

**Office of Chief Counsel
Internal Revenue Service
memorandum**

CC:PA:02:SMcLemore
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date: January 29, 2015

to: Carol A. Campbell
Director
(Return Preparer Office)

from: Melissa Ellen Avrutine
Senior Technician Reviewer
(Procedure & Administration)

subject: Disclosures to state return preparer authorities

ISSUE

May the Return Preparer Office (RPO) disclose certain records pertaining to return preparers to state regulatory authorities for use in the licensing and registration of return preparers?

BACKGROUND

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



ANALYSIS

Both section 6103 of the Internal Revenue Code and the Privacy Act of 1974 (Privacy Act) impose limitations on the information that the Service may disclose and the circumstances under which disclosures may be made. Section 6103(a) provides that returns and return information may not be disclosed unless the disclosure is authorized by some provision of Title 26. Similarly, the Privacy Act prohibits the disclosure of any record contained in a system of records without the permission of the individual to whom the record pertains, unless one of twelve statutory exceptions applies. See 5 U.S.C. § 552a(b).

A. 

Section 6103(b)(2)(A) defines “return information,” subject to the disclosure restrictions of 6103(a), as follows:

[A] taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability,

tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other offense.

Section 6103(b)(6) further refines that definition by providing that the term "taxpayer identity" means "the name of a person with respect to whom a return is filed, his mailing address, his taxpayer identifying number (as described in section 6109), or a combination thereof." Among the identifying numbers described in section 6109 is the identifying number of a tax return preparer, a category that includes PTINs. See sec. 6109(a)(4).

While PTINs are included in the list of identifying numbers described in section 6109, here, a PTIN is not "taxpayer identity" information. Here, a return preparer's PTIN is not a taxpayer identifying number, as that term is defined in section 6103(b)(6), because a return prepared by a PTIN holder is filed with respect to a taxpayer, not the PTIN holder. When the PTIN holder files his own return, he uses either his SSN or ITIN as his identifying number, not his PTIN. While here a PTIN is not taxpayer identity information, a PTIN listed on a tax return is the return information of the taxpayer with respect to whom that return was filed. See sec. 6103(b)(2). When a PTIN is not associated with a tax return, it does not relate to any particular taxpayer and, therefore, falls outside the scope of section 6103(b)(2)'s definition of return information.



As noted above, the Privacy Act prohibits the disclosure to any other person or agency of any record contained in a system of records without the consent of the individual to whom the record pertains, or unless one of twelve statutory exceptions applies. See 5 U.S.C. § 552a(b). For the purposes of the Privacy Act, a "record" is any item, collection, or grouping of information about an individual maintained by an agency that includes the individual's name, identifying number, or other identifying particular assigned to such individual. 5 U.S.C. § 552a(a)(4). A "system of records" is a group of records under the control of the agency from which information is retrieved by the name

or other identifying particular of the individual to whom the record pertains. 5 U.S.C. § 552a(a)(5).

The third exception to the Privacy Act's general prohibition on disclosure allows the disclosure of records for a "routine use." 5 U.S.C. § 552a(b)(3). Subsection (a)(7) of the statute defines "routine use" as "the use of such record for a purpose which is compatible with the purpose for which it was collected." In order for a use to qualify as "routine," the statute also requires that the agency describe the use in the system of records notices that are published in the Federal Register. See 5 U.S.C. § 552a(e)(4)(D). By including these notices in the Federal Register, agencies provide the public with constructive notice of how the agency's records might be used.

[REDACTED]

[REDACTED] PTIN records are records contained in a system of records, as those terms are defined in the Privacy Act. Among the routine uses of such records described in the Federal Register is "[d]isclosure to a Federal, State, local, or tribal agency, or other public authority, which has requested information relevant or necessary to . . . issuing or continuing a contract, security clearance, license, grant, other benefit." Internal Revenue Service System of Records Notices, 77 Fed. Reg. 47930, 47973 (Aug. 10, 2012).

[REDACTED]

B. Disclosure of information concerning individuals who passed the return preparer exam offered prior to the D.C. Circuit decision in *IRS v. Loving*

Like the disclosure of PTINs, in order to determine whether disclosure of exam information is permissible, the disclosure must be analyzed for compliance with both I.R.C. § 6103(a) and the Privacy Act.

The exam information [REDACTED] is not return information as defined by section 6103(b)(2)(A). [REDACTED]

[REDACTED] This exam information does not relate to any taxpayer or tax return. Nor does it relate to any liability under Title 26. The exam [REDACTED] was offered pursuant to regulations issued under Title 31. It is our position that the pre-*Loving* exam results fall outside of the definition of “return information” and are therefore not subject to section 6103(a)’s general prohibition on disclosure.

However, the exam results *are* subject to the restrictions of the Privacy Act. Included in the PTIN system of records are “records pertaining to IRS investigation and evaluation of eligibility for registration” and “records related to competency testing, including applications, answer sheets, and test scores”. 77 Fed. Reg. at 47973. Because the exam results are records contained in a system of records, they may not be disclosed absent permission from the individuals to whom the records pertain or a statutory exemption. See 5 U.S.C. § 552a(b). [REDACTED]

CONCLUSION



Please contact Sarah McLemore at (202) 317-5197 if you have any questions about this matter.