

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

CC:PA:06:MEAvrutine
DISSP-128905-11

UILC: 0552A.02-00, 0552A.02-01

date: September 6, 2011

to: Esther Easter
Acting Chief
(Workers' Compensation Center)

from: Barbara M. Pettoni
Senior Technician Reviewer
(Procedure & Administration)

subject: Release of WCC Medical Records to the IRS's Criminal Investigation Division
for Purposes of Employment Fraud Investigation

This memorandum responds to your request for assistance dated July 11, 2011, as supplemented on August 8, 2011. This advice may not be used or cited as precedent.

ISSUE

Whether the Privacy Act, 5 U.S.C. § 552a, authorizes the disclosure of medical records contained in Federal Employee Compensation Act files to the IRS Criminal Investigation Division in connection with employment fraud investigations.

CONCLUSION

The Privacy Act does not authorize the IRS Criminal Investigation Division to access Federal Employee Compensation Act files in connection with employment fraud investigations.

FACTS

The IRS's Criminal Investigation Division (CI) has requested access to the full medical documentation file contained in the IRS Workers' Compensation Center (WCC)'s Federal Employee Compensation Act (FECA) files so that employees of the Human Capital Office (HCO) embedded within CI can investigate potential employee fraud. Previously, the Office of the Associate Chief Counsel, General Legal Services (GLS), opined that the Privacy Act does not preclude the release of medical documentation

PMTA 2011-29

from the FECA files to CI, however, the GLS opinion did not contemplate CI's use of the FECA files to investigate employment fraud.

LAW AND ANALYSIS

Any information that the WCC maintains about an individual in a system of records that is retrieved by an individual identifier is a record subject to the Privacy Act (Act). 5 U.S.C. § 552a(a)(4). The Privacy Act prohibits the release of records subject to the Act unless an exception within the Act applies. 5 U.S.C. § 552a(b). Only two exemptions to the general rule of confidentiality are potentially applicable here: subsections (b)(1) and (b)(3).

Subsection (b)(1)'s "need to know" exception

The Privacy Act authorizes disclosure "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties." 5 U.S.C. § 552a(b)(1). Such intra-agency disclosures for necessary, official purposes are often referred to as "need to know" disclosures. Legislative history indicates that the term 'agency' should be given "its broadest statutory meaning" in this context, so as to allow intra-agency disclosures within large government agencies. See 120 Cong. Rec. 36,967 (1974). For Privacy Act purposes, the agency is the Department of the Treasury. Here, WCC, which is a Treasury component, maintains the disputed record. As CI is also a Treasury component, section 552a(b)(1) authorizes CI's access to FECA records on a need to know basis only to the extent necessary for the performance of their officially assigned duties.

CI can demonstrate a need for the FECA records so that CI can make decisions regarding fitness-for-duty, light duty, and return to work. If CI needs the medical records for these purposes, then section 552a(b)(1) would authorize such disclosure, however, intra-agency disclosures for improper purposes are prohibited. See e.g., Berry v. Henderson, 2000 WL 761896 at *1-*2 (D. Me.) (finding that agency did not have "automatic" access to plaintiff's personnel and medical records within its possession in connection with its defense in Title VII case and that agency failed to establish that it had need to access the records under subsection (b)(1)).

Fraud by Service employees with respect to their employment is investigated by the Treasury Inspector General for Tax Administration (TIGTA). Thus, disclosure of FECA records to TIGTA to investigate employment fraud by CI employees is authorized by section 552a(b)(1). Because CI does not have authority to investigate employment fraud by CI employees, CI's use of FECA records for this purpose does not fall within the subsection (b)(1) exception.

Subsection (b)(3)'s Routine Use Exception

The "routine use" exception to the Privacy Act authorizes the disclosure of a Privacy Act record if such use is published in the Federal Register and compatible with the purpose for which the agency had collected the records. 5 U.S.C. § 552a(b)(3). Compatibility

for purposes of the Privacy Act encompasses functionally equivalent uses and other uses that are necessary and proper. OMB Guidelines, 52 Fed. Reg. 12,990, 12,993 (April 20, 1987). FECA records are contained in the Department of Labor's government-wide Privacy Act system of records "DOL/GOVT-1, Office of Workers' Compensation Programs, Federal Employees' Compensation Act File," published at 67 Fed. Reg. 16826, at 16827 (April 8, 2002).¹ The WCC may disclose the records if a published routine use applies.

DOL/GOVT-1 authorizes the following relevant routine use disclosure of FECA records maintained by federal agencies—

To federal agencies that employ the claimant at the time of the occurrence or recurrence of the injury or occupational illness in order to verify billing, to assist in administering the FECA, to answer questions about the status of the claim, to consider rehire, retention or other actions the agency may be required to take with regard to the claim or to permit the agency to evaluate its safety and health program. DOL Privacy Act System of Record Notices, 67 Fed. Reg. 16816, at 16827-16828 (April 8, 2002).²

For the use of a FECA record to be consistent with the purpose for which these records were collected, the use must be in connection with an employee's compensation claim. See FECA Circular 09-05 (August 26, 2009).³ Such records cannot be used in connection with disciplinary actions, EEO complaints, or other administrative actions. Id.

Here, CI has requested use of the FECA records for employment fraud investigations. The purpose of collecting these records relates to the employee's compensation claim, and the routine use limits disclosure to the employing agency for purposes of administering FECA and taking actions directly related to the claim and potential reemployment. An employment fraud investigation is not compatible with the purposes for collecting the records nor with the routine use authorizing disclosure to the

¹Categories of records contained in DOL/GOVT-1 include: (1) reports of injury by the employee and/or employing agency; (2) claim forms filed by or on behalf of injured federal employees or their survivors seeking benefits under FECA; (3) forms authorizing medical care and treatment; (4) other medical records and reports; (5) bills and other payment records; (6) compensation payment records; (7) formal orders for or against the payment of benefits; (8) transcript of hearings conducted; and (9) other information submitted or gathered in connection with the claim. DOL Privacy Act System of Record Notices, 67 Fed. Reg. 16816, at 16827-16828 (April 8, 2002).

² GLS has suggested that the records may also be contained in the government-wide Privacy Act system of records OPM/GOVT-10, Employee Medical File System Records. Regardless of whether the FECA records are contained in OPM/GOVT-10, OPM/GOVT-10's routine uses do not authorize release of the records for the purpose that CI intends to use the records. See OPM Privacy Act System of Record Notices, 71 Fed. Reg. 35342 at 35361-35362 (June 19, 2006).

³ The FECA established DOL/GOVT-1 for "...processing and adjudicating claims that federal employees and other covered individuals file with the Department of Labor's OWCP, seeking monetary, medical and similar benefits for injuries or deaths sustained while in the performance of duty." DOL Privacy Act System of Record Notices, 67 Fed. Reg. 16816, at 16827-16828 (April 8, 2002).

employing agency. Thus section (b)(3) does not authorize disclosure of these records to CI for purposes of an employment fraud investigation.

Neither subsection (b)(1) nor (b)(3) of the Privacy Act authorizes CI's access to FECA records for purposes of employment fraud investigation. CI may continue to access FECA records to the extent necessary in order to make work-related determinations for an employee compensated under FECA, however, such access to FECA records must be for this limited purpose and the records obtained pursuant to this access cannot be then used by CI in connection with employment fraud investigations.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-7950 if you have any further questions.