

Office of Chief Counsel  
Internal Revenue Service

# memorandum

CC:SB:GL-114667-03

KAMeyer

date: JUN 28 2003

to: Harvey Aefsky, Program Manager, S:C:CP:FP:IT  
Attn: Mike McGee, Program Analyst, S:C:CP:FP:IT

from: Acting Division Counsel (Small Business/Self-Employed)

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subject: **Bankruptcy Document Retention**

This memorandum responds to your request for assistance dated May 28, 2003. The responses contained in this memorandum were coordinated with the office of the Associate Chief Counsel, Procedure and Administration (Disclosure and Privacy Law). This memorandum should not be cited as precedent.

### DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

### Issues:

1. What sanctions may result under the Privacy Act from retaining records beyond the retention schedule?
2. May Insolvency use the Automated Insolvency System (AIS) closure date as the marker for disposition of Insolvency records?

### Conclusions:

1. Retaining records beyond the retention schedule may result in civil penalties under the Privacy Act if the taxpayer is damaged by the use of those records, or in criminal penalties against Internal Revenue Service (IRS) employees who knowingly operated the system of records in violation of the Privacy Act.
2. Insolvency must make a good faith effort to destroy records within the timeframe established by the Internal Revenue Manual (IRM). Since

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the IRM sets certain guidelines for destruction based on the bankruptcy court proceeding closure date, Insolvency must make a good faith effort to destroy the records using that date to calculate the retention period. In light of the time necessary to research bankruptcy court proceeding closure dates, use of the AIS closure date is not likely to add substantial time to the period the records are maintained.

Discussion:

The Privacy Act, 5 U.S.C. § 522a, grants certain safeguards to individuals against an invasion of personal privacy. Generally, it requires federal agencies to:

1. Maintain accurate, complete, relevant, and up-to-date records;
2. Inform individuals who are subjects of those records about the agency's authority for collection of information and its uses;
3. Protect those records from unauthorized access;
4. Afford individuals access to records, the right to correct records, and to receive an accounting of disclosures of those records.<sup>1</sup>

Subsection (g) of the Privacy Act contains civil remedies if an agency fails to comply with these rules. Specifically, 5 U.S.C. § 552a(g) provides:

(1) Whenever any agency--

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character,

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<sup>1</sup> However, I.R.C. § 7852(e) provides that the amendment provisions of the Privacy Act do not apply to tax records. The Privacy Act amendment provisions do apply to personnel and other nontax records within the IRS.

*rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or*

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

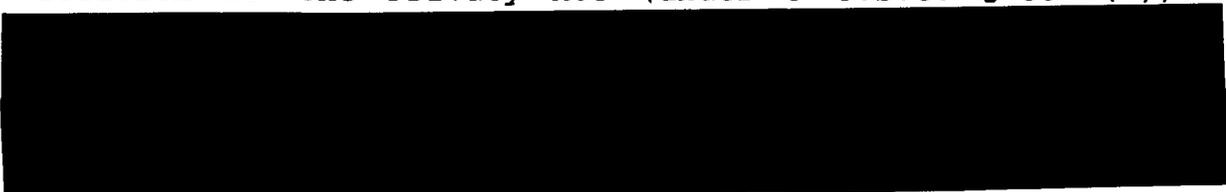
(italics added).

While the Privacy Act sets forth the general principles, it does not dictate to federal agencies how long certain records may or should be maintained. Those timeframes are established by the agencies themselves and are made known to the public; the IRS publishes this information primarily through the IRM. Accordingly, the IRS must make a good faith effort to comply with the timeframes established by the agency, and set forth in the IRM, for record retention.



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Failure to follow the IRM, by itself, does not create a cause of action. See e.g., Matter of Carlson, 126 F.3d 915, 922 (7<sup>th</sup> Cir. 1997); Marks v. Commissioner, 947 F.2d 983, 986 n.1 (D.C. Cir. 1991); United States v. Will, 671 F.2d 963, 967 (6<sup>th</sup> Cir. 1982). However, failure to follow the IRM may provide crucial evidence of neglect or intentional disregard of the privacy interests of individuals mentioned in documents subject to the Privacy Act. Such evidence may be used to substantiate a civil claim for damages against the Service (brought under 5 U.S.C. § 552a(g)(1)), or criminal penalties against Service employees who knowingly operated the system of records in violation of the Privacy Act (under 5 U.S.C. § 552a(i)).



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IRM 1.15.28 contains several timeframes for the maintenance of records relating to bankruptcy cases. Exhibit IRM 1.15.28-1 provides:

Item 25. Internal Control Files.  
These records control work flow; document the action taken; or serve as receipts for records borrowed or loaned.

(b) Bankruptcy Cases. **DESTROY** 2 years after court proceedings have been closed.

Item 41. Closed Taxpayer Delinquent Accounts (TDA's) and Taxpayer Delinquency Investigations (TDI's-TYD-14).

(b) Bankruptcy related forms which are maintained by Special Procedures function. **DESTROY** 2 years after court proceedings have been closed.

Item 70. Payment Transcripts from Bankruptcy Trustees.

**DESTROY** when new list is received.

Item 71. Bankruptcy Control Logs.

**DESTROY** 4 years after most current date of case closure on log.



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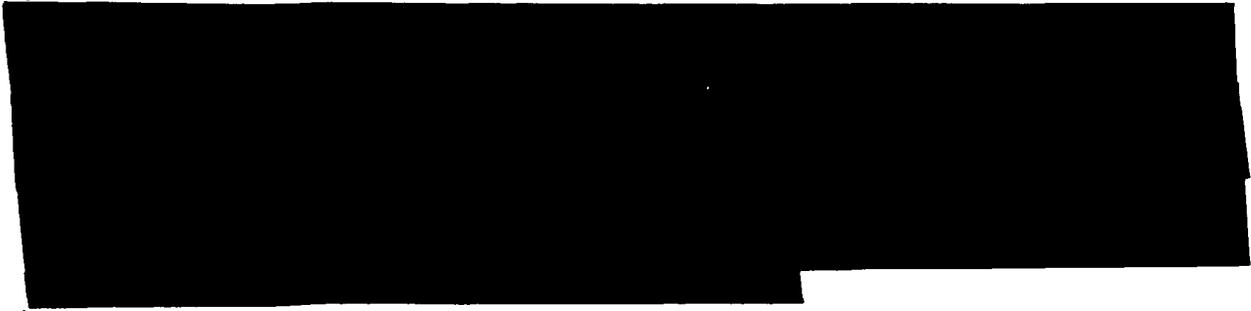
For instance, items 25(b) and 41(b) require destruction within 2 years after the bankruptcy court proceedings are closed. While bankruptcy court closure dates are not readily accessible and vary from judge to judge and court to court, [redacted]



[redacted] In light of the time involved to research case closure dates, the use of the AIS system closure date is not likely to substantially increase the time that the records are maintained on the system and would probably fit within the good faith effort to comply with the destruction schedule.



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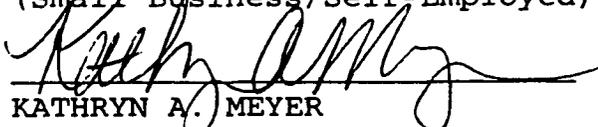


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If you have any additional questions or comments, please contact me at (202) 283-0047. Our office will be closing its file.

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cc: Thomas R. Thomas  
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