed in a precarious financial position due to the loss of a legally authorized federal tax incentive; (3) the uncertainty created by the muddled and changing IRS guidance in relation to the ERC could reasonably be expected to pose a significant financial hardship and potential loss of due process rights for many Missouri businesses; and (4) the State of Missouri's request is for the primary purpose to engage in the dissemination of information, as explained further below in this request, and the State of Missouri has an urgent need to inform the public concerning these actual or alleged IRS activities. We request that notice of the determination of the request for expedited processing be made within 10 days after the date of this request, as required under 5 U.S.C. § 552(a)(6)(E)(ii).

I, Diana Haines, hereby certify this request for expedited processing to be true and correct to the best of my knowledge and belief.

/s/ 

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