

42.00 RESTRICTIONS ON OBTAINING AND USING "TAX RETURNS," "TAXPAYER RETURN INFORMATION," AND "RETURN INFORMATION"

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42.01 STATUTORY LANGUAGE: 26 U.S.C. § 6103(a)

§ 6103. Confidentiality and disclosure of returns and return information

(a) General rule. -- Returns and return information shall be confidential, and except as authorized by this title --

(1) no officer or employee of the United States,

(2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (1)(7)(D) who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information . . . [pursuant to certain provisions of this section],

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

42.02 GENERALLY

Section 6103 of the Internal Revenue Code of 1986 generally prohibits the disclosure of "tax returns" and other "tax return information" outside the Internal Revenue Service (IRS) unless the disclosure falls within one of the specific provisions of section 6103(c) through (o). Note particularly that the statute provides the sole and exclusive means by which return information may be disclosed; the courts do not possess any extra-statutory power to order the IRS to produce return information, either *sua sponte* or on a motion by a defendant. See *United States v. Lochmondy*, 890 F.2d 817, 823-24 (6th Cir. 1989) (Section 6103(i) grants no authority for courts to issue *sua sponte* orders for the disclosure of tax information); *United States v. Barnes*, 604 F.2d 121, 145-46 (2d Cir. 1979).

In cases involving "tax administration" (e.g., criminal tax prosecutions or other criminal cases that have been specifically designated as "related" to tax administration) that have been referred to the Department of Justice, the IRS may, in its own discretion, disclose to the Department of Justice prosecutors handling the case the tax returns and tax return information that "may" relate to the case (section 6103(h)(2)). Under section 6103(h)(2), the prosecutors may use the returns and return information for investigative purposes. Section 6103(h)(4) authorizes the prosecutor to introduce into evidence at trial a return or piece of return information that "is" relevant to the case.

In non-tax criminal cases, Federal prosecutors may obtain and use for

investigative purposes returns and other information filed with the IRS by a taxpayer only through an *ex parte* order of a United States district court based upon an application (that must be signed by the United States Attorney) showing that the information is relevant to an ongoing criminal prosecution. [FN1] The prosecutor may use that information at trial (e.g., introduce it into evidence or otherwise make it public in the proceeding) only upon a showing to the court that the information is "probative of an issue" in the case.

Willful violations of the provisions of section 6103 are punishable as a felony and dismissal from Federal service, while negligent violations subject the United States to a suit for damages. See 42.06, *infra*.

42.03 THE STATUTORY STRUCTURE

42.03[1] Generally

Section 6103(a) requires officers and employees of the United States to keep tax returns and return information confidential, and prohibits them from disclosing such information, except as authorized by the Internal Revenue Code. [FN2] Section 6103(b) defines "return," "return information," and "taxpayer return information." Sections 6103(c) - (o) contain the exceptions that allow disclosure of returns and returns information to taxpayers, the Department of Justice, and other governmental entities. Section 6103(p) provides rules and procedures for the handling, storage, and disposition of return information by the IRS and by those within the Department to whom return information has been disclosed. [FN3]

42.03[2] Return Information Remains Subject to The Non-Disclosure Rules of § 6103 Even After it Has Been Made Public

The section 6103 prohibitions on disclosure are source-based. That is, the statute bars the public disclosure of information directly from IRS files, as well as the disclosure of returns and return information that has been accumulated in Department files. The statute contains no exception that lifts the non-disclosure prohibition for return information once it has been disclosed in public, such as in a judicial proceeding. (In contrast, the secrecy provisions of Federal Rule of Criminal Procedure (Fed. R. Crim. P.) 6(e) governing disclosures of "matters occurring before the grand jury," are held not to apply to information once it has been publically disclosed.)

Section 6103 does not, however, ban the disclosure of information that is taken from the public record. Thus, for example, the statute, as interpreted by the majority of the circuits, prohibits the disclosure from IRS files (or Department files when disclosure has been made to the Department under the statute) of a tax-crime defendant's name, or the fact that he was under investigation or has been indicted for a particular tax crime. To the extent that same information has been placed in the public record (e.g., included in an indictment), its dissemination from the public record does not violate the statute.

Although two circuits have held that once return information has been made public in a judicial proceeding, the non-disclosure restrictions of section 6103 no longer apply, *Rowley v. United States*, 76 F.3d 796, 799-801 (6th Cir. 1996); *Lampert v. United States*, 854 F.2d 335, 338 (9th Cir. 1988), three other circuits have held that even public disclosure of return information does not lift the non-disclosure bar to the same information in the files of the IRS, because the statute does not contain an exception that permits the disclosure of return information after it has been made public, *Johnson v. Sawyer*, 120 F.3d 1307, 1318-19 (5th Cir. 1997); *Mallas v. United States*, 993 F.2d 1111, 1120 (4th Cir. 1993); *Rodgers v. Hyatt*, 697 F.2d 899, 906 (10th Cir. 1983). The Seventh Circuit, in *Thomas v. United States*, 890 F.2d 18, 20-21 (7th Cir. 1989), concluded that an IRS press release based on information in a court opinion did not violate the prohibitions of section 6103 because the "immediate source" of the information in the press release was a public document. See also *Rice v. United States*, 166 F.3d 1088, 1091 (10th Cir. 1999) (holding that information about a taxpayer being classified as "return information" turns on the "immediate source" of the information).

Prosecutors should not make any out of court disclosures of return information. They should exercise great care to ensure that any information provided, for example, to the press, comes only from publicly available information, such as the indictment. See Memorandum to All United States Attorneys from Loretta Argrett, Assistant Attorney General, Tax Division, re: *Press Releases in Cases Involving the IRS* (October 15, 1997), found in Chapter 2, *supra*, at 3-36 - 3-39.

42.04 "RETURN INFORMATION" DEFINED: 26 U.S.C. § 6103(b)

42.04[1] Generally

Section 6103(b) defines three categories of information: "return," "return information," and "taxpayer return information." A "return" is any tax or information return filed with the Internal Revenue Service by, on behalf of, or with respect to a taxpayer. See Section 6103(b)(1). "Return information" is essentially any information relating to the taxpayer received by, recorded by, prepared by, furnished to, or collected by the Internal Revenue Service. See Section 6103(b)(2). This category includes virtually all information about a taxpayer's dealings with the IRS, including whether a particular person is a taxpayer, the amount of any liability, and whether the taxpayer is, will be, or has been investigated. In short, this category includes all information about a taxpayer and his or her liability in the possession of the IRS. See *Mallas v. United States*, 993 F.2d 1111, 1118 (4th Cir. 1992) (information contained in a revenue agent's report considered "return information"); *Chamberlain v. Kurtz*, 589 F.2d 827, 840 (5th Cir. 1979) ("return information" is any information concerning a taxpayer's liability which has been collected by the IRS). See also *Church of Scientology of California v. Internal Revenue Service*, 484 U.S. 9, 15 (1987). "Taxpayer return information"

is "return information" which is filed with, or furnished to, the Internal Revenue Service by or on behalf of the taxpayer to whom the return information relates. See Section 6103(b)(3). It would include, for example, financial statements, offers in compromise, protest letters, and similar documents.

42.04[2] Information Obtained from Non-IRS Sources Is Not "Return Information"

Return information does not include information that does not come from IRS files. Thus, information that a prosecutor gathers as part of a grand jury investigation is not "return information" because it is not information "collected by" the IRS. This is true even in a grand jury investigation into tax offenses. Under Rule 6(e)(3)(A)(ii), Fed. R. Crim. P., IRS agents working on a grand jury investigation are "assist[ing] . . . [the] attorney for the government in the performance of such attorney's duty to enforce federal criminal law." The information that they gather at the direction of the Assistant United States Attorney (AUSA), or under the authority of the grand jury, is being collected by the Attorney General and the grand jury. It is not information being "collected by" the IRS, and thus is not "return information" under the section 6103(b) definition. See *Baskin v. United States*, 135 F.3d 338, 342 (5th Cir. 1998) (copies of checks obtained by grand jury not return information) *Ryan v. United States*, 74 F.3d 1161, 1163 (11th Cir. 1996) (financial information independently obtained by prosecutor not "return information," as it did not come from IRS files); *Stokwitz v. U.S. Dept. of the Navy*, 831 F.2d 893, 897 (9th Cir. 1987) (taxpayer's retained copies of returns seized from his desk by Navy investigators not "returns" or "return information" under section 6103 because they did not come from IRS files).

42.05 PERMISSIBLE DISCLOSURES OF RETURNS AND RETURN INFORMATION

42.05[1] Generally

Subsections 6103(c) through (o) set out the situations in which returns and return information may be disclosed. The subsections authorizing disclosure to the Department of Justice for use in litigation, sections 6103(h) and 6103(i), are discussed in detail below. The other eleven subsections under which disclosure of taxpayer returns and return information may be authorized are as follows:

1. Section 6103(c) -- Disclosure of returns or return information at the taxpayer's request. See, e.g., *Tierney v. Schweiker*, 718 F.2d 449, 454 (D.C. Cir. 1983).
2. Section 6103(d) -- Release of returns and return information to State tax officials and State and local law enforcement agencies charged with the administration of State tax laws to assist in the administration of such laws. See *Huckaby v. Internal Revenue Service*, 794 F.2d 1041, 1046 (5th Cir. 1986).
- N.B.:** There is no other provision authorizing the disclosure of returns and return information to State or local officials. Thus, returns and return information may not be disclosed to state agents or officers who may be working on task forces or otherwise assisting prosecutors in investigating or prosecuting Federal crimes. Disclosure for the sole and limited purpose of assisting the Federal criminal investigation may be appropriate to those State police officers or agents who have been deputized as Deputy United States Marshals.
3. Section 6103(e) -- Disclosure of a taxpayer's returns and return information to individuals who have a material interest in that information. The section lists those persons who will be deemed to have a material interest in such information (e.g., either the husband or the wife in the case of a joint return, a partner in a partnership, a stockholder owning more than 1 percent of the outstanding stock of a corporation in the case of a corporate return, etc.). See, e.g., *Martin v. IRS*, 857 F.2d 722, 724 (10th Cir. 1988) (partnership returns).
4. Section 6103(f) -- Disclosure of returns and return information to committees of Congress. See *Church of Scientology v. Internal Revenue Service*, 484 U.S. 9, 15 (1987).
5. Section 6103(g) -- Disclosure of returns and return information to the President, and employees of the White House designated by the President. See *United States v. Barrett*, 837 F.2d 1341, 1354 (5th Cir. 1988).
6. Section 6103(j) -- Disclosure of returns and return information to be used in structuring the census and conducting related statistical analyses. See *Baskin v. United States*, 135 F.3d 338, 341 (5th Cir. 1998).
7. Section 6103(k) -- Disclosure of returns and return information for tax administration purposes. Section 6103(k)(6) permits the disclosure of return information by Service employees for investigative purposes. Agents and other employees may "disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available . . ." See *Vote v. United States*, 753 F. Supp. 866, 870 (D. Nev. 1990), *aff'd*, 930 F.2d 31 (9th Cir. 1991). See also *Barrett v. United States*, 795 F.2d 446, 450 (5th Cir. 1986), for a discussion of information which is not "otherwise reasonably available."
8. Section 6103(l) -- Disclosure of returns and return information for purposes other than tax administration -- e.g., programs administered by the Social Security

Administration, Railroad Retirement Board, Department of Labor, etc.. See *United States v. Bachelor*, 611 F.2d 443, 446 (3d Cir. 1979).

9. Section 6103(m) -- Disclosure of taxpayer identity information to various agencies and individuals. See *Ryan v. Bureau of Alcohol, Tobacco and Firearms*, 715 F.2d 644, 652 (D.C. Cir. 1983).

10. Section 6103(n) -- Disclosure of returns and return information as necessary in conjunction with the "processing, storage, transmission, and reproduction" of returns and return information; and for purposes of "programming, maintenance, repair, testing and procurement of equipment." See *Wiemerslage v. United States*, 838 F.2d 899, 900 (7th Cir. 1988).

11. Section 6103(o) -- Disclosure of returns and return information relating to alcohol, tobacco and firearms taxes, and returns and return information relating to the wagering excise tax for limited purposes.

42.05[2] Section 6103(h) -- Disclosure to Certain Federal Officers and Employees for Purposes of Tax Administration, etc.

Section 6103(h) is one of two provisions that authorize disclosure of returns and return information to the Department of Justice for use in investigating and prosecuting criminal cases. It governs the disclosure of return information to specified federal officers and employees for purposes of tax administration, including the use of returns and return information in criminal and civil tax litigation. Section 6103(h)(1) provides the authority for employees of the Department of the Treasury to have access to returns and return information as needed for tax administration purposes. [FN4] See *First Western Govt. Securities, Inc. v. United States*, 796 F.2d 356, 360 (10th Cir. 1986).

42.05[3] Disclosures to the Department of Justice for Tax Administration

Section 6103(h)(2), which governs the disclosure of return information to officers and employees of the Department of Justice in tax cases, states in part:

In a matter involving tax administration, a return or return information shall be open to inspection by or disclosure to officers and employees of the Department of Justice (including United States attorneys) *personally and directly engaged in, and solely for their use in*, any proceeding before a Federal grand jury or preparation for any proceeding (or investigation which may result in such a proceeding) before a Federal grand jury or any Federal or State court, but only if --

(A) the taxpayer is or may be a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability in respect of any tax imposed under this title;

(B) the treatment of an item reflected on such return is or may be related to the resolution of an issue in the proceeding or investigation; or

(C) such return or return information relates or may relate to a *transactional relationship* between a person who is or may be a party to the proceeding and the taxpayer which affects, or may affect, the resolution of an issue in such proceeding or investigation. (Emphasis added.)

The italicized portions of the statutory language indicate the circumstances under which returns and return information may be disclosed to Department attorneys. First, the matter must involve "tax administration." That term is defined in section 6103(b)(4) to include the enforcement and litigation of the tax laws and "related statutes." Preparing for and conducting grand jury investigations and prosecuting tax offenses, or offenses charged under statutes that have been determined to be "related to" tax administration, are activities that are part of "tax administration." For cases involving the interpretation of "tax administration," See *Rueckert v. I.R.S.*, 775 F.2d 208, 209-12 (7th Cir. 1985); *United States v. Mangan*, 575 F.2d 32, 40 (2nd Cir. 1978).

Second, the disclosure is made to those attorneys who are "personally and directly" involved in the litigation of the tax matter, and not to the Department of Justice itself. Thus, the individual prosecutors or attorneys handling a case or matter are responsible for controlling and managing the returns and returns information and for any subsequent disclosures. The term "personally and directly engaged in" includes supervisors and support staff. Treas. Reg. § 301.6103(h)(2)-1.

Finally, the information to be disclosed to Department attorneys must meet one of the criteria set out in (A), (B), and (C), commonly referred to as the "party," "item," and "transaction" tests. Department attorneys may have access to the return information of any taxpayer who is or may be a party to a tax case, or whose liability gives rise to a case under the federal tax laws. *United States v. Michaelian*, 803 F.2d 1042, 1044 (9th Cir. 1986) (disclosure to obtain search warrant); *United States v. Olson*, 576 F.2d 1267, 1270 (8th Cir. 1978) (taxpayer as party to case). Second, under the "item" test, prosecutors may obtain those items on a third party's return that are or may be related to a pending case or investigation. Finally, Department attorneys involved in a tax case may be given access to third party return information that reflects a transaction between the taxpayer and the third party, if the information pertaining to the transaction is or may be related to a pending case or investigation. *Davidson v. Brady*, 559 F.Supp. 456, 461 (W.D. Mich. 1983), *aff'd on other grounds*, 732 F.2d 552 (6th Cir. 1984). Under both the item test and the transaction test, access to return information is limited to those portions of the third party return that reflect the relevant item or transaction. See S. Rep. No. 94-938(I) at 682 (1976).

42.05[3][a] Procedures for Disclosure

Section 6103(h)(3) provides two different methods by which taxpayer and third party return information may be released to the Department of Justice. The first method is used in any case that has been "referred" to the Department. Upon referral, the Internal Revenue Service may disclose returns and return information pertaining to the referred case to the Department attorneys responsible for the case. See Section 6103(h)(3)(A); *United States v. Bachelier*, 611 F.2d 443, 447 (3d Cir. 1979). Although the section contains no definition as to what constitutes a "referral," the term has generally been construed as an institutional decision by the Internal Revenue Service to request that Justice defend, prosecute or take other affirmative action in a case, or where the Internal Revenue Service seeks pre-referral advice from the Department.

The term "referral" is defined in section 7602(d) of the Internal Revenue Code in the context of an administrative summons and includes a recommendation for a grand jury investigation or criminal prosecution for offenses connected with the administration or enforcement of the internal revenue laws. However, a "referral" for section 6103 purposes is not limited to a referral as defined in section 7602, but would also include other matters where the Department of Justice is asked to prosecute, defend or take action on a case on behalf of the IRS, including search warrants, summons enforcement, writs of entry, etc. See *United States v. Michaelian*, 803 F.2d 1042, 1048-49 (9th Cir. 1986) (disclosure to Justice to obtain a search warrant.); *Bachelier*, 611 F.2d at 447-48 (technical requirements of a referral); *United States v. Chemical Bank*, 593 F.2d 451, 456-57 (2nd Cir. 1979) (technical requirements of a referral). The term "referral" should also be understood to include disclosures made for the purpose of obtaining pre-referral advice from the Department.

In those instances where no "referral" has been made, the Department may obtain tax returns and return information by a written request to the Secretary of the Treasury from the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, that sets forth the need for disclosure of a specific return or specific return information. Section 6103(h)(3)(B).

(N.B.: The authority to request returns and return information by letter is limited to the specified officials and cannot be delegated. Thus, a United States Attorney cannot use this provision to obtain returns or return information. *Redford v. United States*, 84-1 U.S.M.C. Par. 9421 (D. Tenn. 1984).

42.05[3][b] Joint Tax-Non-Tax Criminal Investigation

Under specific limited conditions, prosecutors may use returns and return information in the non-tax portion of a joint tax/non-tax investigation under section 6103(h). Treas. Reg. § 301.6103(h)(2)-1 authorizes the use of returns and return information in the non-tax portion of an investigation pursuing both tax and non-tax charges if: (1) the return information has been obtained for use in, and is being used in, the tax portion of the case; (2) the tax portion of the investigation has been duly authorized by the Tax Division; and (3) the information will be directly used in connection with the tax administration proceeding. The regulation also requires that if the tax administration portion of the investigation is terminated, the prosecutor cannot continue to use the information without obtaining an order under section 6103(i). [FN5]

42.05[3][c] Investigative Disclosures

Section 6103(h) contains no specific provision for investigative disclosures by federal prosecutors. Treas. Reg. § 301.6103(h)(2)-1(b)(i)-(iii) allows redisclosure of returns and return information by federal prosecutors. Such redisclosures include, but are not limited to, disclosures made: (1) to accomplish any purpose or activity of the nature described in 26 C.F.R. 301.6103(k)(6)-1 (e.g., verify correctness of return; determine responsibility for filing return; establish, verify or collect any tax liability or penalty; identify misconduct under the tax laws; obtain services of persons with special knowledge or skill; (2) to interview and obtain relevant information from a taxpayer or third-party witness who may be called in the proceeding; or (3) to conduct plea or settlement negotiations, or to obtain stipulations of facts. Redisclosure of return or taxpayer return information for such purposes is permitted only in those instances where the proper purpose of section 6103(h) cannot otherwise be accomplished without the disclosure.

42.05[3][d] Disclosure in Judicial and Administrative Tax Proceedings

Section 6103(h)(2) only authorizes the disclosure of tax return information to the Department of Justice. Section 6103(h)(4) governs the Department's further dissemination of that material in judicial and administrative tax proceedings. The section contains "party," "item," and "transaction" tests similar to those in section 6103(h)(2). It also authorizes disclosure:

(D) to the extent required by order of a court pursuant to section 3500 of title 18, United States Code, or rule 16 of the Federal Rules of Criminal Procedure, such court being authorized in the issuance of such order to give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in this title.

However, such return or return information shall not be disclosed as provided in subparagraph (A), (B), or (C) if the Secretary determines that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.

Return information may be disclosed in judicial proceedings, pursuant to section 6103(h)(4), as long as one of the four listed criteria is met. *Conklin v. United States*, 61 F.3d 915 (10th Cir. 1995) (unpublished table decision) (application of section 6103(h)(4)(B)). The authority in section 6103(h)(4) extends only to judicial and administrative tax proceedings; it does not allow disclosures to the public or for any other

purpose.

Note that sections 6103(h)(4)(A) - (C) contain more stringent tests than the parallel tests in sections 6103 (h)(2)(A) - (C). Under subsection (h)(2), the IRS is permitted to disclose returns and return information to the Department of Justice if the taxpayer "is or may be" a party to the proceeding, the treatment of an item on the return "is or may be" related to the resolution of an issue in the proceeding or investigation, or such return or return information "relates or may relate" to a transactional relationship between a person who is or may be a party and the taxpayer. However, in section (h)(4), the disclosure of the information by the Department is limited to those instances in which a "taxpayer is a party," the information "is directly related to" the resolution of an issue in the proceeding or investigation, or such return or return information "directly relates to" a transactional relationship between a person who is a party and the taxpayer. [FN6] See *United States v. Mangan*, 575 F.2d 32, 38-39 (2d Cir. 1978); *United States v. Tsanas*, 572 F.2d 340, 348 (2d Cir. 1978). [FN7]

Finally, section 6103(h)(4) allows the prosecutor to produce returns and return information when ordered to do so by the court to meet the Government's discovery obligations. Standing court rules providing for discovery are sufficient to meet the requirement for a court order. Although that section specifically refers only to Federal Rule of Criminal Procedure 16 and 18 U.S.C. ' 3500, it must be read to allow disclosure of return information necessary to meet the Government's obligation to provide exculpatory information to the defendant under *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Giglio*, 405 U.S. 150 (1972).

42.05[4] Section 6103(i) - Disclosure to Federal Officers or Employees for Administration of Federal Laws Not Related to Tax Administration

42.05[4][a] Generally

Section 6103(i) authorizes the disclosure of tax returns and return information to Department of Justice prosecutors for use in nontax criminal investigations and prosecutions. The statute distinguishes between information obtained from the taxpayer or his representative and return information in general. Section 6103(i) provides that a federal agency enforcing a nontax federal criminal law must obtain an *ex parte* order in order to obtain a tax return or taxpayer return information. Other return information can be obtained through a written request by a specifically designated federal official.

42.05[4][b] Disclosure Pursuant to Court Order: Tax Returns and Taxpayer Return Information

Section 6103(i)(1) provides that *tax returns and taxpayer return information* (i.e., return information that was submitted to the IRS by the taxpayer or his representative) may, upon the grant of an *ex parte* order by a Federal district court judge or magistrate, be disclosed to officers and employees of any federal agency (not to the agency itself) for nontax criminal investigation purposes. The purposes for which the return information may be used are limited to: (1) preparation for any judicial or administrative proceeding pertaining to the enforcement of a specifically designated Federal criminal statute (not involving tax administration) to which the United States or the Federal agency is or may be a party; (2) any investigation which may result in such a proceeding; or (3) any Federal grand jury proceeding pertaining to enforcement of a federal nontax criminal statute.

42.05[4][c] Application for the Order

Section 6103(i)(1)(B) specifies that only the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, any United States Attorney or special prosecutor appointed under 28 U.S.C. ' 593, or any attorney in charge of a criminal division organized crime strike force may authorize application for an order seeking disclosures of returns and taxpayer return information in nontax criminal cases. Acting officials may also authorize applications pursuant to section 6103(i)(1). See *United States v. Bledsoe*, 674 F.2d 647, 669-70 (8th Cir.1982). However, that authority may not be delegated.

An application pursuant to section 6103(i) must establish: (1) reasonable cause to believe that a specific non-tax criminal violation has occurred; (2) reasonable cause to believe that the return or return information is or may be related to a matter relating to the commission of the crime; (3) that the return or return information will be used solely for the criminal investigation of the referenced crime; and (4) that such information cannot reasonably be obtained from another source. 26 U.S.C. § 6103(i)(1)(B)(i)-(iii). See also *In re Hamper*, 651 F.2d 19, 21 (1st Cir. 1981). A copy of a sample application and proposed order are attached.

As noted above, section 6103(i) also provides a mechanism for the release of return information that is not taxpayer return information. See Section 6103(i)(2). Under section 6103(i)(2), non-taxpayer return information may be disclosed pursuant to a simple written request. The request must include: (1) taxpayer's name and address; (2) the taxable periods to which the return information relates; (3) the statutory authority under which the case or investigation is proceeding; and (4) the specific reason why disclosure is or may be relevant. Officials authorized to make the written request are (1) the head of any Federal agency or its Inspector General, or, in the case of the Department of Justice, the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, any United States Attorney, any special prosecutor appointed under 28 U.S.C. § 593, or any attorney in charge of a criminal division organized crime strike force. See Section 6103(i)(2)(A); *United States v. Chemical Bank*, 593 F.2d 451, 457 (2d Cir. 1979).

42.05[4][d] Use or Further Disclosure of Returns and Return Information in Judicial Proceedings**42.05[4][d][i] Information Obtained by Ex Parte Order**

Section 6103(i)(4) governs the use of returns and return information obtained under section 6103(i)(1), (2), or (3)(A) in judicial and administrative proceedings. Returns and return information obtained by way of an *ex parte* court order, *i.e.*, taxpayer return information, may be disclosed in non-tax criminal cases or related civil forfeiture proceedings only upon a finding by the court that the information is probative of an issue in the proceeding or upon an order requiring its production in discovery under Rule 16 or the Jencks Act (18 U.S.C. § 3500).

42.05[4][d][ii] Other Return Information Obtained by Letter

Section 6103(i)(4)(B) provides that return information other than taxpayer return information may be disclosed in a non-tax criminal case or related civil forfeiture proceedings without a court order. Even if such other return information was obtained along with taxpayer return information as part of an (i)(1) order, the statute does not require any further order or other permission to use and disclose the non-taxpayer return information in the criminal trial or civil forfeiture proceeding.

42.05[4][d][iii] Withholding Return Information and Suppression

No return or return information shall be admitted into evidence under section 6103(i)(4) if the Secretary of Treasury determines and notifies the Attorney General or his or her delegate that such admission would reveal the identity of a confidential informant or would otherwise impair a tax investigation. See Section 6103(i)(4)(C). Any improper admission of evidence under the subsection is not reversible error. See Section 6103(i)(4)(E); *United States v. Barnes*, 604 F.2d 121, 146 n.13 (2d Cir. 1979). [FN8]

42.05[4][d][iv] Disclosure of Return Information For Other Purposes

Return information may be disclosed, upon application of certain specified persons for an *ex parte* court order, for the purpose of locating fugitives charged with a federal felony. See Section 6103(i)(5). Only persons named in section 6103(i)(1) may make an application for disclosure to locate a fugitive. However, return information is not to be disclosed if it will result in the identification of a confidential informant, or will otherwise seriously impair a tax investigation. See Section 6103(i)(6).

Under section 6103(i)(3)(A), return information that is evidence of a possible violation of any federal law, other than a federal tax law, may be disclosed to the extent necessary to make the appropriate federal agency aware of the potential violation. *In re Grand Jury Investigation*, 688 F.2d 1068, 1071 (6th Cir. 1982). In addition, under section 6103(i)(3)(B), disclosure of return information (other than taxpayer return information) is authorized in emergency situations, such as those involving a risk of death or physical injury, or flight from federal prosecution.

42.06 REMEDIES FOR VIOLATIONS OF § 6103**42.06[1] Criminal Sanctions**

Sections 7213 and 7213A of the Internal Revenue Code (26 U.S.C.) provide criminal penalties for willful violations of section 6103.

Section 7213 provides that the willful violation of the non-disclosure provisions of section 6103 is a felony, punishable with up to five years in jail, or a \$5,000 fine, or both. See *United States v. Richey*, 924 F.2d 857 (9th Cir. 1991). Under the penalty provisions of 18 U.S.C. ' 3571, the fine may be as high as \$250,000. In the case of federal employees and officers, section 7213 also mandates dismissal or discharge upon conviction. The statute of limitations for prosecutions brought under the section is three years. See 26 U.S.C. ' 6531.

Section 7213A is a misdemeanor offense and governs the unauthorized examination of return information, without regard for whether the "examiner" discloses the information to others. [FN9] To secure a conviction under section 7213A, the government must establish that (1) an officer or employee of the United States, any person described in section 6103(n) of the Code, or any state or other employee described in section 7213A(a)(2) of the Code; (2) willfully inspected; (3) any return or return information; (4) in a manner not authorized by the Code. A violation of section 7213A is punishable by a fine of up to \$100,000 (pursuant to 18 U.S.C. ' 3571), imprisonment of up to one year, and, if the offender is a federal employee, mandatory discharge from employment.

42.06[2] Civil Remedies

Section 7431 provides a civil remedy against the United States for taxpayers who have been injured by the unlawful disclosure of their tax information by an employee of the United States. Suit may be brought only against the United States; the individual employees who made the improper disclosure are neither personally liable nor proper parties to the suit. *Diamond v. United States*, 944 F.2d 431, 432 (8th Cir. 1991). The United States is not civilly liable for unauthorized disclosures made by former employees. A two-year statute of limitations applies to actions brought under section 7431, which begins running at the time of discovery of the disclosure by the taxpayer.

In order to make a case for recovery under section 7431, a taxpayer must show: (1) that an unauthorized examination or disclosure of return information was made; (2) that the examination or disclosure was knowing, or was the result of negligence; and (3) that the examination or disclosure violated 26

U.S.C. ' 6103. 26 U.S.C. ' 7431(b); *Barrett v. United States*, 51 F.3d 475, 479 (5th Cir. 1995) (disclosure of taxpayer information not in good faith where IRS employee did not review section 6103 and did not secure approval of supervisor before circulating taxpayer's return information); *Huckaby v. United States*, 794 F.2d 1041, 1047 (5th Cir. 1986) (disclosure of taxpayer information pursuant to taxpayer's oral consent not in good faith because section 6103 specifically requires written consent of taxpayer).

If successful, the aggrieved taxpayer may recover the greater of actual damages or \$1,000 per improper disclosure, plus court costs. [FN10] See 26 U.S.C. ' 7431(c)(1)(A); *Miller v. United States*, 66 F.3d 220, 223 (9th Cir. 1995) (disclosure to newspaper reporter deemed single act of disclosure, even though reporter disseminated information to wider audience); *Rorex v. Traynor*, 771 F.2d 383, 387 (8th Cir. 1985) (liquidated damages of \$1000 awarded for a single act of unauthorized disclosure which included numerous improperly disclosed items). It is not clear whether actual damages allow recovery for non-pecuniary loss, such as emotional trauma. The few cases that have addressed the issue arrive at vastly different conclusions. Compare, e.g., *Rorex v. Traynor*, 771 F.2d at 387-88 (finding that "hurt feelings alone [do not] constitute actual damages") with *Johnson v. IRS*, 700 F.2d 971, 986 (5th Cir. 1983) (allowing damages for "mental injury."). In all cases in which the unauthorized disclosure was willful or was the result of gross negligence, an injured taxpayer may also recover punitive damages. See 26 U.S.C. ' 7431(c)(1)(B)(ii).

APPENDIX

Sample Application For Section 6103(i)(1) Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

IN RE: _____) No. _____
Investigation of _____)
)
) APPLICATION FOR EX PARTE
) ORDER FOR DISCLOSURE OF
) RETURNS AND RETURN
) INFORMATION

The UNITED STATES OF AMERICA, through its attorney, _____, United States Attorney, [or _____, Assistant United States Attorney,] [FN11] hereby makes application to the Court for an Ex Parte Order directing the Internal Revenue Service (IRS) to disclose to applicant (and others hereinafter named) all returns and return information relating to the following:

[Set forth the following as to each person or entity]

Name:

Address:

Social Security No. or

Employer Identification No.:

Taxable Period(s):

In support of this application, the applicant alleges and states as follows:

1. There is reasonable cause to believe, based upon information believed to be reliable, that violations of a specific criminal act or acts have been committed, to wit, violations of Title __, United States Code, Section ____ [cite statute and describe offense, e.g., "Section 1344 (bank fraud)"]. This reasonable cause is based upon information supplied to the United States Attorney's Office by the [agency], which applicant believes to be reliable, [and/or information developed pursuant to a Grand Jury investigation,] which is summarized as follows:

[state facts sufficient to allow court to find reasonable cause to believe that statute has been violated and, where necessary, the basis for believing that the information is reliable.]

2. There is reasonable cause to believe that the above-described returns and return information are or may be relevant to a matter relating to the possible violations of said criminal statutes. [State the connection between the material requested to be disclosed and the matter in issue related to the commission of the crime and facts sufficient for the court to find that such connection exists.]

3. The returns and return information are sought exclusively for use in a Federal investigation or proceeding concerning the possible violations of the criminal statutes described above, [including a Grand Jury investigation now pending [or which is anticipated to commence] in this District.]

4. The returns and return information cannot reasonably be obtained under the circumstances from any other source.

5. Applicant is the United States Attorney [or an Assistant United States Attorney] for the District of _____ and is personally and directly engaged in the investigation and prosecution of matters related to the enforcement of the above-mentioned violations of Title __ [cite title] of the United States Code, to which the United States is or may be a party. The information sought herein is solely for use for that purpose. No disclosure will be made to any other person except in accordance with the provisions of 26 U.S.C. § 6103 and 26 C.F.R. § 301.6103(i)-1.

6. In addition to applicant, the following individuals are personally and directly engaged in the investigation of the above-mentioned violations, and applicant therefore requests that disclosure be permitted to

the following:

[State names and titles of the agents and any other AUSAs involved in the investigation.]

NOTE: State and local police and other non-Federal agents who may be working on the investigation or task force may not be given access to returns and return information, unless they have been deputized as Deputy United States Marshals and are supervised by a Federal employee.]

7. Applicant further states that the subject of this Application is the subject of a pending investigation in this District, publication of the Application and Order would compromise that investigation, and the failure to seal the Application and Order would result in the public disclosure of confidential information relating to the identified taxpayer and entities related to him.

WHEREFORE, the Applicant respectfully requests this Court to enter an Order under seal granting disclosure by the Internal Revenue Service of the returns and return information specified in this Application, and further ordering that this Application be filed and maintained under seal.

Respectfully submitted,

United States Attorney
[Assistant United States Attorney]

[As noted, the United States Attorney must personally sign the section 6103(i) application or authorize the application for the (i) order. Some districts follow the practice of having an Assistant United States Attorney apply for the order and having the United States Attorney sign an authorization for the application. A sample of that authorization appears below. The Tax Division recommends that this practice be followed where an Assistant United States Attorney applies for the (i) order.]

AUTHORIZATION FOR EX PARTE APPLICATION

The undersigned, being the United States Attorney for the District of _____, pursuant to Title 26, United States Code, Section 6103(i)(1), hereby authorizes the foregoing Application for Ex Parte Order for Disclosure of Tax Returns and Return Information.

Dated: _____
United States Attorney

Sample 6103(i)(1) Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

IN RE: _____) Case No. _____
Investigation of _____)
)
) ORDER (UNDER SEAL)
)

The Court having received and considered the Application of the United States for an Ex Parte Order, pursuant to Title 26, United States Code, Section 6103(i), directing the Internal Revenue Service to disclose certain returns and return information in connection with the above-referenced investigation, and good cause appearing, the Court FINDS:

1. There is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act or acts have been committed, namely, [cite statutes violated].
2. There is reasonable cause to believe that the return and return information is or may be relevant to a matter relating to the commission of such act or acts.
3. The returns and return information are sought exclusively for use in a federal criminal investigation and proceeding concerning such act or acts, and the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.
4. Applicant, United States Attorney _____ [or Assistant United States Attorney _____] and [any other AUSAs and agents] are employees of the United States Department of Justice [and, in the case of deputized state or local personnel, are acting under the direction and control of Applicant] and are personally and directly engaged in, and the information sought is solely for their use in, the investigation of possible violations of the above-mentioned criminal statutes.

IT IS, THEREFORE, ORDERED that the Internal Revenue Service (1) disclose such returns and return information of:

[Set forth the persons, entities, social security numbers and taxable periods]

as have been filed and are on file with the Internal Revenue Service; (2) certify where returns and return information described above have not been filed or are not on file with the Internal Revenue Service; and (3) disclose such returns and return information described above as may come into the possession of the Internal Revenue Service subsequent to the date of this order, but for not longer than [Set forth number of days up to one year, usually 180 days] days thereafter.

IT IS FURTHER ORDERED that the Applicant, or any other officers or employees of any federal agency, shall use the returns and return information disclosed solely in investigating the alleged violations specified and preparing the matter for trial, and that no disclosure be made to any other person except in accordance with the provisions of Title 26, United States Code, Section 6103.

IT IS FURTHER ORDERED that the Clerk of Court shall seal both the Application and this Order, and that the Application and Order shall remain under seal unless and until further order of this Court.

DATED this _____ day of _____, 20__.

United States Magistrate Judge
United States District Court
District of _____

FN 1. See Appendix immediately following this chapter for samples of both an application for Section 6103(i)(1) order and a Section 6103(i)(1) order.

FN 2. The term "disclosure" means the "making known to any person in any manner whatever a return or return information." Section 6103(b)(8).

FN 3. Section 6103(p) imposes an obligation upon agencies and individuals that receive returns and return information to restrict access to the information to only those individuals authorized to use it, to safeguard the information in the manner prescribed by the IRS, to handle copies in the same manner as originals, to maintain the information in a secure location, and to return the information to the IRS or destroy it when it is no longer needed.

FN 4. Unlike many other sections of the statute, § 6103(h)(1) does not require a written request for disclosure: "Returns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for tax administration purposes." 26 U.S.C. § 6103(h)(1).

FN 5. In some non-tax criminal investigations, the IRS designates some aspects of the case, such as currency reporting violations and money laundering charges, as related to tax administration and provides returns and return information to the prosecutor under section 6103(h)(1) using the so-called "related statute call" procedures. That return information may not be used in the non-tax portion of the investigation because it does not satisfy the Regulation's requirement that the tax-related portion of the investigation be approved by the Tax Division before the returns and return information may be used in the non-tax portion of the investigation. See Treas. Reg. 301.6103(h)(2)-1(a)(2)(ii).

FN 6. For a discussion of "directly related," see *Tavery v. United States*, 32 F.3d 1423, 1429 (10th Cir. 1994).

FN 7. The return information of a third party witness may not be used to collaterally impeach that witness unless either the item or transaction test has been met. *United States v. McManus*, 651 F. Supp. 382 (D. Md. 1987), *aff'd*, 826 F.2d 1061 (4th Cir. 1987) (unpublished decision).

FN 8. Section 6103(i) does not permit the IRS to disclose return information for use in a civil case or a civil forfeiture case. *United States v. \$57,303 in U.S. Currency*, 737 F. Supp. 1041, 1042 (C.D. Ill. 1990). However, return information obtained by a prosecutor for use in a non-tax criminal investigation or prosecution may be subsequently used in a "related" civil forfeiture proceeding if the requirements of section 6103(i)(4) are met (that the court determine that the material is "probative" of an issue in the proceeding). *United States v. 3814 N.W. Thurman Street*, 1996 WL 453043 (D. Ore. 1996); *\$57,303 in U.S. Currency*, 737 F. Supp. at 1043.

FN 9. The unauthorized examination of computerized taxpayer information may also be prosecuted under 18 U.S.C. ' 1030(a)(2)(B). Anyone who intentionally accesses a computer "without authorization or exceeds authorized access, and thereby obtains . . . information from any department or agency of the United States" may be imprisoned for a year, or fined, or both.

FN 10. Under section 7431, "costs" do not include attorney's fees. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 720 (1967). Attorney's fees are awarded to section 7431 litigants under 26 U.S.C. ' 7430, which allows for the recovery of reasonable litigation costs. *Huckaby v. United States*, 804 F.2d 297, 298 (5th Cir. 1986).

FN 11. The U.S. Attorney's authority to authorize an application for an order under section 6103(i) may not be delegated. The U.S. Attorney either must personally sign the section 6103(i) application or authorize the application.