

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

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to: Heather Maloy
Acting Deputy Commissioner, Services & Enforcement

from: Drita Tonuzi
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subject: **Publication of Social Security Numbers under Sections 6104 and 527**

Issues

- 1) What authority does the IRS have to withhold from publication extraneous information, such as social security numbers, included in filings the Service is required to make publicly available, electronically via the Internet and otherwise, pursuant to sections 6104 and 527?
- 2) Do any non-Title 26 provisions of Federal law such as the Privacy Act authorize or require the Service to withhold publication of social security numbers or other extraneous information received by the Service in exempt organization filings?
- 3) How long is the IRS required to maintain filings on the Internet and for public inspection pursuant to sections 6104 and 527?

Conclusions

- 1) While there is no legal requirement that the IRS withhold from publication extraneous information, such as social security numbers, included in filings the Service is required to make public pursuant to sections 6104 and 527, the Service has the authority to protect sensitive information provided by exempt organizations that is neither requested by nor required by the Internal Revenue Code to be provided to the Service. The decision to redact social security numbers or other such extraneous information is a discretionary policy decision that may properly be made by agency officials consistent with the sound administration of the tax laws and the fair and equitable treatment of taxpayers.
- 2) Neither the Privacy Act nor other non-Code authority requires the IRS to redact social security numbers or other extraneous information prior to making the filings of exempt organizations available to the public under sections 6104 and 527.

3) The record retention schedules adopted by the IRS pursuant to the Federal Records Act (FRA) permit the Service to destroy the relevant documents 6 years after the end of the year in which the filings were processed, except that the public inspection copies of Form 990 that are made available to the public under section 6104(b) may be destroyed by the Service 4 years after the end of the processing year. The Service need not make such documents publicly available for the same period of time that the Service is required to maintain the documents for record retention purposes under the FRA. The Service may exercise discretion to establish a timeframe for public inspection that balances the competing requirements of providing transparency with respect to tax exempt organizations, the need to protect sensitive information from potential misuse, and the business needs and capabilities of the Service.

Background

Under sections 6104 and 527, Congress adopted a system of transparency for organizations that are exempt from taxation. Under these provisions, the IRS is generally required to provide the public with access to the documents of tax exempt organizations required to be filed with the IRS.

Exempt organizations have various reporting requirements under the Internal Revenue Code. In general, political organizations are required to file an initial notice of intent to be treated as a tax-exempt 527 organization. In addition, political organizations that file the initial notice are also required to file periodic reports detailing the organization's expenditures and contributions. Organizations exempt from taxation under section 501(a) are required to file an application for exemption and annual information returns.¹

The IRS accomplishes the transparency requirements of section 6104 by making photocopies of the relevant filings of exempt organizations available to the public upon written request.² The IRS also scans the documents to computer image files and provides copies of the imaged documents in bulk to requestors on DVDs. The IRS does not redact extraneous information, including social security numbers, provided by

¹ Section 527(i) requires section 527 organizations, with certain exceptions not relevant here, to file an initial notice of intent to be treated as a 527 organization exempt from tax (Form 8871, Political Organization Notice of Section 527 Status). Section 527(j) requires 527 organizations that file the section 527(i) notice to file periodic reports detailing the organization's expenditures and contributions (Form 8872, Political Organization Report of Contributions and Expenditures). Section 508(a) requires most organizations to be treated as a section 501(c)(3) organization and exempt from taxation under section 501(a) to file an application for exemption (Forms 1023 or Forms 1024), and section 6033 requires the organizations to file annual information returns (Form 990). Sections 6034 and 6058 set forth the annual return requirements for certain exempt trusts and employer sponsored deferred compensation plans, respectively.

² See Treas. Reg. 301.6104(a)-6, Treas. Reg. 301.6104(b)-1; see also Statement of Procedural Rules 601.702(d)(3). Certain of the requestors for DVDs such as Guidestar USA, Inc., (<http://www.guidestar.org/>) maintain online databases independent of the IRS where the public can access the filings made by exempt organizations.

exempt organizations prior to making photocopies available for public inspection or distributing DVDs to subscribers.

In addition to public availability upon written request under section 6104, the Service maintains a publicly available online database of the initial notice and periodic reports (Forms 8871 and 8872) filed by 527 organizations.³ Since 2002, all political organizations that are required to file Form 8871 to be treated as a 527 organization have been required to file the form electronically, and 527 organizations with contribution receipts or expenditures greater than \$50,000 in a calendar year are required to file Form 8872 electronically. Sections 527(i)(1) and (j)(7). Section 527 organizations with receipts or expenditures of less than \$50,000 in a calendar year retain the option of filing Form 8872 in paper form. The IRS is only required to make available on the Internet copies of the initial notice (Forms 8871) and periodic reports (Forms 8872) that are filed by section 527 political organizations in electronic form. All Forms 8871 and 8872, whether filed in electronic or paper form, as well as the annual returns (Forms 990) of 527 political organizations, must also be made available for public inspection under the provisions of section 6104.

From July 2000 until July 3, 2013, when the IRS took down the online database of section 527 filings, the online 527 database included all Forms 8871 and 8872 filed with the IRS on or after July of 2000 – regardless of whether filed electronically or in paper form. With respect to those Forms 8872 filed on paper, the IRS scanned the documents into computer image files without redaction and posted the image files to the 527 database. The IRS also posted the annual returns filed on Forms 990 by 527 organizations to the database.

The IRS has become aware that some exempt organizations have included the social security numbers of individuals and other extraneous information in their IRS filings. For instance, with respect to 527 organizations, attachments submitted with Forms 8872 sometimes include the social security numbers of the organization's contributors or the recipients of the organization's expenditures. Exempt organizations have also sometimes included social security numbers on annual returns such as Forms 990, which information was included on DVDs distributed to requestors.

Discussion

1) What authority does the IRS have to withhold from publication extraneous information, such as social security numbers, included in filings the Service is required to make publicly available, electronically via the Internet and otherwise, pursuant to sections 6104 and 527?

In general, pursuant to section 6103, the returns and return information of a taxpayer are to remain confidential except as otherwise provided by Title 26. Sections 6104 and

³ The Service maintains this online database pursuant to the requirements of section 527(k).

527 are exceptions to the general restrictions of section 6103 and obligate the IRS to make available for public inspection certain of the returns and return information filed by organizations exempt from taxation under sections 501(a) and 527. It is important to note that the extraneous information at issue here, including social security numbers, that is sometimes included in the filings of exempt organizations is the return information of the exempt organizations and not the individuals whose social security numbers have been provided.

Under section 6104, the IRS is generally required to make available for public inspection the various reports and filings made by exempt organizations.⁴ The obligation under section 6104 to make information available to the public is broad with only limited and specific exceptions, such as for protection of compensation of certain individuals, trade secrets, or national defense information.⁵ There is no specific provision in section 6104 that allows the IRS to withhold any information from publication of the periodic reports required under section 527(j).

Accordingly, to the extent information of exempt organizations is required by the Code to be furnished to the Service on prescribed forms, the Service has only the authority that is specifically provided by section 6104 in the exceptions described above to withhold that information from public availability, electronically on the Internet or otherwise. Thus, for example, the IRS has no legal authority to withhold the names and addresses of individual contributors to a 527 organization, which are required to be reported (on Form 8872) to the Service by section 527(j)(3).

In addition to the public availability required by section 6104, section 527(k)(1) requires the IRS to post the initial notice filed under section 527(i)(1) on Form 8871 and the periodic reports described in section 527(j)(7) on Form 8872 on the Internet within 48 hours of filing. Section 527(k)(2) requires the IRS to make the entire database of

⁴ Under section 6104(a)(1) the IRS is required to make available for public inspection the application filed by an organization described in section 501(c) or (d) that is exempt from taxation under section 501(a), and the initial notice filed by organizations exempt from taxation under section 527 (Forms 8871), "together with any papers submitted in support of such application". Section 6104(b) requires the IRS to make publicly available the information on the annual returns of exempt organizations "required to be furnished by sections 6033, 6034, and 6058" (e.g., Forms 990). Section 6104(d)(7) requires the public availability of the periodic reports required to be filed under section 527(j) (Forms 8872) by 527 organizations.

⁵ With respect to the initial application of an exempt organization (or notice in the case of 527 political organizations), sections 6104(a)(1)(C) requires the IRS to withhold information from which the compensation of any individual could be identified. Section 6104(a)(1)(D) gives authority to the IRS to withhold certain trade secrets from publication upon the request of the exempt organization as well as any information the Secretary determines may harm the national defense. With respect to the annual returns required under sections 6033, 6034, and 6058, the only exception to public availability required by section 6104(b) is that the IRS may not "disclose the name or address of any contributor to any organization or trust (other than a private foundation . . . or a political organization . . . under section 527) which is required to furnish such information."

notices and reports posted on the Internet searchable by certain defined terms, including contributors to the organization, the employers of such contributors, and the recipients of expenditures by the organizations.

The requirement to post on the Internet is limited to the 527 notices and reports that are filed with the IRS electronically under section 527 (all Forms 8871, some Forms 8872, but not Forms 990). Section 527 was amended in 2002 to require electronic filing. Section 527(i)(1) now requires all notices of intent to be treated as a 527 organization (Forms 8871) to be filed electronically. Section 527(j)(7) was added to require the reports filed under 527(j) (Forms 8872) to be filed in electronic form if the organization's expenditures or contributions exceed \$50,000 for the calendar year. Organizations with less than \$50,000 in expenditures or contributions retain the option to file Form 8872 on paper. Because section 527(k)(1) is specific to the electronic filings described in (i)(1) and (j)(7), the IRS is not required to post paper-filed reports on the Internet.⁶

Neither the Code nor the prescribed forms require exempt organizations to include social security numbers in their filings. The periodic reports required to be filed by 527 organizations call for only limited personal information of contributors and recipients of expenditures.⁷ The Code provisions describing the contents of the reports do not require the social security numbers of the organization's contributors or the recipients of expenditures. Nor do the relevant IRS forms (e.g., Forms 8871, 8872, 990, 990-PF) request exempt organizations to provide the social security numbers of contributors. In the case of Form 990, organizations are specifically warned in the instructions not to include social security numbers because the IRS is required to make the filing available for public inspection.

Section 6104 provides no specific authorization for the IRS to redact extraneous information, including social security numbers, -- information not required by law -- from filings submitted by exempt organizations. Nor is there any legal requirement under section 6104 that the IRS withhold such information prior to making the filings available to the public. At the same time, there is also nothing in section 6104 or elsewhere in the Code that specifically prohibits the IRS from doing so. We conclude that the IRS has

⁶ This conclusion is supported in the legislative history to section 527(k): "the Secretary must make the section 527(i) notices and the electronically filed section 527(j) reports available for public inspection on the Internet." Joint Committee on Taxation, Technical Explanation of H.R. 5596, Relating to Political Organizations Described in Section 527 of the Internal Revenue Code (JCX-103-02).

⁷ Section 527(j)(3) defines the contents of the periodic reports required to be filed by 527 organizations. These organizations are required to furnish "the amount, date, and purpose of each expenditure made to a person if the aggregate amount of expenditures to such person during the calendar year equals or exceeds \$500 and the name and address of the person (in the case of an individual, including the occupation and name of employer of such individual)." Sec. 527(j)(3)(A). With respect to contributors, 527 organizations are required to provide "the name and address (in the case of an individual, including the occupation and name of employer of such individual) of all contributors which contributed an aggregate amount of \$200 or more to the organization during the calendar year and the amount and date of the contribution." Sec. 527(j)(3)(B). See also secs. 6033, 6034, and 6058.

the discretionary authority to withhold from publication social security numbers and other such extraneous information furnished to the Service, through error or otherwise, by exempt organizations.⁸ Such private information is inherently sensitive and entitled to protection, and the Service's exercise of discretion to withhold such information from public inspection is consistent with the sound administration of the tax laws and the fair and equitable treatment of taxpayers.

[REDACTED]
[REDACTED]
[REDACTED] The transparency mandates of sections 527 and 6104 are broad and the distinction between what is extraneous information and what is required under the Code will not always remain as clear as it is with social security numbers and other identity theft-vulnerable information.

2) Do any non-Title 26 provisions of Federal law such as the Privacy Act authorize or require the Service to withhold publication of social security numbers or other extraneous information received by the Service in exempt organization filings?

Neither the Privacy Act nor other non-Code authority requires the IRS to redact social security numbers or other extraneous information prior to making the filings of exempt organizations available to the public under sections 6104 and 527.

The Privacy Act of 1974 (the Privacy Act) generally aims to protect the privacy of individuals with respect to personal and financial data maintained in Federal information systems.⁹ Since its enactment, the Office of Management and Budget (OMB) has promulgated guidelines pursuant to section 6 of the Privacy Act. For instance, OMB has released memoranda that clarify the obligations of Federal agencies to safeguard personally identifiable information (PII) and respond to the unauthorized disclosure of PII.¹⁰

⁸ The public availability mandate provided by section 6104 can be read as limited to the information that is required to be provided to the IRS by exempt organizations under the Internal Revenue Code. For instance, section 6104(d)(7), provides that “Any report filed by an organization under section 527(j) (relating to required disclosure of expenditures and contributions)” (emphasis added) shall be made available to the public. Section 6104(b) provides “The information required to be furnished by sections 6033, 6034, and 6058” shall be made available to the public.

⁹ Privacy Act of 1974, Pub. L. No. 93–579, 5 U.S.C. § 552a. The Privacy Act permits individuals to determine what records pertaining to the individual are collected or maintained by agencies and limits the use of such information without consent of the individual. 5 U.S.C. § 552a(b) & (c). Additionally, the Privacy Act imposes standards of quality and diligence on government agencies with respect to the maintenance of records. 5 U.S.C. § 552a(e).

¹⁰ See, e.g., OMB M-07-16, Safeguarding Against and Responding to the Breach of Personally Identifiable Information (May 22, 2007). OMB defines PII to include “information which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, etc.” Id. The IRS similarly defines PII. See I.R.M. 10.2.13.3.1. The IRS further classifies PII as Sensitive

The Privacy Act does not apply to social security numbers that are furnished to the IRS by exempt organizations. The plain language of the statute states that the Privacy Act applies to records about "individual[s]" maintained by federal agencies, an "individual" being defined as "a citizen of the United States or an alien lawfully admitted for permanent residence." That definition does not include exempt organizations. Thus, because only individuals are protected by the Privacy Act, a person cannot claim that his or her rights are invaded by a violation directed against a third party entity.¹¹ Further, because the IRS does not maintain or retrieve the 527 organization's information by an individual's social security number, but rather by the organization's EIN, the Service does not make an unauthorized disclosure under Privacy Act by making copies of Forms 8872 that include an individual's social security numbers available on the Internet.¹²

Other Federal laws, such as the E-Government Act of 2002 (which included the Federal Information Security Management Act of 2002 (FISMA)), similarly do not require redaction. The provisions of the E-Government Act generally require agencies to increase the use of information technology to improve public access and transparency. The E-Government Act also requires agencies to perform privacy impact assessments when implementing a new collection of information and post privacy notices on agency websites consistent with the requirements of the Privacy Act.¹³ There is no requirement in the E-Government Act that the IRS redact social security numbers that are provided to the IRS by exempt organizations prior to making the relevant filings available to the public.

3) How long is the IRS required to maintain filings on the Internet and for public inspection pursuant to sections 527 and 6104?

But Unclassified (SBU) PII if the information is protected by the confidentiality provisions of the Code or the Privacy Act. *Id.* OMB defines the need to safeguard PII by reference to the requirements of the Privacy Act. *See* OMB M-07-16, Attachment 1.

¹¹ 5 U.S.C. § 552a(a)(2). *See, e.g., Parks v. IRS*, 618 F.2d 677, 684-85 (10th Cir. 1980) (union lacks standing to sue for damages to its members); *Sirmans v. Caldera*, 27 F. Supp. 2d 248, 250 (D.D.C. 1998) (plaintiffs "may not object to the Army's failure to correct the records of other officers").

¹² The Privacy Act applies to "records" in a "system of records." A "system of records" is a group of records under the control of an agency from which information is "retrieved by the name of the individual" or by some other identifying particular assigned to the individual. The definition of system of records is critical because, generally, it makes coverage under the Act dependent upon the method of retrieval of a record rather than the substantive content of the record. Thus, "if an individual is named in a record about someone else . . . and the agency only retrieves the portion pertaining to him by reference to the other person's name," the Privacy Act does not apply. *See Baker v. Department of Navy*, 814 F.2d 1381, 1383 (9th Cir. 1987) (quoting OMB Guidelines to the Privacy Act, 40 Fed.Reg. 28,949 (1975)).

¹³ E-Government Act of 2002, Pub. L. 107-347, §§ 206; 208.

The Federal Records Act (FRA), 44 U.S.C. § 2901, et seq., governs the creation, management, and disposal of federal records. The FRA authorizes each agency head to establish a records management program and to define the extent to which documents are “appropriate for preservation” as agency records. 44 U.S.C. § 3102. The FRA further states that the “head of each Federal agency shall establish and maintain an active and continuing program for the economic and efficient management of the records of the agency.” Id.

When statutes relating to specific documents are silent with respect to how long they are to be preserved, the retention and destruction of records are governed by the FRA. Neither section 6104 nor section 527 includes a timeframe for how long the IRS is required to make documents available for public inspection. Thus, the retention schedules formulated by the Service pursuant to the FRA govern the length of time the IRS is required to maintain the forms subject to the public availability requirements of sections 6104 and 527. In general, these schedules require the Service to retain exempt organization filings for 6 years, except that the public inspection copies of Forms 990 made available to the public under section 6104(b) may be destroyed 4 years after the end of the processing year.¹⁴

The retention schedules adopted by the Service mandate the length of time Service is required to maintain records, but do not direct the length of time the Service is required to make such records publicly available pursuant to sections 6104 and 527. Sections 6104 and 527 are also silent in this regard. Accordingly, the IRS need not make such documents publicly available for the same period of time that the Service is required to maintain the documents for record retention purposes under the FRA. For instance, because electronically filed returns and reports are not ordinarily retired to a Records Center, the IRS could limit the online availability of 527 organization filings to the analogous 4-year period that the public inspection copies of Forms 990 are required to be maintained. Likewise, the Service could decide not to make paper submissions of Forms 8872 electronically available beyond the 4-year period inasmuch as these submissions are not required to be posted on the Internet in the first instance. The Service's exercise of discretion in making these determinations is necessary in order to balance the competing requirements of providing transparency with respect to tax

¹⁴ The Service's retention schedules are available in Document 12990, Records Controls Schedule. The retention and disposition of Forms 990, 8871, and 8872 are covered by RCS 29 for Tax Administration. Item No. 66 of RCS 29 provides that these records are to be retired to the Records Center beginning January 2, one year after the end of the year in which the returns were numbered and processed. These documents may then be destroyed 6 years after the end of the processing year. Returns filed and maintained only in electronic form are not formally retired to a Records Center but may be destroyed 6 years after the end of the processing year. Under RCS 28, Item 64, Forms 990 that constitute a public inspection record and are maintained apart from the “return” portion of these forms are not retired to a Records Center but are to be destroyed 4 years after the end of the processing year. In other words, the copy of the actual Form 990 filed by an exempt organization must be preserved under RCS 29, Item 66 for 6 years after the end of the processing year, but the inspection copy of the return which is made available to the public under section 6104 may be destroyed 4 years after the end of the processing year.

exempt organizations, the need to protect sensitive information from potential misuse, and the business needs and capabilities of the Service.