

## Assessing IRS Liability For Disclosing Tax Return Info

*Law360, New York (August 19, 2013, 5:30 PM ET)* -- The IRS has had a rough several months defending allegations that it inappropriately targeted conservative groups seeking nonprofit status, wasted taxpayer money on lavish conferences, and some of its employees used agency credit cards to buy alcohol and pornography. Some lawmakers are trying to use these incidents to attack the Affordable Care Act — stating that the IRS is either too incompetent or too untrustworthy to take such an important enforcement and oversight role in the act. One allegation of IRS impropriety, however, never gained much traction with the national media — the fact that the IRS may have disclosed as many as 100,000 names, addresses, and social security numbers on its website. This incident may result in a political black-eye for the embattled organization and a significant judgment as well.

### 26 U.S.C. § 6103

Generally, United States employees are prohibited from inspecting or disclosing a taxpayer's return information. There are, however, a number of exceptions to this general rule — including disclosing return information to the taxpayer or his agent, to certain individuals and organizations while conducting audits or criminal investigations, to certain committees in congress, and to compile and distribute statistical information. If an employee does not meet one of these exceptions and inspects or discloses an individual's or entity's tax return information, the employee is subject to criminal penalties. The employee also exposes the United States to civil liability — either \$1,000 for each wrongful inspection or disclosure or actual damages suffered (whichever is higher).

The Internal Revenue Code defines “return information” broadly. It includes a taxpayer's name, income, net worth, assets, liabilities, deficiencies, whether a return is subject to examination, and “any other data received by, recorded by, prepared by, furnished to, or collected by the [IRS] with respect to a return or with respect to the determination of the existence ... of [tax] liability ...” Perhaps the most recognizable “return information” is an individual's social security number.

Social security numbers are extremely valuable to identity fraud perpetrators, and it is particularly important that these numbers are safeguarded. It is for that reason a bit surprising that there is not more public outcry about the fact that the IRS may have been, for several years, posting the names, addresses and social security numbers of as many as 100,000 individuals on its own website.

### IRS Disclosing Return Information

There are at least two separate incidents of the IRS recently disclosing return information. The first deals with IRS Forms 990. These are annual forms that nonprofit organizations must file each year and include the organization's mission and significant activities, contributions, assets and liabilities, compensation of officers, directors, key employees, etc. These forms are made public and, as a result, there is a statutory provision that allows the IRS to disclose these returns without running afoul of 26 U.S.C. § 6103.

Instead of posting these returns online, the IRS sells a DVD subscription that contains images of these forms. Many groups (e.g., GuideStar and Public.resource.org) pay a subscription fee to obtain these DVDs and then post the returns on their websites. In mid-June, Public.resource.org received a phone call from the IRS indicating that the Form 990 DVD the IRS sent had been “improperly vetted.” Public.resource.org removed the Forms 990 from their website 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. This, however, was only the tip of the iceberg.

Public.resource.org then looked at other forms that exempt organizations file — specifically, Forms 8871 and 8872. These forms are filed by political organizations exempt from tax under 26 U.S.C. § 527. To be tax exempt, a political organization simply files a notice (Form 8871) with the IRS. The organization is then required to annually file a Form 8872 listing the name, contact information and contribution amounts of its contributors. The IRS posts these forms online on a searchable database on its website (See <http://www.irs.gov/Charities-&-Non-Profits/Protect-Personal-Information:-Do-Not-Include-Social-Security-Numbers-on-Publicly-Disclosed-Forms>). In early July, the IRS temporarily removed public access to this database. It was supposed to be back online by July 8, 2013. It is currently still offline.

Before the IRS removed access to this database, Public.resource.org and other organizations determined that thousands of social security numbers were publicly available on the database — along with individuals’ names and addresses. There are several reasons for these disclosures, two of which will be discussed herein.

First, when a political organization files its notice that it is an exempt organization, it must include an EIN (employer identification number) with its notice. Many new organizations do not yet have an EIN so the IRS allows an organization to simultaneously submit its notice of exemption (Form 8871) with a request for an EIN (Form SS-4). The Form SS-4 requires the social security number of the individual responsible for the organization submitting the request. This form is not supposed to be made public; however, when the IRS received the Form SS-4 with the Form 8871 it posts both online (without redacting the social security number).

Second, some political organizations voluntarily provide the social security numbers of its contributors in addition to their names, contact information and contribution amounts. The IRS then posts this information online. Even when the IRS is informed that a Form 8872 includes individuals’ social security numbers, the 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 long been posted on the IRS’s website.

### **Potential Consequences**

Each time the IRS wrongfully discloses an individual’s return information, it is subject to either actual damages suffered by the individual or \$1,000 in statutory damages. Public.resource.org estimates that as many as 100,000 social security numbers may have been disclosed on the IRS website, subjecting the United States to a fairly significant potential judgment.

Liability, however, is not so clear cut. In any action based upon this security breach, the IRS will likely argue that liability is inappropriate because (1) it is statutorily required to publish the tax returns at issue, and (2) it has no discretion to remove social security numbers that have been errantly included with the forms.

With respect to this latter point, the IRS is correct that no internal revenue code provision expressly allows them to redact the information; however, the converse is also true — there is nothing in Section 6103 or 7431 that would prevent the IRS from removing these numbers before publishing the returns.

Moreover, the Privacy Act and Federal Information Security Management Act require agencies to take appropriate steps to protect personal information from unauthorized use and disclosure.

No court has yet ruled whether the IRS's refusal to redact social security numbers it knows are incorrectly included on publicly available returns violates 26 U.S.C. § 6103. However, the IRS runs a significant risk that its refusal to redact, along with wrongfully posting Forms SS-4 could lead to a substantial judgment against the United States.

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