



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

October 30, 2018

Via electronic mail

Ms. Catherine A. Battin
McDermott Will & Emery
444 West Lake Street
Chicago, Illinois 60606
cbattin@mwe.com

Via electronic mail

Mr. Jim Nichelson
Assistant General Counsel/Ethics Officer
Illinois Department of Revenue
101 West Jefferson Street
Springfield, Illinois 62702
jim.nichelson@illinois.gov

RE: FOIA Request for Review – 2011 PAC 13591

Dear Ms. Battin and Mr. Nichelson:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2016)). For the reasons that follow, the Public Access Bureau concludes that the response by the Illinois Department of Revenue (Department) to Ms. Julie Skelton's January 21, 2011, FOIA request did not violate FOIA.

On that date, Ms. Skelton, on behalf of McDermott Will & Emery, requested:

copies of any and all chapters or sections of the Illinois Department of Revenue Audit Manual (the "Audit Manual") in effect for the taxable years ending December 31, 1998 through December 31, 2010 relating to the following legal issue:

(1) The determination of corporate income tax under the Illinois Income Tax Act, 35 ILCS 5/101 *et. seq.*

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(2) The determination of sales and use taxes under the Use Tax Act, 35 ILCS 105/1 *et. seq.*; the Service Use Tax Act, 35 ILCS 110/1 *et. seq.*; the Service Occupation Tax Act, 35 ILCS 115/1 *et. seq.*; the Retailer's Occupation Tax Act, 35 ILCS 120/1 *et. seq.*; and the Hotel Operators' Occupation Tax Act, 35 ILCS 145/1 *et. seq.*^[1]

On February 15, 2011, the Department denied Ms. Skelton's request in its entirety pursuant to sections 7(1)(d)(i), 7(1)(d)(ii), and 7(1)(d)(v) of FOIA (5 ILCS 140/7(1)(d)(i), (1)(d)(ii), (1)(d)(v) (West 2010)). On April 15, 2011, this office received Ms. Skelton's Request for Review challenging the Department's denial.

On April 25, 2011, this office sent a copy of the Request for Review to the Department and asked it to provide a detailed explanation of its legal and factual bases for denying Ms. Skelton's request. On May 10, 2011, this office received the Department's written response and copies of the table of contents for sections of the audit manual for our confidential review. The Department asserted that although the Internal Revenue Service and several states have public versions of their audit manuals, the Department did not maintain a separate manual for public disclosure. On November 13, 2013, Ms. Catherine Battin informed this office that Ms. Skelton was no longer at McDermott Will & Emery, but that the firm remained interested in obtaining a resolution to the Request for Review. On January 10, 2014, the Department submitted a supplemental written answer to this office. On January 15, 2014, this office forwarded the supplemental response to Ms. Battin. She did not reply. On January 4, 2018, this office requested that the Department provide a copy of the Audit Manual for this office's confidential review. On January 12, 2018, the Department provided the requested records.

DETERMINATION

"All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." 5 ILCS 140/1.2 (West 2010).

Section 7(1)(d)(v) of FOIA exempts from disclosure:

¹Letter from Julie M. Skelton to Mr. George Logan, Freedom [of] Information Officer, FOI Office (January 21, 2011), at 1.

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(d) Records in the possession of any public body created in the course of administrative enforcement proceedings, and any law enforcement or correctional agency for law enforcement purposes, but only to the extent that disclosure would:

* * *

(v) disclose unique or specialized investigative techniques other than those generally used and known [* * *] and disclosure would result in demonstrable harm to the agency or public body that is the recipient of the request[.]

The Department asserts that the section 7(1)(d)(v) exemption applies to the Audit Manual because: (1) the Department is a law enforcement agency; (2) the Audit Manual was created for law enforcement purposes; (3) disclosure of the Audit Manual would reveal the Department's specialized investigative techniques; and (4) disclosure would result in demonstrable harm to the Department.

FOIA does not define "law enforcement agency." When construing a statute, the primary purpose is to ascertain and give effect to the intent of the General Assembly. *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415, 844 N.E.2d 1, 14 (2006). "The best evidence of legislative intent is the language used in the statute itself, which must be given its plain, ordinary and popularly understood meaning." *Nelson v. Kendall County*, 2014 IL 116303, ¶23, 10 N.E.3d 893, 988 (2014). When a term is undefined in a statute, it is entirely appropriate to use a dictionary to help determine its meaning. *Lacey v. Village of Palatine*, 232 Ill. 2d 349, 363, 904 N.E.2d 18, 26 (2009). The term "law enforcement" is defined in relevant part as: "[t]he detection and punishment of violations of the law." Black's Law Dictionary (10th ed. 2014), available at Westlaw BLACKS. A note in Black's Law Dictionary's definition of "law enforcement" provides:

This term is not limited to the enforcement of criminal laws. For example, the [Federal] Freedom of Information Act contains an exemption from disclosure for information compiled for law-enforcement purposes and furnished in confidence. That exemption is valid for the enforcement of a variety of noncriminal laws (such as national-security laws) as well as criminal laws. See 5 USCA § 552(b)(7). Black's Law Dictionary (10th ed. 2014), available at Westlaw BLACKS.

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Accordingly, to establish that it is a law enforcement agency under section 7(1)(d) of FOIA, a public body must prove that it has authority to enforce civil or criminal laws by promoting compliance and/or detecting violations.

The Department explained that taxpayers use self-reported data to determine the amount of tax they owe. To compel compliance with tax laws, the Department conducts its own investigations, known as audits, of the information reported by taxpayers. The Department has authority to impose penalties on taxpayers for deficient returns. *See* 35 ILCS 5/904(a) (West 2010) ("As soon as practicable after a return is filed, the Department shall examine it to determine the correct amount of tax. If the Department finds that the amount of tax shown on the return is less than the correct amount, it shall issue a notice of deficiency to the taxpayer which shall set forth the amount of tax and penalties proposed to be assessed."). The Uniform Penalty and Interest Act (35 ILCS 735/3-1 *et seq.* (West 2010)), provides authority to the Department to impose interest and penalties for failure to file or pay taxes, among other things. Accordingly, the Department not only detects tax underpayment and compels compliance by seeking payment of taxes owed, but it also may punish those who do not comply with tax laws by imposing penalties and interest. Therefore, this office concludes that the Department is a "law enforcement agency" under section 7(1)(d) of FOIA when it is engaged in investigating and enforcing compliance with tax laws.

The Department asserted that the Audit Manual is for law enforcement purposes, as it "identifies procedures and tactics to assist auditors to conduct successful and accurate audits [and] was created so there would be a mechanism to enforce compliance with the State's self-reporting tax system."² In analyzing the application of a law enforcement exemption in the Federal FOIA to records in the possession of the Internal Revenue Service (IRS), the United States District Court for the Northern District of Illinois noted that "whenever the IRS is enforcing the revenue laws, it is completely obvious that it is proceeding with an enforcement purpose." *Sutton v. Internal Revenue Service*, No. 05 C 7177, 2007 WL 30547, at *5 (N.D. Ill. January 4, 2007) (Not Reported in F. Supp. 2d). Similarly, it is clear that the Department uses the Audit Manual to enforce tax laws, and therefore this office concludes that the Audit Manual is for the Department's law enforcement purposes.

The Department argued that the Audit Manual contains the Department's specialized investigative techniques because it includes:

the accumulated knowledge, opinions, and recommendations of
hundreds of past and present auditors and lawyers, who have

²Letter from Paul Berks, Deputy General Counsel, Illinois Department of Revenue, to Tola Sobitan, Assistant Attorney General, Public Access Bureau (January 10, 2014), at 8.

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conducted investigations of many taxpayers over many years. The tactics the Department has developed for unearthing misconduct and underpayment derive from this accumulated knowledge and are not generally known to the public.

[* * *]

In short, one of the principal purposes of the Audit Manual is to share among the audit staff the procedures and "investigative tools" that are not generally known to the taxpayer community.^[3]

This office has reviewed the Audit Manual and confirms that it contains specialized investigative techniques that are not generally known to the public. The Audit Manual provides detailed, highly technical guidance for conducting investigations into the accuracy of taxpayers' returns. Among other things, the Audit Manual contains tactics, procedures, and investigative tools to detect misconduct and underpayment.⁴ Although the Audit Manual also contains quotations of legal references and descriptions of procedural, rather than investigative, guidelines for conducting audits, these factual provisions are to be read in conjunction with the specialized techniques and cannot be easily segregated from the sensitive investigative material.

The final factor in the 7(1)(d)(v) analysis is whether disclosure of the Audit Manual would result in demonstrable harm to the Department. "Harm" is defined as: "Injury, loss, damage; material or tangible detriment." Black's Law Dictionary (10th ed. 2014), *available at Westlaw BLACKS*. Accordingly, in order to withhold requested information under section 7(1)(d)(v), a public body must prove that it would suffer injury, loss, or damage if the information were to be disclosed.

The Department argues that disclosure of the Audit Manual would "provide a roadmap on how to avoid detection of unlawful behavior"⁵ and

will guide unscrupulous taxpayers on circumventing their obligations, which will cause the State to lose revenue, honest

³Letter from Paul Berks, Deputy General Counsel, Illinois Department of Revenue, to Tola Sobitan, Assistant Attorney General, Public Access Bureau (January 10, 2014), at 9.

⁴Because the Department provided the Audit Manual to this office confidentially, section 9.5(c) of FOIA precludes this office from further describing the substance of the Audit Manual's contents.

⁵Letter from Paul Berks, Deputy General Counsel, Illinois Department of Revenue, to Tola Sobitan, Assistant Attorney General, Public Access Bureau (January 10, 2014), at 11.

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taxpayers to shoulder a disproportionate share of the tax burden, and all taxpayers to lose respect for the State's taxing authority.^[6]

Federal courts have repeatedly found that certain IRS records, the disclosure of which could be exploited by tax cheats to evade revenue laws, are exempt under the Federal FOIA. Illinois courts have recognized that because Illinois's FOIA statute is based on the Federal FOIA statute, decisions construing the latter, while not controlling, may provide helpful and relevant precedents in construing the state Act. *See Margolis v. Director, Illinois Department of Revenue*, 180 Ill. App. 3d 1084, 1087 (1st Dist. 1989). Thus, a review of Federal FOIA cases involving IRS records is useful for understanding the risks present in disclosing law enforcement records related to tax laws.

The court in *Mayer Brown LLP v. I.R.S.*, 562 F.3d 1190, 1193 (D.C. Cir. 2009), addressed whether records related to certain tax shelters and the IRS's settlement practices were exempt pursuant to section 7(E) of the Federal FOIA (5 U.S.C. §552(b)(7)(E) (2006)). Section 7(E) exempts from disclosure law enforcement records that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." The court noted that "[t]hrough the information here does not necessarily provide a blueprint for tax shelter schemes, it could encourage decisions to violate the law or evade punishment." *Mayer Brown LLP*, 562 F.3d at 1193. The court concluded that the records were not subject to mandatory disclosure because they "would clearly be of enormous benefit to potential evaders and past violators hoping to escape punishment" and would risk circumvention of tax laws. *Mayer Brown LLP*, 562 F.3d at 1196.

In *Sutton*, 2007 WL 30547, at *1, the plaintiff sought "all underlying files, work papers, and documents pertaining to" the IRS's notice of deficiency against him, and in response the IRS withheld discriminant function ("DIF") scores. "DIF scoring is the method used by the IRS to identify tax returns that should be examined or audited." *Sutton*, 2007 WL 30547, at *3. The court held that none of the information on four specific pages concerning the IRS's DIF scores could be segregated out without disclosing the DIF scores, and that "[g]iven that an unscrupulous taxpayer could use DIF information to avoid examination or audit, the determination that disclosure of the DIF scores would seriously impair assessment, collection, or enforcement under the internal revenue laws [was] not arbitrary and capricious." *Sutton*, 2007 WL 30547, at *4.⁷

⁶Letter from Paul Berks, Deputy General Counsel, Illinois Department of Revenue, to Tola Sobitan, Assistant Attorney General, Public Access Bureau (January 10, 2014), at 10.

⁷In *Sutton*, the court analyzed the IRS's assertion of section 552(b)(3) of the Federal FOIA (5 U.S.C. § 552(b)(3) (2006) (exempting from disclosure records that are "specifically exempted from disclosure by

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In *Roberts v. I.R.S.*, 584 F. Supp. 1241, 1243 (E.D. Mich. 1984), the United States District Court for the Eastern District of Michigan described the IRS's Law Enforcement Manual as "certain guidelines which enable [the IRS] to scrutinize those returns most likely to reveal noncompliance. The guidelines focus upon a variety of characteristics of a given return which have a positive correlation with income tax evasion." The court determined that the IRS was not required to disclose the Law Enforcement Manual pursuant to section 2(C) of the Federal FOIA (5 U.S.C. § 552(a)(2)(C) (1982)), which exempts from disclosure "administrative staff manuals and instructions to staff that affect a member of the public." The court concluded that "the material contained in the [Law Enforcement Manual] is the kind of sensitive law enforcement information, disclosure of which will only serve to undermine law enforcement." *Roberts*, 584 F. Supp. at 1245.

Like the records addressed in the federal cases cited above, disclosure of the Audit Manual would make information available that could be used to thwart auditors' investigations and to perpetrate tax evasion schemes. Tax evasion not only harms the Department by hindering its ability to perform its duty of enforcing revenue laws, it also leads to the tangible loss of revenue owed to the Department and State. Ms. Skelton asserted that she was not seeking the portion of the Audit Manual that was the equivalent of the IRS's Law Enforcement Manual and that she did not intend "to publicize the Department's proprietary enforcement information in any way."⁸ The specialized techniques described in the Audit Manual are not segregable from the purely factual material, however, so it would not be possible for the Department to provide a version of the Audit Manual that did not disclose or reveal specialized investigative techniques that are not generally known to the public.

Accordingly, for the reasons stated above, this office finds that the Department has met its burden of establishing by clear and convincing evidence that the Audit Manual is a law enforcement record containing specialized investigative techniques, the disclosure of which would harm the Department. Therefore, this office concludes that the Department did not violate FOIA by denying Ms. Skelton's request for the Audit Manual pursuant to section 7(1)(d)(v) of FOIA. Because this determination is dispositive, this office need not review the applicability of the other exemptions cited by the Department, sections 7(1)(d)(i) and 7(1)(d)(ii), to the responsive records.


statute") and its argument that section 6103(b)(2) of the Internal Revenue Code prohibited disclosure of the records at issue. 26 U.S.C. § 6103(b)(2) (2006)) (exempting from disclosure "standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.").

⁸Letter from Julie M. Skelton, McDermott Will & Emery, to Public Access Counselor, Office of the Attorney General (April 14, 2011), at 2.

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The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this matter. If you have any questions, please contact me at the Springfield address on this letter, (217) 524-7958, or lharter@atg.state.il.us.

Very truly yours,



LAURA S. HARTER
Assistant Attorney General
Public Access Bureau

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