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#2**Restrict Access to the Death Master File****PROBLEM**

Tax-related identity theft is a growing problem — for its victims, for the IRS, and when Treasury funds are improperly paid to the perpetrators, for all taxpayers. In fiscal year (FY) 2011, the IRS’s centralized Identity Protection Specialized Unit (IPSU) received more than 226,000 cases, a 20 percent increase over FY 2010.¹ In addition, the Taxpayer Advocate Service received over 34,000 identity theft cases in that time, a 97-percent increase over FY 2010.²

In a relatively new tactic, some identity thieves are filing tax returns that claim the dependency exemption and various tax credits for deceased individuals. The IRS began to filter out these decedent schemes in April 2011 and has since stopped payment for more than 200,000 questionable returns claiming refunds estimated at more than \$850 million.³

Identity thieves have found that Social Security numbers (SSNs) and other personal information of the deceased is easily accessible. One might be surprised to learn that the federal government itself is one source of this information. The Social Security Administration (SSA) maintains a “Death Master File” (DMF) containing the full name, SSN, date of birth, date of death, and the county, state, and ZIP code of the last address on record of decedents.⁴ DMF data is updated weekly and made available to the public. Today, anyone can quickly find a number of websites (including genealogy sites) that publish DMF information free or for a nominal fee.⁵

EXAMPLE

Aaron and Belinda lose their newborn baby Chloe to Sudden Infant Death Syndrome in August 2010. Distraught and devastated, the couple dutifully reports the death of their child to the SSA, which enters her full name, complete SSN, date of birth, date of death, and address into the DMF.

Zoe is part of an organized crime network. She has heard that filing falsified tax returns is a lucrative endeavor and even paid \$200 to attend a seminar by one of her associates on how to obtain personally identifiable information. As instructed, Zoe visits a for-profit

¹ IRS, *IPSU Identity Theft Report* (Oct. 1, 2011); IRS, *IPSU Identity Theft Report* (Oct. 2, 2010); IRS, *IPSU Identity Theft Report* (Oct. 3, 2009).

² In FY 2010, TAS opened 17,291 stolen identity (primary issue code 425) cases. In FY 2011, the number jumped to 34,006. Taxpayer Advocate Management Information System (TAMIS) (Oct. 31, 2011).

³ TAS notes from IRS Decedent Schemes conference call (June 16, 2011).

⁴ See Office of the Inspector General, SSA, *Personally Identifiable Information Made Available to the General Public Via the Death Master File*, A-06-08-18042 (June 2008).

⁵ See Boston Herald, *Sandwich Parents Are Twice Robbed* (Nov. 27, 2011); Scripps Howard News Service, *ID Thieves Cashing in on Dead Children’s Information* (Nov. 3, 2011).

genealogy website that purchases DMF data and makes it available in unredacted form at no cost. By the end of the day, Zoe obtains the names, SSNs, and addresses of dozens of deceased individuals. She uses children's names to maximize the available credits, and one of the names she selects is Chloe's. In January 2011, Zoe files a tax return claiming Chloe as a qualifying child for the child tax credit, dependency exemption, and earned income tax credit.

In April 2011, Aaron and Belinda are still too distraught at the thought of Chloe's death to file their tax return and seek an extension. By August, they are ready to move on with their lives, and they file the return. In October 2011, Aaron and Belinda receive a notice from the IRS informing them that someone else claimed Chloe as a dependent for the 2010 tax year. Aaron and Belinda spend the rest of 2011 corresponding with the IRS to prove Chloe was their daughter. During the course of their research, Aaron and Belinda are shocked to discover how easy it is for anyone to access Chloe's personal information, including her full SSN, date of birth, and address.

RECOMMENDATION

The National Taxpayer Advocate recommends that Congress enact legislation to restrict access to certain personally identifiable information in the DMF. The National Taxpayer Advocate is not recommending a specific approach at this time, but outlines below several available options.

PRESENT LAW

The Freedom of Information Act (FOIA) provides that any person has a right, enforceable in court, to obtain access to federal agency records.⁶ In crafting FOIA, Congress recognized the importance of allowing citizen access to government information. However, Congress also understood the government's need to keep some information confidential, including private information about individuals who might be mentioned in federal files, and thus included nine exemptions in the law.⁷

Personal privacy interests are protected by two exemptions within FOIA. Section 552(b)(6) protects information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." Section 552(b)(7)(C) relates to information compiled for law enforcement purposes and protects personal information when disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

The challenge for the courts has been balancing the public's interest in release of the records in question against the privacy interest of the individuals involved. In 1980, the

⁶ See 5 USC § 552.

⁷ See 5 USC § 552(b).

United States District Court for the District of Columbia entered a consent judgment in a FOIA lawsuit that required the SSA to disclose the SSN, surname, and date of death (if available) of deceased Social Security beneficiaries once a year upon the request of the plaintiff in the case.⁸ Subsequently, the SSA decided to create the DMF, which contains the full name, SSN, date of birth, date of death, and the county, state, and ZIP code of the last address on record, and to provide it on a weekly basis.⁹

In 1989, the Supreme Court clarified that the purpose of FOIA is to enable citizens to find out “what their government is up to” and that this purpose “is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency’s own conduct.”¹⁰ The DMF contains personal records of millions of deceased individuals but such records do not reveal much, if anything, about the SSA’s own conduct.¹¹

An additional challenge for the courts has been assessing the privacy interest of the deceased. While the death of the subject of personal information diminishes to some extent the privacy interest in that information, courts have held that it does not extinguish that interest.¹² In *Accuracy in Media, Inc. v. Nat’l Park Service*, the U.S. Court of Appeals for the District of Columbia “squarely rejected the proposition that FOIA’s protection of personal privacy ends upon the death of the individual depicted.”¹³

In 2004, the Supreme Court fully recognized that surviving family members also enjoy a privacy interest that must be considered when analyzing the release of agency records as it relates to Exemption 7(C).¹⁴ The U.S. Court of Appeals for the District of Columbia has recognized that the privacy interests of relatives apply to Exemption 6 of FOIA.¹⁵

Given that (1) the type of information the DMF holds does not reveal much about “what the government is up to,” (2) there is a real threat that identity thieves can easily misuse the information contained in the DMF to claim improper tax benefits, and (3) the victims’ families may suffer emotional and financial harm as they deal with the aftermath of identity theft, we think a court, after conducting the requisite balancing test, might allow the SSA to shield DMF information from disclosure.

⁸ See *Perholtz v. Ross*, Civil Action No. 78-2385 and 78-2386, U.S. District Court for the District of Columbia (Apr. 11, 1980).

⁹ See Office of the Inspector General, SSA, *Personally Identifiable Information Made Available to the General Public Via the Death Master File*, A-06-08-18042 (June 2008).

¹⁰ *Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 772-73 (1989).

¹¹ We acknowledge that there may be some value in accessing the DMF to gain insight into the SSA. For example, an enterprising reporter could utilize DMF information to show that the SSA’s records are grossly inaccurate by tracking down how many of the people listed there are actually still living. This may show that the SSA’s method of recordkeeping is seriously flawed. However, one could make such a finding even with partial access to the DMF or if access was delayed a couple of years.

¹² *Schrecker v. Dep’t of Justice*, 254 F.3d 162, 166 (D.C. Cir. 2001).

¹³ *Accuracy in Media, Inc. v. Nat’l Park Serv.*, 194 F.3d 120, 123 (D.C. Cir. 1999) (relating to suicide of White House official Vince Foster).

¹⁴ *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 169 (2004) (finding that “well-established cultural tradition acknowledging a family’s control over the body and death images of the deceased has long been recognized at common law” with respect to suicide of White House official Vince Foster).

¹⁵ *New York Times v. NASA*, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (*en banc*).

REASONS FOR CHANGE

The National Taxpayer Advocate is appalled that the federal government is making sensitive personal information so readily available to those who steal the identities of deceased individuals and add to the burden and heartbreak facing their survivors. Perhaps most worrisome, the DMF contributes to tax-related identity theft by providing the date of birth and SSN, allowing thieves to target decedents who were minors and can be claimed as dependents.

When the 1980 consent judgment was entered, identity theft was not a significant problem. Today, heightened identity theft not only imposes a considerable hardship on victims or their families, but it also costs the government money and resources. Moreover, much of the case law affecting the public-private analysis had not yet been established in 1980, especially the narrowing of the public interest to be served by the disclosed information. A contemporary balancing test between the public's right to the DMF data and the privacy rights of the decedents' families may yield different results than the same test applied 31 years ago. While DMF data has some legitimate users (such as pension administrators who rely on DMF data to terminate payments and genealogists), there is a compelling public interest in keeping such information out of the public domain.

Recently, several genealogy websites have voluntarily agreed to curtail the availability of the Death Master File information. Ancestry.com announced in December 2011 that it will no longer display SSNs for anyone who has passed away within the past ten years.¹⁶ RootsWeb.com, another genealogy site affiliated with Ancestry.com, states that it will not share information from the DMF “due to sensitivities around the information in this database.”¹⁷ While these voluntary changes should make it more difficult for identity thieves to file false tax returns, the National Taxpayer Advocate requests that Congress enact legislation to restrict access to the DMF to those with a legitimate need for such sensitive information.

EXPLANATION OF RECOMMENDATION

Congress could take one of several approaches to restrict access to the DMF. One approach is to create an exemption under FOIA, which is proposed in S. 1534.¹⁸ This bill would restrict who can access the DMF and impose penalties for unauthorized re-disclosure. Recipients of the DMF would be required to certify that they have a legitimate

¹⁶ See Ancestry.com, *Why Was the Social Security Death Index Recently Changed?*, http://ancestry.custhelp.com/cgi-bin/ancestry.cfg/php/enduser/sab_answer.php?p_faqid=5420&p_created=1323809913&p_sid=utw11BLk&p_accessibility=&p_redirect=&p_lva=&p_sp=cF9zcmNoPTEmcF9zb3J0X2J5PSZwX2dyaWRzb3J0PSZwX3Byb2RzPSZwX2NhdHM9JnBfcHY9JnBfY3Y9JnBfcGFnZT0x&p_li=&p_topview=1 (last visited Dec. 19, 2011).

¹⁷ See About.com, *Genealogy Sites Pressured Into Removing SSDI*, <http://genealogy.about.com/b/2011/12/16/genealogy-sites-pressured-into-removing-ssdi.htm> (last visited Dec. 19, 2011); Ancestry.com, *Why Was the Social Security Death Index Recently Changed?*, http://ancestry.custhelp.com/cgi-bin/ancestry.cfg/php/enduser/sab_answer.php?p_faqid=5420&p_created=1323809913&p_sid=utw11BLk&p_accessibility=&p_redirect=&p_lva=&p_sp=cF9zcmNoPTEmcF9zb3J0X2J5PSZwX2dyaWRzb3J0PSZwX3Byb2RzPSZwX2NhdHM9JnBfcHY9JnBfY3Y9JnBfcGFnZT0x&p_li=&p_topview=1 (last visited Dec. 19, 2011); Scripps Howard News Service, *Genealogy Sites Remove Social Security Numbers of Deceased* (Dec. 15, 2011), available at <http://www.abcactionnews.com/dpp/news/national/genealogy-sites-remove-social-security-numbers-of-deceased>.

¹⁸ Identify Theft and Tax Fraud Prevention Act, S. 1534, 112th Cong. § 9 (1st Sess. 2011).

fraud-prevention interest in accessing the DMF and be subject to a penalty of \$1,000 for re-disclosure or misuse of the information.¹⁹

Alternatively, Congress could adopt the approach it uses to govern the confidentiality and disclosure of tax return information. In that situation, Congress established a general rule that tax return information will be kept confidential and has delineated a number of exceptions to the rule.²⁰ This approach could produce the same result as S. 1534, allowing the government to provide DMF information to entities with a demonstrated fraud-prevention purpose and imposing significant penalties for unauthorized re-disclosures. It could also make all or substantially all DMF information public after a specified number of years so that genealogists may access it.²¹

Finally, Congress could mandate that a truncated version of the SSN (*e.g.*, only the last four digits) be included in the DMF to prevent the theft and misuse of the decedents' identities. Because the release of full SSNs substantially furthers criminal conduct and affects the public fisc, the benefits of partially redacting SSNs may outweigh those of releasing the complete numbers. However, this approach may disclose enough information to permit some amount of identity theft and might be inadequate for pension administrators and other anti-fraud users who rely on full SSNs. Therefore, this approach would require further study.

¹⁹ Identify Theft and Tax Fraud Prevention Act, S. 1534, 112th Cong. § 9(c) (1st Sess. 2011).

²⁰ See *generally* Internal Revenue Code § 6103.

²¹ Typically, decedents have a final tax filing requirement in the year of death. See IRS Publication 559, *Survivors, Executors, and Administrators* 4 (Mar. 2011). A surviving spouse may be able to file as a qualifying widow(er) using the Married Filing Jointly tax rates for two years following the spouse's death. The IRS could retire the SSNs of decedents in the third year after death and thus block any returns with those numbers in later years.