

[Criminal Tax Manual](#)

[prev](#) • [next](#)

TABLE OF CONTENTS

42.00 RESTRICTIONS ON OBTAINING AND USING “TAX RETURNS,” “TAXPAYER RETURN INFORMATION,” AND “RETURN INFORMATION”	1
42.01 STATUTORY LANGUAGE: 26 U.S.C. § 6103(a)	1
42.02 GENERALLY.....	1
42.03 THE STATUTORY STRUCTURE.....	2
42.03[1] Generally	2
42.03[2] Status of Return Information With Respect to the Non-Disclosure Rules of § 6103 After the Information Has Been Made Public	3
42.04 “RETURN INFORMATION” DEFINED: 26 U.S.C. § 6103(b)	6
42.04[1] Generally	6
42.04[2] Information Obtained from Non-IRS Sources Is Not “Return Information”	7
42.05 PERMISSIBLE DISCLOSURES OF RETURNS AND RETURN INFORMATION.....	7
42.05[1] Generally	7
42.05[2] Section 6103(h) -- Disclosure to Certain Federal Officers and Employees for Purposes of Tax Administration, etc.	9
42.05[3] Disclosures to the Department of Justice for Tax Administration	10
42.05[3][a] Procedures for Disclosure	12
42.05[3][b] Joint Tax/Non-Tax Criminal Investigation.....	13
42.05[3][c] Investigative Disclosures	13
42.05[3][d] Disclosure in Judicial and Administrative Tax Proceedings	14
42.05[4] Section 6103(i) - Disclosure to Federal Officers or Employees for Administration of Federal Laws Not Related to Tax Administration.....	16
42.05[4][a] Generally.....	16
42.05[4][b] Disclosure Pursuant to Court Order: Tax Returns and Taxpayer Return Information.....	16
42.05[4][c] Application for the Order.....	17
42.05[4][d] Use or Further Disclosure of Returns and Return Information in Judicial Proceedings.....	18
42.05[4][d][i] Returns and Taxpayer Return Information	18
42.05[4][d][ii] Other Return Information Obtained by Letter	18

42.05[4][d][iii] Withholding Return Information and Suppression.....	18
42.05[4][d][iv] Disclosure of Return Information For Other Purposes	19
42.05[5] Disclosure of Return Information Relating to Terrorist Activities	20
42.06 REMEDIES FOR VIOLATIONS OF § 6103	22
42.06[1] Criminal Sanctions	22
42.06[2] Civil Remedies	23
APPENDIX.....	25
Sample Application For Section 6103(i)(1) Order	25
Sample 6103(i)(1) Order.....	29
Sample Motion for a Protective Order.....	31

**42.00 RESTRICTIONS ON OBTAINING AND USING “TAX RETURNS,”
“TAXPAYER RETURN INFORMATION,” AND “RETURN INFORMATION”**

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

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 law enforcement agency receiving information under subsection (i)(7)(A), any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(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 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). 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, at its 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) & (3)). 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. *See* Appendix immediately following this chapter for samples of both an application for a Section 6103(i)(1) order and an order under Section 6103(i)(1). 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. 26 U.S.C. § 6103(i)(4)(A)(i).

A willful violation of the provisions of section 6103 is punishable as a felony and by dismissal from Federal service, *see* 26 U.S.C. 7213(a)(1), while a negligent violation subjects 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. The term “disclosure” means the “making known to any person in any manner whatever a return or return information.” 26 U.S.C. § 6103(b)(8). Section 6103(b) also defines “return,” “return information,” and “taxpayer return information.” Sections 6103(c) - (o) contain the exceptions that allow disclosure of returns and return 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. 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. 26 U.S.C. § 6103(p)(4).

42.03[2] Status of Return Information With Respect to the Non-Disclosure Rules of § 6103 After the Information Has Been Made Public

Section 6103 contains no language that lifts the prohibition against disclosure after return information has been disclosed in public, such as in a judicial proceeding. There is a split of authority as to whether the disclosure restrictions of Section 6103 nevertheless cease to apply once return information has been made public in a judicial proceeding. The cases are described in IRS Publication 4639, *Disclosure & Privacy Law Reference Guide* at 2-26 - 2-28 (Oct. 2007):

1. The Ninth Circuit has held that tax information actually placed in and made a part of the public record is no longer subject to section 6103's disclosure restrictions.

a. William E. Schrambling Accountancy Corp. v. United States, 937 F.2d 1485, 1489 (9th Cir. 1991) (information contained in Notice of Federal Tax Lien and bankruptcy petition are no longer confidential, therefore disclosure did not violate section 6103), *cert. denied*, 502 U.S. 1066 (1992).

b. Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988) (once tax return information is made a part of the public domain, that taxpayer can no longer claim a right of privacy in that information), *cert. denied*, 490 U.S. 1034 (1989). The Ninth Circuit's opinion affirmed three district court decisions: Peinado v. United States, 669 F. Supp. 953 (N.D. Cal. 1987); Lampert, 1987 WL 48210 (N.D. Cal. Apr. 8, 1987); and Figur v. United States, 662 F. Supp. 515 (N.D. Cal. 1987).

c. Tanoue v. IRS, 904 F. Supp. 1161 (D. Haw. 1995) (only those items of information actually placed in and made a part of the public record are no longer subject to section 6103's disclosure restrictions).

2. The Sixth Circuit has held that tax information that has been made public in connection with recording a federal tax lien is no longer protected by section 6103, but has not ruled with respect to disclosures made in judicial proceedings. *See* Rowley v. United States, 76 F.3d 796, 801-02 (6th Cir. 1996) (general rule of confidentiality not applicable

where information was disclosed in tax lien filings and later disclosed in notices of sale which were made for tax administration purposes).

3. The Fourth Circuit has relied on the absence of an express exception in section 6103 to find that the otherwise unauthorized release of previously publicized return information violates section 6103. Mallas v. United States, 993 F.2d 1111, 1120-21 (4th Cir. 1993) (even to the extent that the revenue agent's reports repeated information otherwise available to the public, they still fell within the broad definition of return information).

4. The Seventh Circuit has adopted a hybrid test referred to as the "immediate source" test, i.e., "that the definition of return information comes into play only when the immediate source of the information is a return, or some internal document based on a return, as these terms are defined in § 6103(b)(2), and not when the immediate source is a public document lawfully prepared by an agency that is separate from the Internal Revenue Service and has lawful access to tax returns." Thomas v. United States, 890 F.2d 18, 21 (7th Cir. 1989) (IRS's release of court's opinion in tax case to newspaper which then published article based on the decision was not an unauthorized disclosure because the information was obtained from the court's opinion).

5. The Third Circuit has not ruled on this issue in a published opinion. It issued a summary opinion in Barnes v. United States, 17 F.3d 1428 (table cite) (3d Cir. 1994), affirming the district court's adoption of the Magistrate's Report and Recommendation. *See* 1991 U.S. Dist. LEXIS 21633, at **14-15 (W.D. Pa. Aug. 2, 1991) (magistrate's recommendation), adopted at 1991 U.S. Dist. LEXIS 12883 (W.D. Pa. Aug. 27, 1991). The Magistrate, citing Cox and Lampert, concluded that a press release announcing an indictment issued by the U.S. Attorney's office was not an unauthorized disclosure because the information was already a matter of public record.

6. The Eighth Circuit cited Thomas, in an unpublished opinion with little analysis or discussion, to approve of disclosures based upon public record information. Noske v. United States, 998 F.2d 1018, 1993 WL 264531 (8th Cir. Jul. 15, 1993) (no unauthorized disclosure of return information when the IRS provided a copy of a district court opinion to the local paper).

7. The Tenth Circuit has adopted the Seventh Circuit approach. *See* Rice v. United States, 166 F.3d 1088, 1091(10th Cir.) (press release issued based on public affairs officer's attendance at trial, and not on IRS documents, was not an unauthorized disclosure), *cert. denied*, 528 U.S. 933 (1999). *But see* Rodgers v. Hyatt, 697 F.2d 899, 904, 906 (10th Cir. 1983) (an IRS Agent's in court testimony at a summons enforcement

hearing did not authorize the agent's subsequent out of court statements to a third party regarding an ongoing investigation where the agent actually obtained his confidential information from the taxpayer's tax return and not at the public hearing).

8. The Fifth Circuit also applies the "immediate source" test, thereby implicitly adopting the Seventh Circuit's approach in Thomas v. United States.

a. Johnson v. Sawyer, 120 F.3d 1307, 1323 (5th Cir. 1997) (IRS permitted to issue a press release from court documents or proceedings, however, where information in press release came from IRS records, an unauthorized disclosure has occurred).

b. Harris v. United States, No. 01-20543, 35 Fed. Appx. 390, 2002 WL 760887 (5th Cir. Apr. 17, 2002) (revenue officer who disclosed that the plaintiffs had a judgment filed against them for a specific amount had acted in a good faith belief that the disclosure was permitted as a disclosure of information in the public record), *cert. denied*, 538 US 922 (2003).

The IRS has taken the following position with respect to public record information:

Although section 6103 bars disclosure of tax information taken directly from IRS files, it does not ban the disclosure of information that is taken from the public court record. The IRS's legal position has confined the disclosure of public record information to tax information that has been made a matter of public record in connection with tax administration activity. The following provides a framework for analyzing public record information.

A. Return information loses any confidential status if it becomes a matter of public record. Returns and return information that have become public as a result of actions taken by, or on behalf of, the IRS are no longer subject to the confidentiality provisions of the Code and may be provided to a third party requester. Great care should be exercised in determining whether tax information has actually become a matter of public record, as information supplemental to that which has become public is subject to the confidentiality provisions. . . .

B. Information made public by a taxpayer or third party does not affect the confidentiality of identical return or return information in the possession of the IRS. Thus, the IRS cannot use return information to confirm information made public by any other party unless specifically authorized to do so by section 6103. For example, if a Fortune 500 company

announces that the IRS is auditing its inventory accounting practices for purposes of determining income, the IRS cannot confirm that announcement because there is no statutory authority permitting the IRS's disclosure.

C. Information that has become public, which is not publicly connected with tax administration, remains confidential in the hands of the IRS. The IRS draws a distinction between general public record information (*e.g.*, decrees of divorce, mortgage deeds of trust) and return information that has become a matter of public record through tax administration activity in determining whether the information can be disclosed. By permitting the release of return information only after it has become a matter of public record in connection with tax administration, the IRS avoids linking otherwise innocuous public information with a person's tax liability.

D. See IRM 11.3.11.13 (5/2005), Information Which Has Become Public Record, for further explanation.

To avoid problems under Section 6103, prosecutors should not make any out-of-court disclosures of return information received from the Internal Revenue Service, whether or not the information has lawfully been made public. Prosecutors should exercise great care to ensure that any case information provided to the press or any other proper recipient comes only from publicly available information, such as an indictment. *See, e.g.,* [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 3, *supra*.

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

42.04[1] Generally

Section 6103(b) defines three categories of information: "returns," "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. 26 U.S.C. § 6103(b)(1). "Return information" is essentially any information that relates to a taxpayer and that has been received by, recorded by, prepared by, furnished to, or collected by the Internal Revenue Service. 26 U.S.C. § 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 that the IRS has collected). “Taxpayer return information” is “return information” that is filed with, or furnished to, the IRS by or on behalf of the taxpayer to whom the return information relates. See 26 U.S.C. § 6103(b)(3). It would include, for example, financial statements, offers in compromise, “defier” 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 Federal Rule of Criminal Procedure 6(e)(3)(A)(ii), 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. United States*, 831 F.2d 893, 894-97 (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, §§ 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, 454-55 (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).¹

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 owing more than 1 percent of the outstanding stock of a corporation in the case of a corporate return, etc.). *See, e.g., Solargistic Corp. v. United States*, 921 F.2d 729, 731 (7th Cir. 1991) (concluding that investors in tax shelter may be advised of audit); *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 or employees of the White House designated by the President.

¹ 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. *See* 28 C.F.R. § 0.112 (empowering Director of the U.S. Marshals Service to deputize “[s]elected . . . state [] or local law enforcement officers whenever the law enforcement needs of the U.S. Marshals Service so require”)

6. Section 6103(j) -- Disclosure of returns and return information to be used in structuring the census and conducting related statistical analyses.

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).

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.

9. Section 6103(m) -- Disclosure of taxpayer identity information to various agencies and individuals.

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, 901-04 (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. Section 6103(h) governs the disclosure of return information to specified federal officers and employees for purposes of tax administration, including criminal and civil tax litigation. Section 6103(h)(1) provides authority for employees of the

Department of the Treasury to have access to returns and return information as needed for tax administration purposes. See *Gardner v. United States*, 213 F.3d 735, 738-39 (D.C. Cir. 2000); *First Western Govt. Securities, Inc. v. United States*, 796 F.2d 356, 360 (10th Cir. 1986). 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).

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 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 *Hobbs v. United States ex rel. Russell*, 209 F.3d 408, 401-11 & n.2 (5th Cir. 2000) (“The courts that have considered whether certain activities qualify as ‘tax administration’ uniformly have defined the term broadly”); *Tavery v. United States*, 32 F.3d 1423, 1429 n.7 (10th Cir. 1994); *Rueckert v. Internal Revenue Service*, 775 F.2d 208, 209-12 (7th Cir. 1985); *United States v. Mangan*, 575 F.2d 32, 40 (2nd Cir. 1978).

Second, the disclosure may be made only to those attorneys who are “personally and directly” involved in a proceeding, or investigation that may lead to a proceeding, regarding a 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 return information and for any subsequent disclosures. Those individuals are permitted to disclose the returns and return information to their supervisors and to support staff assisting with an investigation or judicial proceeding. 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 subparagraphs (A), (B), and (C), which are commonly referred to as the “party,” “item,” and “transaction” tests respectively. 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, 1048-49 (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 324-26 (1976), as reprinted in 1976 U.S.C.C.A.N. 3753-56.

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* 26 U.S.C. § 6103(h)(3)(A); ***United States v. Batcheler***, 611 F.2d 443, 447 (3d Cir. 1979). The section contains no definition of a “referral,”² but the legislative history of the statute indicates that for purposes of Section 6103(h), “the referral of a tax matter by the IRS to the Justice Department would include those disclosures made by the IRS to the Justice Department in connection with the necessary solicitation of advice and assistance with respect to a case prior to a formal referral of the entire case to the Justice Department for defense, prosecution or other affirmative action.” Staff of Joint Comm. on Taxation, 94th Cong., 2d Sess., *General Explanation of the Tax Reform Act of 1976*, 322 (1976), *quoted in McQueen v. United States*, 5 F. Supp. 2d 473, 488 n.31 (S.D. TX 1998), *aff’d*, 176 F.3d 478 (5th Cir. 1999). In ***McQueen***, the court held that there had been a referral under Section 6103(h) where an IRS agent had made a disclosure to an Assistant United States Attorney solely for the purpose of helping the IRS obtain a search warrant for an IRS administrative investigation of a possible criminal violation of the Internal Revenue Code. 5 F. Supp. 2d at 488-89 & n.31. Further, a formal referral by the IRS does not lose its character as a “referral” merely because an investigation originates with the Department of Justice rather than the Internal Revenue Service. ***United States v. Batcheler***, 611 F.2d 443, 448 (3d Cir. 1979).

In those instances in which 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.³ The written request must set forth the need for disclosure of the

² A definition of “referral” applicable to the use of administrative summonses is set forth in 26 U.S.C. § 7602(d) (“A Justice Department referral is in effect with respect to any person if -- (i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or (ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.”)

³ The specificity of the statute suggests that the authority to request returns and return information by letter is limited to the specified officials and cannot be delegated. *See United States v. Mangan*, 575 F.2d 32, 39 (2d Cir. 1978) (“When Congress chooses to speak with such specificity, courts must heed its language.” (citing ***United States v. Giordano***, 416 U.S. 505 (1974))).

specific return or specific return information. Upon such a request, the Secretary “shall disclose” the return or return information. 26 U.S.C. § 6103(h)(3)(B).

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

Section 6103 does not explicitly provide for the use, in the non-tax portion of a joint tax/non-tax investigation, of returns and return information obtained under Section 6103(h). However, an IRS regulation, Treas. Reg. § 301.6103(h)(2)-1, does provide for such use under specific limited conditions. The regulation authorizes the use of returns and return information in the non-tax portion of an investigation pursuing both tax and non-tax charges where (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 non-tax portion of the investigation involves or arises out of the particular facts and circumstances giving rise to the tax portion of the case. Treas. Reg. § 301.6103(h)(2)-1(a)(2)(ii). The regulation also provides that if the tax administration portion of the investigation is terminated, the prosecutor cannot continue to use the returns and return information without obtaining an order under section 6103(i). Treas. Reg. § 301.6103(h)(2)-1(a)(2)(ii). Because of the statute’s silence on the use of returns and return information addressed by Treas. Reg. § 301.6103(h)(2)-1, the Tax Division believes that the most prudent course for prosecutors is to obtain an order under Section 6103(i) before using returns or tax return information in their possession for the non-tax portion of a joint tax/non-tax investigation.

42.05[3][c] Investigative Disclosures

Section 6103(h) contains no specific provision for investigative disclosures by federal prosecutors. However, the regulations do allow disclosure of returns and return information by federal prosecutors under certain circumstances. Authorized disclosures include, but are not limited to, disclosures made (1) to accomplish any purpose or activity of the nature described in Section 6103(k)(6) (*i.e.*, obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of the Internal Revenue Code); (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. Treas. Reg. § 301.6103(h)(2)-1(b). Disclosure of return or taxpayer return information for such

purposes is permitted only in those instances in which the proper purpose of section 6103(h) cannot be accomplished without the disclosure.⁴

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

Section 6103(h)(4) governs the Department's dissemination of a tax return or tax return information in judicial and administrative tax proceedings. The Section allows disclosure under "party," "item," and "transaction" tests similar to those in Section 6103(h)(2). 26 U.S.C. § 6103(h)(4)(A), (B), (C). It also authorizes disclosure "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," but permits the court "to give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in this title." 26 U.S.C. § 6103(h)(4)(D). The statute further provides, however, that "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." 26 U.S.C. § 6103(h)(4).

Since the bases for disclosure are worded in the disjunctive, a return or return information may be disclosed in a judicial proceeding, pursuant to section 6103(h)(4), as long as any one of the four listed criteria is met. *See, e.g., Tavery v. United States*, 32 F.3d 1423, 1430 (10th Cir. 1994); *Hobbs v. United States ex rel. Russell*, 209 F.3d 408, 411 (5th Cir. 2000) (holding that district court did not err in concluding that plaintiff could not maintain a suit for violation of Section 6103, because IRS properly disclosed his tax return information under Section 6103(h)(4)(A)); *Rice v. United States*, 166 F.3d 1088, 1092 (10th Cir. 1999) (holding that revelation of return information in trial proceedings was proper "under the exception to § 6103 allowing such disclosure in federal court where the taxpayer is a party to the proceedings. 26 U.S.C. §

⁴ Prosecutors should be aware that investigative disclosures have come under fire in the courts, sometimes with bizarre results. For example, in *Snider v. United States*, 468 F.3d 500 (8th Cir. 2006), a decision as to which the IRS issued an action on decision stating its nonacquiescence, action on dec., 2007-03, 2007 WL 2172814 (Jul. 23, 2007), a panel of the Eighth Circuit held that an agent violates section 6103 "when he or she identifies the subject of his or her investigation." 468 F.3d at 507. The panel found that "[t]he government has neither shown that the disclosure of the Taxpayers' identity was necessary nor does the record reveal any necessity for the disclosures." *Id.* The panel did not explain, however, how, without disclosing the identity of the taxpayer under investigation, an agent could avoid confusing a third-party witness about the nature and scope of the investigation or how the absence of such a disclosure would not have an adverse impact on accuracy and reliability of the information provided by the third-party witness. *See* Action on Decision 2007-03 (discussion of issue 1). Decisions such as *Snider* add uncertainty and risk to the use of disclosures of return and return information in investigations.

6103(h)(4)(A)"). 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 for disclosure 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, under 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. See *Tavery v. United States*, 32 F.3d 1423, 1429 (10th Cir. 1994) (containing a discussion of "directly related"); *United States v. Tsanas*, 572 F.2d 340, 348 (2d Cir. 1978).

Finally, Section 6103(h)(4)(D) allows the prosecutor to produce returns and return information when ordered to do so by a court to meet the government's discovery obligations. Standing court rules providing for discovery should be sufficient to meet the requirement for a court order, but we are not aware of any cases on point. Although Section 6103(h)(4)(D) specifically refers only to Federal Rule of Criminal Procedure 16 and 18 U.S.C. § 3500, it has been held that the statute does not preclude the disclosure of exculpatory information under *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Giglio*, 405 U.S. 150 (1972). *United States v. Dawes*, Nos. 88-10002-01, 90-10036-01 and 88-10002-02, 1990 WL 171074, at *4 (D. Kan. Oct. 15, 1990) ("If the United States Attorney has knowledge of and access to IRS records showing certain government witnesses, whose testimony and credibility are material to the guilt of the defendants, are the subject of a current IRS audit or investigation, those records should be disclosed as *Brady* material.). Further, the IRS generally complies with court orders requiring disclosure of exculpatory information under *Brady* and *Giglio*. See IRS Publication No. 4639, *Disclosure and Privacy Law Reference Guide* at 12-18 (Oct. 2007 ed.). In Publication No. 4639, the IRS advises that, where there is such an order, "the United States should request the court to conduct an *in camera* review of any third party

return information located. If, after *in camera* review, the court rules that the Constitution requires information to be provided to the defendant, the United States should request a disclosure order that also imposes upon the parties conditions restricting the use of the information solely to the instant case, and preventing dissemination by any person in any manner outside the instant proceeding. For sample language of an appropriate protective order, see *United States v. Moriarty*, 1969 U.S. Dist. LEXIS 12657, at *1 (E.D. Wis. Jan. 3, 1969).”

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 non-tax criminal investigations and prosecutions under certain conditions. The statute distinguishes between information obtained from the taxpayer or his representative and other return information. Section 6103(i) provides that a federal agency enforcing a non-tax 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 “*any* return or return information . . . shall, pursuant to and 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 non-tax criminal investigation purposes. 26 U.S.C. § 6103(i)(1) (emphasis added). 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 non-tax 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, any 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 return information in non-tax 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 relevant 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 Hampers*, 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 26 U.S.C. § 6103(i)(2).⁵ Under Section 6103(i)(2), non-taxpayer return information may be disclosed pursuant to a simple written request. The request must include (1) the name and address of the taxpayer to whom the requested information relates, (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. 26 U.S.C. § 6103(i)(2)(B). Officials authorized to make the written request are the head of any federal agency or its Inspector General, and, 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

⁵ As with respect to disclosure of tax returns and return information, the purposes for which the return information that is not taxpayer 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 non-tax criminal statute. 26 U.S.C. § 6103(i)(2)(A)(i)-(iii).

Investigation, the Administrator of the Drug Enforcement Administration, any United States Attorney, any special prosecutor appointed under 28 U.S.C. § 593, and any attorney in charge of a criminal division-organized crime strike force. *See* 26 U.S.C. § 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] Returns and Taxpayer Return Information

Under Section 6103(i)(4)(A), returns and taxpayer return information obtained by way of an *ex parte* court order pursuant to 26 U.S.C. 6103(i)(1) or 26 U.S.C. 6103(i)(7)(C)⁶ may be disclosed in non-tax criminal cases or related civil forfeiture proceedings upon a finding by the court that the information is probative of an issue in the proceeding or upon issuance of an order requiring production of the information under the Jencks Act (18 U.S.C. § 3500) or Rule 16 of the Federal Rules of Criminal Procedure.

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 without an order in a non-tax criminal case or related civil forfeiture proceeding to which the United States or a federal agency is a party. Even if such other return information was obtained along with taxpayer return information under 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 the Treasury determines, and notifies the Attorney General or his or her delegate or the head of the federal agency concerned, that such admission would reveal the identity of a confidential informant or would otherwise impair a tax

⁶ Section 6103(i)(7)(C), which relates to disclosures pursuant to an *ex parte* court order of return information relating to terrorist activities, expired effective December 31, 2007, but legislation that would make the subsection permanent is currently pending in Congress. See paragraph [42.05\[5\]](#), *infra*.

investigation. *See* 26 U.S.C. § 6103(i)(4)(C). Any improper admission of evidence under the subsection is not, as such, reversible error. *See* 26 U.S.C. § 6103(i)(4)(E).

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 subsequently be used in a “related” civil forfeiture proceeding if the requirements of Section 6103(i)(4) are met (*i.e.*, the court must 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.

The imposition of the exclusionary rule is not warranted for a disclosure of return information that violates Section 6103. Congress has specifically provided civil (26 U.S.C. 7431) and criminal (26 U.S.C. 7213) penalties for violations of Section 6103 and, absent specific reference to an exclusionary rule, it is not appropriate for courts to read such a provision into the act. *See United States v. Orlando*, 281 F.3d 586, 595-95 (6th Cir. 2002) (criminal case); *Nowicki v. Commissioner*, 262 F.3d 1162, 1163-64 (11th Cir. 2001) (civil case); *United States v. Thompson*, 936 F.2d 1249, 1250-51 (11th Cir. 1991) (in criminal case, government’s failure to comply with a statute does not warrant application of exclusionary rule).

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

Return information may be disclosed, upon application of a specified person for an *ex parte* court order, for the purpose of locating a fugitive charged with a federal felony. *See* 26 U.S.C. § 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 not involving tax administration 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.

42.05[5] Disclosure of Return Information Relating to Terrorist Activities

The Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, amended Section 6103 to provide for disclosure of return information for responding to or investigating terrorist incidents, threats, or activities, and for analyzing intelligence concerning terrorist incidents, threats, or activities. *See* 26 U.S.C. §§ 6103(i)(3)(C) & 6103(i)(7). The authority under these provisions terminated, however, on December 31, 2007. 26 U.S.C. §§ 6103(i)(3)(C)(iv) & 6103(i)(7)(E). Legislation that would eliminate the sunset provisions is currently pending in Congress. *See* H.R. 6049, 110th Cong. (2d Sess.) § 251 (2008); S. 3125, 110th Cong. (2d Sess.) § 251 (2008). Unless and until legislation eliminating the sunset provisions is enacted, disclosure of return information relating to terrorist activities is not permitted, unless such disclosure falls under one of the other provisions of 26 U.S.C. § 6103.

Section 6103(i)(3)(C) permitted the Secretary of the Treasury to disclose, in writing, return information (other than taxpayer return information) that might be related to a terrorist incident, threat, or activity to the extent necessary to apprise the head of the appropriate federal law enforcement agency responsible for investigating or responding to that terrorist incident, threat, or activity. In turn, the head of the agency was allowed to disclose such return information to agency officers and employees to the extent necessary to investigate or respond to the terrorist incident, threat, or activity. 26 U.S.C. § 6103(i)(3)(C)(i). Information also was permitted to be provided under this provision to the Attorney General to the extent necessary for, and solely for use in preparing, an application under 26 U.S.C. § 6103(i)(7)(D), for an *ex parte* disclosure order. 26 U.S.C. § 6103(i)(3)(C)(ii). However, return information was not to be disclosed if it would result in the identification of a confidential informant, or would otherwise seriously impair a tax investigation. *See* Section 6103(i)(6).

Section 6103(i)(7) provided for disclosure of return information (other than taxpayer return information) relating to terrorist activities upon written request to the Secretary of the Treasury by certain officers and employees of a federal law enforcement agency or federal intelligence agency. The officers and employees to whom disclosure was made were required to be personally and directly engaged in an investigation of,

response to, or analysis of intelligence and counterintelligence information concerning any terrorist incident, threat, or activity. These officers and employees were permitted to use this information solely in the investigation, response, or analysis, and in any judicial, administrative, or grand jury proceeding, pertaining to any such terrorist incident, threat, or activity. 26 U.S.C. § 6103(i)(7)(A) - (B). However, return information was not to be disclosed if it would result in the identification of a confidential informant or would otherwise seriously impair a tax investigation. *See* 26 U.S.C. § 6103(i)(6).

A request by a federal law enforcement agency had to be made by the head of the federal law enforcement agency (or delegate) involved in the response to or investigation of any terrorist incident, threat, or activity. The request was required to set forth the specific reason(s) why the requested disclosure might have been relevant to a terrorist incident, threat, or activity. 26 U.S.C. § 6103(i)(7)(A)(iii).

For a disclosure to an intelligence agency, the request was required to be made by a Presidentially appointed and Senate-confirmed officer or employee of the Department of Justice or the Department of the Treasury, or by the Director of the United States Secret Service. In addition, this official had to be responsible for the collection and analysis of intelligence and counterintelligence information concerning any terrorist incident, threat or activity. The request was required to set forth the specific reason(s) why the disclosure sought might have been relevant to a terrorist incident, threat, or activity. 26 U.S.C. § 6103(i)(7)(B)(ii)-(iii).

Section 6103(i)(7)(C) also provided for disclosure of returns or return information relating to a terrorist incident, threat or activity, pursuant to an *ex parte* order. The Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, or any United States Attorney was permitted to authorize an application to a Federal district court judge or magistrate for an order under this Section. A Federal district court judge or magistrate judge was permitted to grant an *ex parte* order if, based on the facts submitted, he or she determined (1) that there was reasonable cause to believe, based upon information believed to be reliable, that the return or return information might have been relevant to a matter relating to the terrorist incident, threat, or activity; and (2) that the return or return information was sought exclusively for use in a federal investigation, analysis, or proceeding concerning any terrorist incident, threat, or activity. 26 U.S.C. § 6103(i)(7)(C)(ii).

This information was permitted to be disclosed (but only to the extent necessary as provided in the order) to officers and employees of the appropriate federal law enforcement or intelligence agency responsible for investigating or responding to a terrorist incident, threat, or activity to respond to such terrorist incident, threat, or activity. Use of the information was limited to the federal investigation or analysis concerning the terrorist incident, threat, or activity. 26 U.S.C. § 6103(i)(7)(C)(i).

Finally, Section 6103(i)(7)(D) provided a special rule for *ex parte* disclosures by the IRS. In those instances, the Secretary of the Treasury was permitted to authorize an application to a federal district court judge or magistrate for an *ex parte* order under 26 U.S.C. § 6103(i)(7)(C)(i) to disclose information to the extent necessary to apprise the head of the appropriate federal law enforcement agency responsible for investigating or responding to a terrorist incident, threat, or activity and solely for use in a federal investigation, analysis or proceeding concerning any terrorist incident, threat, or activity.

42.06 REMEDIES FOR VIOLATIONS OF § 6103

42.06[1] Criminal Sanctions

Section 7213 of the Internal Revenue Code provides for criminal penalties for willful violations of Section 6103, and Section 7213A provides for criminal penalties for willfully inspecting any return or return information, except as authorized by the Code.

Section 7213 provides that a willful violation of the non-disclosure provisions of section 6103 is a felony, punishable with up to five years in jail, or a fine, or both. *See United States v. Richey*, 924 F.2d 857 (9th Cir. 1991).⁷ 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. 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

⁷ Under the penalty provisions of 18 U.S.C. § 3571, the fine may be as high as \$250,000.

7213A(a)(2) of the Internal Revenue 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.

The unauthorized examination of computerized taxpayer information may also be prosecuted under 18 U.S.C. § 1030(a)(2)(B), which provides that any person 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.

42.06[2] Civil Remedies

Section 7431 of the Internal Revenue Code provides for a civil remedy against the United States for a taxpayer who has been injured by the unlawful disclosure or inspection of his or her tax information by an employee of the United States. Suit may be brought only against the United States; the individual employee who made the improper disclosure or inspection is neither personally liable nor a proper party to the suit.

Diamond v. United States, 944 F.2d 431, 435 (8th Cir. 1991). The United States is not civilly liable for unauthorized disclosures or inspections made by former employees. *See* 26 U.S.C. § 7431(a)(1) (referring only to conduct by "any officer or employee of the United States"). A two-year statute of limitations, which begins to run at the time the taxpayer discovers the disclosure or inspection, applies to actions brought under Section 7431. 26 U.S.C. § 7431(d).

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. *See* 26 U.S.C. § 7431(a). No liability shall attach, however, if the United States shows either that the disclosure or inspection resulted from a good faith, but erroneous, interpretation of Section 6103, or that the disclosure or inspection was requested by the taxpayer. 26 U.S.C. § 7431(b); *see, e.g., Barrett v. United States*, 51 F.3d 475, 479 (5th Cir. 1995) (disclosure of taxpayer information not in good faith when IRS employee did not review Section 6103 and did not secure approval of supervisor before circulating taxpayer's return information).

If successful, the aggrieved taxpayer may recover the greater of actual damages or \$1,000 per improper disclosure, plus court costs. *See* 26 U.S.C. § 7431(c)(1). There is a split of circuit authority as to whether a single act of disclosure to multiple people counts as multiple acts of disclosure. *Compare Siddiqui v. United States*, 359 F.3d 1200, 1202-03 (9th Cir. 2004) (holding that agent's disclosure to 100 people in one room at one time constituted single act of disclosure), *Miller v. United States*, 66 F.3d 220, 223-24 (9th Cir. 1995) (disclosure to newspaper reporter deemed single act of disclosure, even though reporter disseminated information to wider audience), *and 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); *with Snider v. United States*, 468 F.3d 500, 508-09 (8th Cir. 2006) (rejecting government's arguments that a disclosure to more than one person at a time amounts to one act of disclosure and that a disclosure of more than one piece of return information in a single interview constitutes a single act of disclosure), *action on dec. (nonacq.)*, 2007-03 (Jul. 23, 2007), *and Mallas v. United States*, 993 F.2d 1111, 1124-25 (4th Cir. 1993) (holding that single mailing of information to two addressees counted as two acts of disclosure).

In a case in which the unauthorized disclosure or inspection was willful or was the result of gross negligence and the taxpayer presents proof of actual damages, the taxpayer may also recover punitive damages. *See* 26 U.S.C. § 7431(c)(1)(B)(ii); *Siddiqui*, 359 F.3d at 1204.

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,**] [⁸] 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

⁸ 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.

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 criminal 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 such an 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 are 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 90 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 shall 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 Court
District of _____

Sample Motion for a Protective Order
IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA)
)
)
 v.) Case No. _____
)
)
 _____)
 Defendant(s))
)

GOVERNMENT'S MOTION FOR PROTECTIVE ORDER REGARDING
DISCOVERY

The United States, through undersigned counsel, respectfully moves the Court, pursuant to Rule 16(d)(1) of the Federal Rules of Criminal Procedure, to enter an order prohibiting the unauthorized disclosure of certain discovery material or information contained therein to non-litigants. In support of this motion, the government states as follows:

1. Defendant(s) [identify defendant(s) and describe charges in indictment].

2. The voluminous [or describe scope of discovery] discovery materials in this case contain, among other things, private financial information about numerous individuals; other private information, including social security numbers, addresses, and birth dates; and confidential tax returns and taxpayer return information within the meaning of Title 26, United States Code, Section 6103(b). Disclosure of such tax return and taxpayer return information is governed by Title 26 United States Code, Section 6103(a), which mandates that return and return information will be confidential except as authorized by Section 6103. Section 6103(h)(4)(D) permits disclosure to the defense of such tax return

and taxpayer return information in accord with Rule 16 of the Federal Rules of Criminal Procedure and Title 18, United States Code, Section 3500, but further disclosure of this tax return and taxpayer return information by defendants or their attorneys is restricted by Section 6103.

3. The government has followed all requirements of Rule 16, and will follow the requirements of Title 18, United States Code, Section 3500. The government asks the Court to ensure that the defendant(s) is/are informed about the limitations of Federal Rule of Criminal Procedure 6(e), regarding grand jury transcripts [if appropriate], and Title 26, United States Code, Section 6103(a), regarding tax returns and taxpayer return information, and the appropriate legal purposes for which certain discovery may be used.

4. The government believes that because of the volume and nature of the discovery in this case, it is appropriate for the Court to enter a Protective Order containing the following provisions (when the term “defendant” is used, said term encompasses an attorney for the defendant):

A. Many of the materials provided as discovery (hereinafter discovery materials), which were produced by the government in preparation for or in connection with any stage of the proceedings in this case, including, but not limited to: individuals’ records, investigators or agency memoranda or reports, grand jury transcripts, witness statements, tapes, computer disks, transcripts, applications, affidavits, computer or electronic records, memoranda of interview, tax returns, correspondence with the Internal Revenue Service, internal books and records of a witness’s or defendant’s business, bank records, and any documents and tangible objects provided by the government other than trial exhibits (i.e., items actually admitted during the trial and made part of the record), are not public information. Accordingly, these discovery materials and all copies thereof should be protected from unnecessary dissemination.

B. Such discovery materials provided by the United States should be utilized by the defendant(s) solely in connection with the defense of this case and for no other purpose and in connection with no other proceeding.

C. Such discovery materials and their contents, and any notes or other record of such materials or their contents, should not be disclosed either directly or indirectly to any person or entity other than the defendant(s), defendant(s)’ counsel, persons employed to assist in the defense, individuals who are interviewed as potential witnesses in the case, or such other persons as to whom the Court may authorize disclosure.

D. Such discovery materials should not be copied or reproduced except as necessary to provide copies of the material for use by an authorized person as described

above to prepare or assist in the defense, and all such copies and reproductions will be treated in the same manner as the original matter.

E. [Each] Defendant's counsel should inform the defendant of the provisions of the Protective Order, and direct him/her not to disclose or use any information contained in the government's discovery in violation of the Protective Order. However, nothing contained in the Protective Order will preclude any party from applying to the Court for further relief or for modification of any provision hereof.

Respectfully submitted,

United States Attorney
[Assistant United States Attorney]

Sample Proposed Protective Order

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA)
)
) Case No. _____
 v.)
)
 _____)
 Defendant(s))
)

ORDER

THIS MATTER having come before the Court on the motion of the United States of America, by and through its undersigned counsel, and the Court having found that entering a Protective Order regarding discovery materials is appropriate, and for good cause shown,

IT IS on this _____ day of _____, 20____, ,

ORDERED,

1. The government has produced voluminous discovery materials in this case that contain, among other things, individually identifiable information and other private information about numerous individuals, as well as confidential tax returns and taxpayer return information, within the meaning of Title 26, United States Code, Section 6103(b). Disclosure of such tax return and taxpayer return information is governed by Title 26 United States Code, Section 6103(a), which mandates that return and return information will be confidential except as authorized by Section 6103. Section 6103(h)(4)(D) permits disclosure to the defense of such tax return and taxpayer return information in accord

with Rule 16 of the Federal Rules of Criminal Procedure, but further disclosure of this tax return and tax return information by defendant(s) or his/her/their attorney(s) is restricted by Section 6103.

2. The discovery materials will also include information which is governed by Rule 6(e) of the Federal Rules of Criminal Procedure.

3. The materials produced by the government may be used by the defendant(s), defendant(s)'s counsel and any employees or agents of defendant(s)'s counsel solely in the defense of this case.

4. Defendant(s)'s counsel and defendant(s) will not disclose the tax return information or other private information contained in the discovery material directly or indirectly to any person except those assisting the defense, persons who are interviewed as potential witnesses, potential experts, or other authorized persons, during the course of the investigation and defense of this case.

5. The discovery material produced by the government will not be copied or reproduced unless the material is copied or reproduced for authorized persons to assist in the defense, and in the event copies are made, the copies shall be treated in the same manner as the original material.

6. When providing the discovery materials to an authorized person, the defendant(s)'s counsel must inform the authorized person that the materials are provided subject to the terms of this Protective Order and that the authorized person must comply with the terms of this Protective Order.

7. [Each] defendant(s)'s counsel will inform the defendant of the provisions of this Protective Order, and direct him/her/them not to disclose or use any information contained in the government's discovery in violation of this Protective Order. However, nothing contained in the Protective Order will preclude any party from applying to the Court for further relief or for modification of any provision hereof.

Date

Judge
United States District Judge