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IRS Can Make You Produce Offshore Bank Records Even If Self-Incriminating

If you are still fretting over undisclosed foreign bank accounts, consider the IRS voluntary disclosure program. [See 10 IRS Rules for Stress-Free Foreign Accounts.](#) The program is a good solution. The IRS has multiple avenues for finding you and the stakes are getting higher.

Imagine getting a grand jury subpoena to produce your **own** offshore bank records. Can't you take the [Fifth](#)? The [Fifth Amendment](#) says you cannot be forced to incriminate yourself. It turns out there's an **exception** for "required records."

In [In re Grand Jury Investigation M.H.](#), the Ninth Circuit allowed prosecutors to compel someone to produce offshore account data even if it was self-incriminating. The Seventh Circuit has just done the same in [In Re Special February 2011-1 Grand Jury Subpoena](#). Under the Required Records Doctrine, it doesn't violate your rights if:



- The government’s inquiry is essentially regulatory;
- The information is a preserved record of a kind customarily retained; and
- The records have taken on public aspects making them analogous to a public document.

You might be shocked to learn that foreign bank records could be viewed in this way. But two appellate courts have said so. In the Ninth Circuit, it was “M.H.” who lost. In the Seventh, it was “T.W.” These names may not remain secret much longer.

Suppose the IRS and Department of Justice are investigating, trying to determine if you used offshore bank accounts to evade taxes. The grand jury issues a subpoena demanding records you are required to keep under the Bank Secrecy Act of ’70—that’s the law requiring [FBARs](#). You try to quash the subpoena based on your Constitutional privilege against self-incrimination, since handing over the records clearly would incriminate you.

But the courts are saying the Required Records Doctrine trumps your Fifth Amendment privilege. Sure, the government has to establish the three elements of the Required Records Doctrine. But once they do, you have to hand over the documents no matter how incriminating they are. The Fifth Amendment doesn’t allow you to refuse to produce them.

This kind of development should make the IRS voluntary disclosure program even more attractive. See [New IRS Offshore Amnesty Announced: Third Time’s A Charm](#).

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