

## EMPLOYEE BENEFITS SECURITY ADMINISTRATION

## Chapter 20, Release of Information

1. Release of Information to News Media and the Public.

a. All news releases are written by DOL's Office of Public Affairs. News announcements for decentralized litigation will be prepared and released by the regional Office of Public Affairs staff in conjunction with the respective field office and the Regional Solicitor's Office. EBSA field offices are responsible for coordinating the release of information concerning criminal prosecutions with the U.S. Attorney's Office(s) in their jurisdiction. The field office is responsible for forwarding copies of the relevant court documents and the issued news release to OE. Follow-up inquiries on news announcements are to be handled by the regional Office of Public Affairs staff originating the document.

b. In the case of questions from news media or the public concerning open investigations, employees are to follow the policy of neither confirming nor denying the existence of an investigation unless special circumstances warrant otherwise. Whether an investigation is underway or even under consideration should not be discussed. In those instances where the RO is satisfied that knowledge of an open investigation is in the public domain, the RD or Deputy RD may confirm the existence of an investigation; however, no comments on the investigation should be made. Requests for a variance from this policy should be directed to the Director of Enforcement.

2. Release of Information Pursuant to ERISA §504.

a. Section 504 of ERISA provides that the Secretary may make available to any person actually affected by any matter which is the subject of an investigation, and to any department or agency of the United States, information concerning any matter which may be the subject of such investigation, except that any information obtained by the Secretary pursuant to section 6103 of the Internal Revenue Code shall be made available only in accordance with regulations prescribed by the Secretary of the Treasury. (See paragraph 7 for treatment of IRS information.)

b. Information concerning any matter which is the subject of an open investigation may not be disclosed without approval from OE/DFO. Information concerning any matter which is the subject of a closed investigation may be disclosed pursuant to ERISA §504, subject to the restrictions imposed by various statutes and rules, such as the Freedom of Information Act (see paragraph 4), the Right to Financial Privacy Act (see paragraph 5), the Privacy Act (see paragraph 6), the Internal Revenue Code (see paragraph 7), Rule 6(e) of the Federal Rules of Criminal Procedure (see paragraph 8), and 18 U.S.C. §1905 prohibiting disclosure of confidential information (Figure 1).

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3. Release of Information Pursuant to Subpoena.

The Department's regulations set forth at 29 CFR Part 2, Subpart C concern responses to subpoenas, orders, or other demands which call for the production or disclosure of material contained in Departmental files, or information relating to material contained in such files, in connection with proceedings to which the Department is not a party. Those regulations require an employee who receives a subpoena for the production of material or disclosure of information to immediately notify the appropriate Associate or Regional Solicitor's Office by forwarding a copy of the subpoena, order, or other demand calling for the production or disclosure of material for evaluation. In addition, DFO should be notified when a third-party subpoena has been received.

Investigators/Auditors shall not comply with a subpoena except upon approval of the Deputy Solicitor of Labor. Disclosure of information shall not be made without authorization from the Deputy Solicitor even in the face of a court order directing immediate compliance with a subpoena. The Solicitor's Office will represent any employee ordered by a court to comply with a subpoena.

4. Release of Information Pursuant to the Freedom of Information Act.

a. The Freedom of Information Act (FOIA), 5 U.S.C. §552, requires federal agencies to make records promptly available to any person whose request reasonably describes the records sought and who complies with procedures for making such requests. Departmental regulations concerning FOIA are found at 29 C.F.R. Part 70.

Normally an agency must respond to a request within 20 business days. If a response cannot be made within the 20 business day limit, an extension of the deadline should be telephonically obtained from the requester and subsequently confirmed in writing to the requester.

b. Federal agencies are not required to disclose material which falls within the nine exemptions set forth in FOIA. These exemptions are for material concerning:

1. national security or foreign policy;
2. internal agency personnel rules and practices;
3. specific exemptions provided for by statute;
4. trade secrets and privileged or confidential commercial and financial information;
5. inter-agency and intra-agency memoranda and letters not available by law to a party in litigation with the agency;
6. personnel and medical files;
7. law enforcement records or information;

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8. financial regulatory matters; and
  9. technical information about wells.

The exemptions most likely to be relevant to Investigators/Auditors are those dealing with personnel rules, commercial and financial information, inter-agency and intra-agency communications, law enforcement records, and financial regulatory information. See paragraph 5 for a discussion of the exemption dealing with information from financial regulatory agencies.

c. By Executive Order 12600 and Departmental regulations 29 CFR 70.26, Exemption 4, which addresses the protection of documents containing trade secrets or confidential commercial information, establishes procedures which must be met prior to a decision to release records. When a claim of confidential commercial information is received from a party providing information to the Department, the case file should be identified as containing such a request. In addition, a copy of the request should be forwarded to OE.

Responses to FOIA requests involving information protected by Exemption 4 should be coordinated with the appropriate RSOL.

d. The RD and DS, by regulation, are designated as FOIA Disclosure Officers, with signatory authority for FOIA responses.

#### 5. Release of Information Obtained from Financial Regulatory Agencies.

a. Exemption 8 of FOIA permits officials to withhold materials related to examination, operations, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions. Under Departmental regulations, officials must refuse to disclose information from financial regulatory agencies unless there is express authority permitting it.

b. The Right to Financial Privacy Act (RFPA), 12 U.S.C. §3401 *et seq.*, prohibits any agency or department of the United States from obtaining financial records of a customer from a financial institution unless the records are reasonably described and the disclosure is authorized by the customer or the records are disclosed in response to an administrative subpoena which meets specific requirements as set forth in the Act. (See paragraph 15 of Chapter 33 for a more complete explanation of the RFPA.) Once a government agency obtains such financial information, it may transfer the financial records to another federal agency only if an official of the transferring agency certifies in writing that there is reason to believe that the records are relevant to a legitimate law enforcement inquiry of the receiving agency. In addition, within 14 days after any transfer, the customer must be notified of the transfer unless the government has obtained a court order delaying notice. See Figure 2 for a model notice letter.

Transfer restrictions do not apply to intra-departmental transfers or to transfers from state or local government agencies to federal agencies or from federal to state agencies.

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6. Release of Information Subject to the Privacy Act.

a. The Privacy Act, 5 U.S.C. §552a, provides that, with certain exceptions, an agency must not disclose any record contained in a system of records from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual unless it has permission of the individual to whom the record pertains. The Privacy Act sets forth criminal penalties for officials who willfully disclose such material to a person or agency not entitled to receive it. Departmental regulations concerning the Privacy Act are found at 29 C.F.R. Part 70a.

b. The Privacy Act also provides that any agency which maintains a system of records containing information of a personal nature which is retrieved by name, social security number, or some other identifying number, symbol, or identifying particular, must ensure that administration of the file complies with requirements in the Privacy Act. The Department has taken the position that its investigatory files are exempted from these requirements by reason of the provision of the Act which exempts investigatory material compiled for law enforcement purposes. In addition, Departmental regulations deny disclosure to anyone, including the individual subject of the record, of information compiled in reasonable anticipation of a civil action or proceeding.

c. RDs or DSs have primary responsibility for Privacy Act compliance.

7. Release of Information Obtained from the IRS.

a. IRC section 6103 generally prohibits the IRS from disclosing federal tax returns and return information (Federal Tax Information). However, exceptions to the general prohibition allow the IRS to furnish tax returns and return information to DOL for the enforcement of Title I of ERISA. As a condition of receiving federal tax returns and return information, DOL must establish and maintain, to the satisfaction of the IRS, certain safeguards designed to prevent unauthorized uses of the information and to protect the confidentiality of that information.

b. Any DOL employee who illegally discloses tax information received from the IRS may be subject to criminal penalties under IRC section 7213 (a \$5,000 fine, five years imprisonment, or both), as well as civil damages under IRC section 7431 (Figure 3). These civil and criminal penalties apply even if the unauthorized disclosures are made after employment with DOL has terminated.

Therefore, all employees are cautioned to insure that tax information is not disclosed to unauthorized persons or used for unauthorized purposes. Tax returns and return information may be disclosed only to the extent necessary to conduct an investigation or prepare for litigation. Among those persons to whom returns and return information may be disclosed for such purposes are other DOL employees, employees of other federal agencies, and court reporters. In addition, any DOL employee who performs an unauthorized inspection of tax information received from the IRS may be subject to criminal penalties under IRC section 7213A (a \$1,000 fine, one year imprisonment, or both).

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c. If during any investigation, the RD or DS believes that information in the possession of the IRS will help in carrying out the provisions of Title I, a written request for such information may be made to the IRS using the format found in Figure 4. Copies of the requests should be retained a minimum of five years.

d. Access to federal tax information must be strictly on a need-to-know basis. Such restricted access can be accomplished by a variety of internal safeguards, some of which are listed below:

1. Keep federal tax information separate from other information to the maximum extent possible. Where this proves impractical, clearly label files to indicate that federal tax information is included.

2. Any files containing federal tax information (including the IRS Form 6212-B Checksheet) should be set up and maintained in a secured area. Each office holding IRS 6103 information must maintain an EBSA Form 534 (IRS Safeguard Inventory and Destruction Log). The files area should not contain coffee, lounge, or similar facilities. During non-duty hours, all areas where federal tax information is present should be locked.

3. Do not commingle federal tax information with other information in such a way that its confidentiality could be inadvertently compromised. For example, when documents are given to a clerk/typist, no federal tax information should be included unless it is needed in performance of clerical or typing duties.

All federal tax returns and tax information must be maintained in accordance with the procedures set forth in EBSA Notice No. 97-2.

e. Upon completion of use of the federal tax information, either return the information (including any copies made) to the office from which it was originally obtained or make the information undisclosable by burning, mulching, pulping, shredding, or disintegrating. These safeguards cease to apply to any return or return information to the extent that it is disclosed in the course of any judicial or administrative proceeding and to the extent that it is made a part of the public record thereof.

8. Documents Obtained from a Grand Jury.

a. Rule 6(e) of the Federal Rules of Criminal Procedure prohibits the disclosure of matters occurring before a grand jury. A knowing violation of the rule may be punished as contempt of court; any violation of the rule can jeopardize an investigation to the extent that civil litigation may become impossible.

b. If documents or transcripts of a grand jury are obtained during an investigation, the material must be maintained in a secure manner, and may not be disclosed to anyone, including other DOL employees, unless that person is authorized by the court to have access to the material. (See Chapter 52).

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9. Release of Documents to Other Government Agencies.

At times, another government agency may request documents from EBSA. If there is a Memorandum of Understanding (MOU) with that agency, the procedures identified in the MOU should be followed. If there is no MOU, the other agency should submit an access request letter to EBSA. If appropriate, the agency and EBSA should execute a common interest agreement.

**18 U.S.C. 1905. DISCLOSURE OF CONFIDENTIAL INFORMATION GENERALLY**

Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Office of Federal Housing Enterprise Oversight, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

NOTICE OF TRANSFER  
OF FINANCIAL RECORDS

Dear (Name of Customer):

Copies of, or information contained in, your financial records lawfully in the possession of the Employee Benefits Security Administration, U.S. Department of Labor, have been furnished to \_\_\_\_\_ (Government Agency) pursuant to the Right to Financial Privacy Act of 1978 for the following purpose(s):

If you believe that this transfer has not been made to further a legitimate law enforcement inquiry, you may have legal rights under the Right to Financial Privacy Act of 1978 or the Privacy Act of 1974.

Sincerely,

Regional Director

## UNAUTHORIZED DISCLOSURE OF INFORMATION

**Sec. 7213(a)(1)** [Internal Revenue Code of 1986]

Federal Employees and other Persons -- It shall be unlawful for any officer or employee of the United States or any person described in section 6103(n) (or an officer or employee of any such person), or any former officer or employee, willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)). Any violation of this paragraph shall be a felony punishable upon conviction by a fine in an amount not exceeding \$5,000, or imprisonment of not more than 5 years, or both, together with the cost of prosecution, and if such offense is committed by any officer or employee of the United States, he shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction for such offense.

CIVIL DAMAGES FOR UNAUTHORIZED  
DISCLOSURE OF RETURNS AND RETURN INFORMATION

**Sec.7431(a)(1)** [Internal Revenue Code of 1986]

Disclosure by Employee of United States -- If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

January 2008

Internal Revenue Service  
 Manager, EP Classification  
 31 Hopkins Plaza  
 Room 1520  
 Baltimore, MD 21201

RE: Name and address of plan  
 EIN  
 EBSA Case No.

Dear \_\_\_\_\_:

In connection with the administration of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), and a current investigation conducted by the, Employee Benefits Security Administration (EBSA) it is requested that you make available to this office, pursuant to section 6103(l)(2) of the Internal Revenue Code, the following documents: [Choose from below as applicable.]

1. Any reports, reports of investigation or interview, or memoranda related to the above-referenced plan, its sponsor or fiduciaries and any work papers related thereto or related to any audit of the above-referenced plan or its sponsors, including, but not limited to, any conclusive findings developed by the District Office as a result of its investigation and review. The reports of investigation, interviews or memoranda requested include information relating to any exclusive benefit rule/fiduciary disqualification of the plan.
2. Any correspondence or memoranda reflecting communications between the IRS and the above-referenced plan, its sponsors or its fiduciaries in regard to any of the above, including, but not limited to, any tax exempt status and IRS responses.
3. Reports or documents of any nature, plus attachments, filed by or obtained from the above-referenced plan, its sponsors, its fiduciaries, and any other persons affiliated with the above-referenced plan.
4. Tax returns filed by the following individuals/partnerships for the years \_\_\_\_\_ :

Name and Address	Social Security No.
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I would appreciate your furnishing the requested documents and, if necessary, discussing their contents with the following individuals of the Department of Labor (select as appropriate and state proper names):

January 2008

Regional Office, EBSA

Regional Director  
Deputy Regional Director  
District Supervisor

Supervisory Investigator  
Investigator/Auditor

National Office, EBSA

Director of Enforcement  
Chief, Division of Field Operations  
Criminal Coordinator, Office of Enforcement  
Investigator/Auditor

Office of the Solicitor

Solicitor  
Associate Solicitor, Plan Benefits Security Division (PBSD)  
Deputy Associate Solicitor, PBSD  
Counsel for Regulations, PBSD  
Counsel for General Litigation, PBSD  
Counsel for Fiduciary Litigation, PBSD  
Counsel for Appellate and/or RSOL Decentralized Litigation, PBSD  
Staff Attorney, PBSD  
Regional Solicitor  
Staff Attorney, RSOL

This information is necessary and is being requested for the purpose of the administration of Title I of ERISA. It is understood that the information furnished by the Internal Revenue Service will be used strictly in accordance with, and subject to the limitations of, the disclosure provisions of the Internal Revenue Code pertaining to confidentiality and taxpayer rights to privacy. The Department of Labor representatives are also aware of the penalty provisions of section 7213 of the Internal Revenue Code and section 1905 of Title 18 of the United States Code with respect to their use of this information.

Sincerely,

Regional Director/District Supervisor

cc: Director of Enforcement