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Another IRS Scandal: IRS Posted as Many as 100,000 Names, Addresses, and Social Security Numbers on Its Website

BY DUSTON BARTON

The Internal Revenue Service has spent a lot of time in the news lately, including allegations of inappropriately targeting conservative nonprofit groups, lavish conferences (including awful *Star Trek* parodies), and its union members opposing legislation requiring them to sign up for the Affordable Care Act exchanges.

Seemingly lost among this negative press was a recent bombshell that IRS may have disclosed as many as 100,000 Social Security numbers (along with names and addresses) on its website. This event may not only result in a political black eye but a significant judgment as well.

Unlawful Inspection or Disclosure Of Return Information

Prior to 1977, presidential administrations routinely (and lawfully, if not ethically) obtained the tax information of political opponents.¹ In 1976, Congress acted to end this practice and amended the Internal Revenue Code to provide for criminal and civil sanctions for the unauthorized inspection or disclosure of return information.²

Return information is broadly defined to include, *inter alia*, a taxpayer's name, income, net worth, whether a return is subject to examination, and "any other data

¹ See, e.g., Allan Karnes & Roger Lirely, *Striking Back at the IRS: Using Internal Revenue Code Provisions to Redress Unauthorized Disclosures of Tax Returns or Return Information*, 23 Seton Hall L. Rev. 924 (1993).

² *Id.*

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received by, recorded by, prepared by, furnished to, or collected by the [IRS] with respect to a return" or the determination of any potential tax liability.³ Of course, one's Social Security number is included in this expansive definition.

Internal Revenue Code Section 7431 provides for damages if an employee of the United States⁴ knowingly or negligently inspects or discloses return information. Damages include the greater of actual damages or \$1,000 for each inspection or disclosure.⁵ Damages also include costs and fees, including attorneys' fees to a prevailing party.⁶

Lawful Disclosures of Return Information

Both Sections 6103 and 7431 provide exceptions to the general prohibition against disclosing return information. For instance, IRS can disclose return information to a taxpayer (or his or her agent), to certain individuals and organizations while conducting audits or criminal investigations, to compile and distribute statistical information, etc.

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Certain tax returns are also required to be made public. No liability attaches for disclosing these returns, which include annual returns for political organizations (Form 8872) and annual returns for nonprofit organizations (Form 990). In fact, IRS scans all Forms 990 and sells a subscription DVD service to organizations and

³ Internal Revenue Code Section 6103.

⁴ Section 7431 also provides damages when someone who is not an employee of the United States inspects or discloses tax return information "in violation of any provision of section 6103." However, because only U.S. employees (and state employees in certain circumstances) can violate Section 6103, the provision covering non-U.S. employees is largely toothless.

⁵ I.R.C. Section 7431(c).

⁶ *Id.* Section 7431(c)(3).

individuals who want access to these forms. Some organizations like Public.Resource.Org and GuideStar take the forms and post them online. For the political organizations, IRS maintains a searchable database on its website (<http://www.irs.gov/Charities-&-Non-Profits/Political-Organizations/Political-Organization-Filing-and-Disclosure>) where any individual can search the annual returns (Form 8872) and initial notices (Form 8871) of all political organizations.

IRS Posting Return Information Online

In mid-June, Public.Resource.Org received a phone call from IRS indicating that the Form 990 DVD that IRS sent had been “improperly vetted.” Public.Resource.Org removed the Forms 990 from its online database and conducted an audit to see what was wrong with the material. It found several data breaches, including more than 2,319 Social Security numbers that may have been disclosed with the Forms 990.

The privacy breach with the political organizations was significantly worse. Form 8872 requires that political organizations list the name, contact info, and contribution amount of each contributor to the organization. Some organizations (although not requested) also include the Social Security numbers of its contributors. Even when IRS is informed that a Form 8872 includes individuals’ Social Security numbers, IRS refuses to redact the information, claiming it “has no authority to remove that information before making the forms publicly available.” Thus, these Social Security numbers

(along with individuals’ names and addresses) have been posted on IRS’s website.

Additionally, a political organization is required to obtain an employee identification number (EIN). If the organization does not have one, it can request one when it files its notice to IRS that it is a political organization (Form 8872). The problem is that the form to request an EIN (Form SS-4) requires the Social Security number of the person responsible for the organization. When this form is filed with the Form 8872, IRS posts both online—the Form 8872 (which is supposed to be public) and the Form SS-4 (which is not supposed to be public).

Because of these two issues (refusing to redact Social Security numbers on Forms 8872, and posting Forms SS-4 when they accompany Form 8871), IRS has disclosed thousands of Social Security numbers on its website for anyone with an internet connection to access. Public.Resource.Org estimates that as many as 100,000 Social Security numbers may have been disclosed on IRS’s website. In early July, IRS removed public access to its database.

Conclusion

No court has yet ruled whether IRS’s refusal to redact Social Security numbers it knows are incorrectly included on publicly available returns is a wrongful disclosure of return information. However, this obstinate refusal to redact, along with the unauthorized posting of Forms SS-4, could lead to not only another public relations nightmare, but potentially a substantial judgment.