Tax Confidentiality in Sweden and the United States—A Comparative Study

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Abstract

This article, based on my PhD thesis: *"Tax Confidentiality: A Comparative Study and Impact Assessment of Global Interest,"* compares Swedish and US tax confidentiality legislation concerning public opportunities of accessing tax information held by their respective tax administrations. The article concerns itself with the historical development of tax confidentiality legislation, the general legal framework, the reasons behind tax confidentiality, and the main content of the tax confidentiality rules. The overall comparative conclusion is that Sweden provides a high level of tax transparency based on the right of public access to official documents, while the United States offers a high-level of confidentiality and protection of taxpayer information based on the individual's right to privacy. Notwithstanding this overall difference, there are certain similarities, such as public accessibility being source-based. That is, if the individual's tax information is contained in a tax return, then the information is confidential, however, if it is contained in public court records, then the information is public.

Part I: Introduction

This article contains a comparative study of the tax confidentiality legislation in Sweden and in the United States. More particularly, it concerns the rules governing public access to information held by the respective tax administrations.[1]

"Confidentiality" and "transparency" are key concepts in this article, which is why the manner in which they are used here must be defined. The broad definition of transparency centers on the visibility, or openness, of

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government activity.[2] In its narrower sense, transparency maintains the right to gain access to information held by a public administration. A government is seen to be transparent when the information it holds is accessible. When information is confidential, there is considered less transparency. In short, both confidentiality and transparency are terms which apply to access to information held by a tax administration. "Confidentiality" means that the tax administration in question does not reveal information to the public, while "transparency" means the opposite; that information is revealed to the public by the tax administration.

One facet of transparency concerns the disclosure of information regarding how a particular tax administration operates, and on its policies and opportunities for public participation in its work. However, this form of frankness affords only limited opportunities for the public to monitor how a tax administration actually carries out the duties laid upon it by the state. For instance, it would be impossible to gain insight into how assessment work is undertaken if decisions on taxation were held to be confidential.[3] This brings us nearer to the issue to be dealt with in this article, which is closer to another facet of tax transparency—the issue of disclosure. For instance, the Swedish tax confidentiality legislation provides a rule making tax administration decisions public information. A rule such as this inevitably affords insight into how a particular tax administration applies tax laws. At the same time, it may reveal intimate details about an individual taxpayer, since tax information generally includes a taxpayer's income and other details about personal circumstances such as spending and savings, employment status, personal belongings, disability status, associations and club memberships, donations to charities, mortgage costs, child support and alimony, and the number and size of gifts.

One can depict tax confidentiality legislation as that of a balance of interests set on a scale, where at one end there is total confidentiality and at the other end complete transparency.

Total tax confidentiality Complete tax transparency

[2] See, for instance, Transparency International, defining transparency as a "[c]haracteristic of governments, companies, organisations and individuals of being open in the clear disclosure of information, rules, plans, processes and actions", TRANSPARENCY INTERNATIONAL, THE ANTI-CORRUPTION PLAIN LANGUAGE GUIDE 44 (2009), http://www.transparency.org/whatwedo/publication/the_anti_corruption_plain_language_guide (last visited Dec 8, 2014).

[3] SOU 1987:31 INTEGRITETSSKYDDET I INFORMATIONSSAMHÄLLET 4. PERSONREGISTRERING OCH ANVÄNDNING AV PERSONNUMMER. DELBETÄNKANDE AV DATA- OCH OFFENTLIGHETSKOMMITTÉN., 123.

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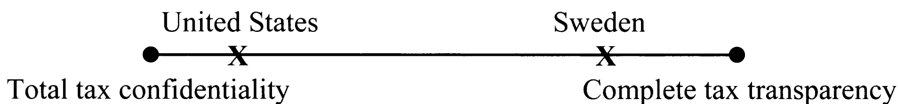
As explained above, this article contains a comparative study of tax confidentiality legislation in Sweden and the United States. Regarding the choice of Sweden for inclusion in a comparative study, Sweden is noted in many international contexts for its transparency, or the right to gain access to information. This is hardly surprising, as the right of public access to information has been enshrined in the Swedish constitution since 1766. This makes the Swedish tradition of open administration the oldest in the world. Openness as a constitutional principle, with its two hundred-year tradition, together with political and ethical support for the principle of transparency in Swedish society, have shaped a deeply grounded culture of openness that to this day remains a *differentia specifica* of Sweden.[4] In the course of writing my PhD thesis on tax confidentiality, I observed that the Swedish regime is perceived as very different and quite remarkable outside of Sweden.[5] Furthermore, the confidentiality rules created in the late 1970s have remained mostly the same since the creation of the Secrecy Act of 1980[6] through to the new Public Access to Information and Secrecy Act of 2009[7] ("PAISA"). Because of this, I believe there is good reason to choose Sweden for a comparative study.

Sweden, with its high levels of transparency in public administration in general and concerning the tax authority specifically, could be said to be placed close to the transparency end of the scale. The United States, highlighting the importance of protecting taxpayer privacy through a high level of tax confidentiality, could be said to be placed closer (though not exceptionally so) to the other end of the scale.[8]



The comparison of the tax confidentiality legislations in Sweden and the United States revolves around the following questions, which help make

[4] Bojan Bugaric, *Openness and Transparency in Public Administration: Challenges for Public Law*, 22 WIS INTL LJ 483, 488–491 (2004).

[5] Hans Danelius points out that publicly accessible taxations is in other countries perceived as objectionable, HANS DANELIUS, MÄNSKLIGA RÄTTIGHETER I EUROPEISK PRAXIS. EN KOMMENTAR TILL EUROPAKONVENTIONEN OM DE MÄNSKLIGA RÄTTIGHETERNA 367 (4 ed. 2012).

[6] Sekretesslag (1980:100)

[7] Offentlighets- och sekretesslag (2009:400), which succeeded the Secrecy Act of 1980 in 2009.

[8] The scale here presented is only illustrative and does not claim to show any exact placing on the scale.

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clear the similarities and differences between the two jurisdictions and thus facilitate a sound basis for comparative conclusions:

1. How did tax confidentiality legislation develop in Sweden and the United States respectively?

2. What is the general legal framework regarding the transparency or confidentiality of tax information in Sweden and the United States?

3. What is the basis for the tax confidentiality regime in Sweden and the United States? and

4. What is the main content of the provisions on tax transparency or confidentiality in Sweden and the United States?

This article is comprised of four parts. Part I includes this brief introduction to tax confidentially in general. Part II is an in-depth analysis of the Swedish tax confidentiality culture, structure, and legislation, while Part III examines the history of the US tax confidentiality regime and its current structure. Finally, Part IV compares and contrasts several specific areas within the two jurisdictions and conclusions are drawn as to their differences and similarities.

Part II: Sweden

Part II of this paper begins with a brief presentation of the Swedish Tax Agency, followed by a description of the historical development of the culture of tax confidentiality in Sweden. Thereafter follows a more in-depth description of the current rules on tax confidentiality beginning with the basis for tax confidentiality, which includes the basics of the right of access to official documents and the restrictions on this right specifically in terms of tax information.

A. The Swedish Tax Agency

The Swedish Tax Agency (Sw. *Skatteverket*) is the government agency, responsible for, *inter alia*, collecting taxes in Sweden. It was formed on January 1, 2004 through the merger of the Swedish National Tax Board (Sw. *Riksskatteverket*) with 10 regional tax authorities (Sw.

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skattemyndigheter).[9] The Agency is accountable to the government, but operates as an autonomous public authority.

Today, the Swedish Tax Agency consists of a Head Office, located in Solna outside of Stockholm, which directs and guides eight regions throughout Sweden. It is at this regional level where tax matters are handled via more than 100 local tax offices. These local offices handle tax matters for individuals and businesses, matters pertaining to public records, real estate, estate inventories, and identification cards, and have full authority to conduct investigations.[10]

B. The Historical Development of Swedish Tax Confidentiality

1. The Freedom of the Press Act ("FPA")

Tax confidentiality in Sweden, as dealt with in this article, begins with constitutional law, namely the Freedom of the Press Act ("FPA") (Sw. *tryckfrihetsförordning*), as "confidentiality" constitutes a restriction on the right of public access to official documents, a right introduced in Sweden's first FPA in 1766.[11] This original FPA contained, *inter alia,* provisions outlining the public nature of official documents and the exceptions associated therewith. Every citizen was thus given a constitutional right to freely access almost all documents relating to the administration of justice and public administration, and to publish these documents at will. The original FPA not only contained the right of access to official documents, but also provided exceptions from this right. Confidentiality provisions were thus to be found in constitutional law.

The issue of "tax confidentiality" as a restriction on the right of public access to official documents was placed on the agenda at the beginning of the 20th century, with the Government bill[12] for a proposal for regulation on

[9] PROPOSITION 2002/03:99 DET NYA SKATTEVERKET, 03. *See also*, lag (2003:642) med anledning av inrättandet av Skatteverket.

[10] Skatteverkets organisation, SKATTEVERKET, http://www.skatteverket.se/omoss/omskatteverket/organisation.4.7b610ded10741da92fa80001414.html (last visited May 12, 2014); SFS 2007:780 FÖRORDNING MED INSTRUKTION FÖR SKATTEVERKET.

[11] 1766 års förordning angående skrif- och tryckfrihet

[12] Government bills are part of what falls under the term "preparatory works." The government can, in connection with the process of drafting a new law, appoint a committee or commission of inquiry to conduct a thorough examination of the various alternatives. The commission then reports its proposals to the government. The report is published in a series known as the Swedish Government Official Reports (SOU). If a government ministry has conducted the inquiry, it will be published in a series

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Income Tax.[13] This bill asserted that it was an undisputed necessity that tax returns be kept from disclosure. The proposed legislation also contained a provision on the confidentiality of tax returns, while at the same time recognizing its ineffectiveness, as the 1766 FPA § 2 para 4 prescribed the right to obtain a copy of a tax return.[14] The bill was ultimately enacted, meaning that beginning in 1903, the FPA required confidentiality of tax information on individual taxpayers. This exemption from the right of access to official documents included information submitted to the tax administration by the taxpayer for the determination of taxation, information from banks on interest income and remaining balances, as well as tax returns containing information in connection with the calculation of inheritance tax or gift tax.

The extent of the confidentiality provisions in the 1903 FPA gradually increased, not because of a changed perception of the right of public access to official documents, but mainly due to state business expanding into new areas. Considering this rapid increase in the need for confidentiality rules in general, and the fact that the FPA, having the status of constitutional law, is more complicated to change than ordinary law,[15] the confidentiality provisions were transferred from the FPA to a separate, ordinary law known as the Secrecy Act of 1937,[16] while the access provisions remained in the FPA.

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known as the Ministry Publications Series (Ds). Before the Government deals with the recommendations of an inquiry, the report is circulated for comment to relevant consultation bodies. These bodies may be central government agencies, local government authorities or other bodies, including non-governmental organizations, whose activities may be affected by the proposals. The government's proposals for new legislation are presented in documents known as government bills (Sw. "proposition", abbreviated "prop."). Bills are then submitted to the Riksdag where they are dealt with by one of the standing committees. If passed, the bill then becomes law, published in the Swedish Code of Statutes (SFS). Preparatory works are seen as an aid to the dominant legal source, the legislative text. That is, preparatory works are used in interpreting legislation. The detail lacking in the statutory language is thus often supplied by the preparatory works. *See* Stig Strömholm, *Rätt, rättskällor och rättstillämpning: En lärobok i allmän rättslära* (5th edn, Norstedts juridik 1996) 358–374.

[13] KUNGL. MAJ:TS PROPOSITION N:O 16 [1902] FÖRSLAG TILL FÖRORDNING OM INKOMSTSKATT

[14] *Id.* at 51.

[15] Enactment of a constitutional act has to be done by two decisions, of identical wording, of Parliament (Sw. *Riksdag*), with a general election between the two decisions, IG Chapter 8 § 14. An ordinary act is enacted by one decision only.

[16] KUNGL. MAJ:TS PROPOSITION NR 140 (1936) MED FÖRSLAG TILL ÄNDRAD LYDELSE AV § 86 REGERINGSFORMEN, § 38 RIKSDAGSORDNINGEN SAMT §§ 1 OCH 2 TRYCKFRIHETSFÖRORDNINGEN, 28; SOU 1935:5 FÖRSLAG TILL ÄNDRADE BESTÄMMELSER RÖRANDE ALLMÄNNA HANDLINGARS OFFENTLIGHET, 25. The Swedish

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2. The Secrecy Acts of 1937 and 1980 and the Public Access to Information and Secrecy Act of 2009

Beginning in 1937, tax confidentiality was governed by § 17 of the Secrecy Act of 1937, which prescribed absolute confidentiality of tax information for a time period of 20 years. Embraced by this provision were documents such as tax returns, income statements and audit memoranda. Within the 20-year time limit, the documents could, in principle, be disclosed only with the consent of the individual to whom the information pertained.

The rules governing tax confidentiality however, did not include confidentiality of the results of a tax assessment. The need for such rule was raised on occasion, but only with regard to a prohibition on *publication* of taxpayers' taxable income and the results of a tax assessment, and not the actual disclosure of the documents.[17]

The Secrecy Act of 1937 was eventually replaced by a new Secrecy Act in 1980.[18] The most significant change was that the new Act brought together rules on document-confidentiality in relation to documents, and rules on professional secrecy into one Act (the rules on the latter were previously scattered). The Secrecy Act of 1980 was replaced in 2009 with the introduction of the Public Access to Information and Secrecy Act ("PAISA").[19] The reasons for replacing the Secrecy Act of 1980 with a new law were mainly structural and linguistic, making it more user friendly by including a table of contents, dividing the act into manageable parts, providing chapters with subheadings, and simplifying the language.[20] The substantive content of the provisions remained largely unchanged. Consequently, absolute confidentiality in tax matters, along with its time limit of 20 years still remains in today's current PAISA.

C. Current Swedish Tax Confidentiality Law

1. The Basis for Tax Confidentiality

As explained above, for our purposes, tax confidentiality begins with the right of public access to official documents which is governed by the

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title of the Secrecy law of 1937 is lag (1937:249) om inskränkningar i rätten att utbekomma allmänna handlingar

[17] SOU 1927:2 UTREDNING MED FÖRSLAG TILL ÄNDRADE BESTÄMMELSER RÖRANDE ALLMÄNNA HANDLINGARS OFFENTLIGHET, 214–215.

[18] Sekretesslag (1980:100).

[19] Offentlighets- och sekretesslag (2009:400).

[20] PROPOSITION 2008/09:150 OFFENTLIGHETS- OCH SEKRETESSLAG, 1.

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FPA.[21] FPA Chapter 2 Article 1 provides

> *Every Swedish citizen*[22] *shall be entitled to have free access to official documents, in order to encourage the free exchange of opinion and the availability of comprehensive information.*[23]

a. Definitions

The right of access discussed above presupposes access only to documents that are considered to be official documents. The term *document*, according to FPA Chapter 2 Article 3, means any written or pictorial matter or recording which may be read, listened to, or otherwise comprehended only using technical aids.[24] Thus, the concept of *document* not only includes conventional documents usually found on paper and comprising some sort of information or documentation such as tables, schedules, forms, records, and memoranda, as well as maps, drawings, and various kinds of images such as

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[21] The right of public access to official documents is one aspect of the principle of public access to information. The principle of public access to information takes other forms in legislation as well, such as freedom of expression for officials and others (IG chapter 2 § 1), the right to communicate and publish information (Tryckfrihetsförordning (1949:105) chapter 1 § 1 para 3 and the Fundamental Law on Freedom of Expression chapter 1 § 2), access to court hearings (IG chapter 2 § 11 para 2) and access to meetings of decision-making assemblies (this principle is not laid down in constitutional law, but found in the Riksdag Act, Sw. riksdagsordningen, chapter 1 § 4 and the Local Government Act, Sw. kommunallagen) chapter 5 § 38. However, the principle of public access to information is mainly associated with the right of public access to official documents, ALF BOHLIN, OFFENTLIGHETSPRINCIPEN 20 (8 ed. 2010); SIGVARD HOLSTAD, SEKRETESS I ALLMÄN VERKSAMHET : EN INTRODUKTION TILL DE GRUNDLÄGGANDE REGLERNA 13 (5 ed. 2013); *See also* ALF BOHLIN & WIWEKA WARNLING-NEREP, FÖRVALTNINGSRÄTTENS GRUNDER 24 (2 ed. 2011); and Wiweka Warnling-Nerep, *Offentlighet och yttrandefrihet*, *in* SVENSK FÖRFATTNINGSPOLITIK , 66 (Ingvar Mattson & Olof Petersson eds., 3 ed. 2011) where the authors first and foremost refer to the right of public access to official documents in Tryckfrihetsförordning (1949:105) chapter 2 § 1, when speaking of the principle of public access to information.

[22] Foreign nationals are equated with Swedish citizens in this matter. *See* Tryckfrihetsförordning (1949:105) Chapter 14 § 5 para. 2.

[23] Tryckfrihetsförordning (1949:105) Chapter 2 Article 1

[24] Tryckfrihetsförordning (1949:105) Chapter 2 Article 3

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photographs. It also includes information stored on other media such as microfilm, CDs, or computers.[25]

In order for a document to be regarded as official, Article 3 also requires that it be *held by* a public authority and that it has been *received by* the authority or *drawn up* there.[26] The concept *held by* focuses primarily on conventional documents and imposes conditions on a physical connection to the authority, that is to say, that the document exists within the authority's building.[27] It might, however, not be construed so narrowly that the document must always be on an authority's premises for it to be considered held by that authority.[28] For instance, a document is considered to be held by the authority even in the case of an officer taking it home to work on.[29] Concerning recordings, these are deemed to be held by the authority if they can be read, listened to, or in other ways comprehended with technical aids that the authority normally uses itself.[30] A document is *received by* an authority when the document has arrived at the authority or is in the hands of an authorized officer,[31] and a document is *drawn up* when an authority dispatches it.[32] A document is *dispatched* when it has been made available to a third party, for instance, another public authority.[33]

However, not all documents falling under the above requirements are considered to be *official documents*. For example, according to Article 9, a draft of a decision or a written communication is not an official document if it is not relied upon when the matter is finally determined.[34]

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[25] ALF BOHLIN, OFFENTLIGHETSPRINCIPEN (8 ed. 2010) at 44–45. There has been discussions in preparatory works, if the concept document should discarded and replaced by a more modern concept, more suited for today's information society. A suggested term is official information (Sw. allmän uppgift), see SOU 1997:39 INTEGRITET. OFFENTLIGHET. INFORMATIONSTEKNIK. BETÄNKANDE AV DATALAGSKOMMITTÉN., 7 and 493–500; However, the term official document is kept and given a more technology neutral tenor, *see* PROPOSITION 2001/02:70 OFFENTLIGHETSPRINCIPEN OCH INFORMATIONSTEKNIKEN, 12–15

[26] Tryckfrihetsförordningen (1949:105) Chapter 2 Article 3 Paragraph 1.

[27] PROP. 1975/76:160 OM NYA GRUNDLAGSBESTÄMMELSER ANGÅENDE ALLMÄNNA HANDLINGARS OFFENTLIGHET, 122

[28] *Id.*

[29] RÅ 1951 E 42.

[30] Tryckfrihetsförordning (1949:105) Chapter 2 Article 3 para 2.

[31] Tryckfrihetsförordning (1949:105) Chapter 2 Article 6.

[32] Tryckfrihetsförordning (1949:105) Chapter 2 Article 7.

[33] *See* RÅ83 2:57; RÅ 1999 ref. 36; HFD 2011 ref. 52.

[34] Tryckfrihetsförordning (1949:105) Chapter 2 Article 9.

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b. How to Access to Official Documents

Concerning the rules on how to access official documents, FPA Chapter 2 Article 12 provides that an official document shall be made available upon request, provided immediately or as soon as possible, free of charge, to any person wishing to examine it.[35] The person requesting the document has the right to read it at the place where it is held.[36] Persons wishing to obtain official documents are entitled to obtain a transcript or a copy of the document on payment of a fee,[37] and any person wishing to obtain an official document should turn directly to the public authority keeping the document.[38]

The right of public access to official documents also involves a right for the individual to access official documents without having to disclose his name or the purpose for which the documents are requested.[39] The prohibition on the public authority inquiring into a requester's identity or the purpose for the request applies except insofar as such inquiry is necessary to enable the authority to judge whether or not there is any obstacle to releasing the document.[40] Upon a request for disclosure of information in a document falling under one of the provisions of the PAISA, which limits the disclosure of the information contained in the document, the authority may sometimes need to know who wishes to obtain the information and what it will be used for. Otherwise, the authority might not be able to make a decision concerning whether the document may be made available or not. In that case, the applicant may either say who he or she is and state what the document will be used for or give up any hope of obtaining it.[41]

The rules in Chapter 2 of the FPA on *access* to official documents are complemented by rules in Chapter 6 of the PAISA on *disclosure of information* in official documents. According to PAISA Chapter 6 § 4, [Disclosure of Information], on the request of an individual, a public authority shall, disclose information in an official document that is held by the authority, if the information is not protected by confidentiality.[42] The duty to provide information under this section, applies to the extent that disclosure does not impede the

[35] Tryckfrihetsförordning (1949:105) Chapter 2 Article 12.

[36] Id.

[37] Tryckfrihetsförordning (1949:105) Chapter 2 § 13.

[38] Tryckfrihetsförordning (1949:105) Chapter 2 § 14.

[39] Tryckfrihetsförordning (1949:105) Chapter 2 § 14 para 3.

[40] *Id.*

[41] PROPOSITION 1981/82:37 OM OFFENTLIGHETSPRINCIPEN OCH ADB, 47–48; *See also* PROPOSITION 1979/80:2 MED FÖRSLAG TILL SEKRETESSLAG M.M. DEL A, 81–82.

[42] Offentlighets- och sekretesslag (2009:400) Chapter 6 § 4.

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usual function of the authority.[43] Consequently, a person requesting information held by a public authority may access information *either* under the rules in Chapter 2 of the FPA concerning access to official documents *or* under the rules in Chapter 6 of the PAISA concerning disclosure of information contained in an official document.

c. Restrictions on the Right of Public Access to Official Documents

Concerning restrictions on the right of public access to official documents, FPA Chapter 2 Article 2 distinctly indicates the ultimate limits of confidentiality by an enumeration of protected interests and is thus of significant value for confidentiality legislation.[44] The right of access to official documents may thus be restricted only if restriction is necessary with regard to:

> 1. *the security of the realm or its relations with another state or an international organization;*
> 2. *the central fiscal, monetary or currency policy of the realm;*
> 3. *the inspection, control or other supervisory activities of a public authority;*
> 4. *the interest of preventing or prosecuting crime;*
> 5. *the economic interests of the public institutions;*
> 6. *the protection of the personal or economic circumstances of individuals; or*
> 7. *the preservation of animal or plant species.*[45]

The above list sets the ultimate limits concerning restrictions on the right of public access to official documents. Regulations concerning any of these restrictions must be laid down in the PAISA.[46]

Confidentiality as defined in PAISA Chapter 3 § 1 means a prohibition on disclosing information, whether made orally or through disclosure of an official document, or disclosure in any other way.[47] The prohibition on disclosing information applies to authorities, which includes the Tax Agency, and for those participating in such activities.[48] In this context, it is important to highlight that confidentiality in PAISA refers to *information*, not to

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[43] *Id.*
[44] Tryckfrihetsförordning (1949:105) Chapter 2 Article 2.
[45] *Id.*
[46] *Id.* at para. 2.
[47] Offentlighets- och sekretesslagen (2009:400) Chapter 3 § 1.
[48] Offentlighets- och sekretesslagen (2009:400) Chapter 2 § 1.

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documents, although information may be revealed through the disclosure of a document as described in the foregoing paragraph. This may be compared to the FPA, which provides access to official *documents*. The Secrecy Act of 1937 corresponded with the 1903 FPA in that the scope of the rules on tax confidentiality were determined mainly through the enumeration of different documents, such as tax returns and income statements. However, the implementation of Automatic Data Processing (ADP) by the tax administration led to unwanted consequences, as information in certain documents, for instance tax returns, was registered in the database and thus considered public information, while the document itself—the tax return—was protected by confidentiality. The determination of confidentiality was thus dependent on the source of information. In other words, if information existed in one of the enumerated documents protected by confidentiality, the information was confidential. However, if the same information instead existed within a tax record (deemed an official document) the same information would be considered public information. These inconsistencies were adjusted with the Secrecy Act of 1980, under which the rules on tax confidentiality went from being document-oriented to being information-oriented instead.[49]

It is furthermore important to note that the right of public access to official documents is the starting point for Swedish confidentiality legislation. This means that this right may not be restricted except in cases where there is good reason to assume that disclosure would cause damage to any of the interests specified in the list above.[50] Confidentiality shall apply only to the extent necessary to protect the interests underlying the confidentiality provisions.[51] It is held that public access is of great importance in matters where authorities act as bearers of public authority and that the right of public access to official documents should not be limited immediately unless it is identified that drawbacks of some importance can follow from disclosure.[52] Public access should, according to the preparatory works of the Secrecy Act, be limited only when it appears necessary in reference to important conflicting interests.[53] The preparatory works also state that the aim in the

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[49] *Id.* at 250–252.; DS JU 1977:11 HANDLINGSSEKRETESS OCH TYSTNADSPLIKT. FÖRSLAG TILL NY SEKRETESSLAG. DEL 2: SPECIALMOTIVERING, 531–535.

[50] PROP. 1979/80:2 DEL A, *supra* note 41 at 56.

[51] SOU 2003:99 NY SEKRETESSLAG. HUVUDBETÄNKANDE AV OFFENTLIGHETS- OCH SEKRETESSKOMMITTÉN, 131.

[52] PROP. 1975/76:160, *supra* note 27 at 71 and 73.

[53] *Id.* at 73.

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drafting of the Secrecy Act of 1980 has been to avoid any form of confidentiality for safety's sake.[54]

d. Levels of Confidentiality

Swedish confidentiality legislation affords, in principle, three different levels of confidentiality. The highest level is **absolute confidentiality**. Information protected by absolute confidentiality is always confidential, unless there are any confidentiality-breaking rules related to that information.[55] One example of a confidentiality-breaking rule can be found in PAISA Chapter 10 § 1 under which confidentiality provisions meant to protect the individual do not apply in relation to the individual himself, unless otherwise specified in PAISA. In other words, an individual can request access to information about himself. Another example is found in PAISA Chapter 12 § 2, according to which the individual can fully or partially waive confidentiality applicable for his protection, unless otherwise indicated. Further, PAISA Chapter 12 § 2 para 2 provides that if the individual so requests, the authority shall, when the information is disclosed, impose a reservation which restricts the recipient's right to pass on or exploit the information.[56] Confidentiality legislation also contains confidentiality-breaking rules for the benefit of authorities. The basis for these rules is a balance of interests between the need of the authorities to exchange information and the interest protected by the specific confidentiality provision.[57] Accordingly, confidentiality does not prevent information being made available to another authority or to an individual if it is necessary in order for the authority to perform its own function(s).[58] Moreover, Chapter 10 § 27 contains a provision (Sw. *generalklausulen*) that allows for confidential information to be disclosed to another authority if the interest in disclosing it outweighs the interest to be protected by confidentiality.[59]

The other two levels of confidentiality are expressed through what is called *requirements of damage* (Sw. *skaderekvisit*). These requirements are constructed so that in order for confidentiality to apply, there must, in the

[54] DS JU 1977:11 HANDLINGSSEKRETESS OCH TYSTNADSPLIKT.FÖRSLAG TILL NY SEKRETESSLAG. DEL 1: LAGFÖRSLAG OCH ALLMÄN MOTIVERING 16.

[55] Current legislation does not differentiate between rules providing "true" absolute confidentiality, that is, where confidentiality applies in any situation, and rules stating absolute confidentiality complemented by rules stipulating situations in which this confidentiality may cease to apply. This latter form of absolute confidentiality may be termed semi-absolute confidentiality.

[56] Offentlighets- och sekretesslag (2009:400) Chapter 12 § 2 para 2.

[57] DS 2012:34 SEKRETESS I DET INTERNATIONELLA SAMARBETET, 24.

[58] Offentlighets- och sekretesslag (2009:400) Chapter 10 § 2.

[59] *Id.* at § 27.

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particular case, be a likelihood of damage occurring upon disclosure. The lowest level of confidentiality protection is provided through the *straight* requirement of damage (Sw. *rakt skaderekvisit*). A higher level of confidentiality is provided by the *reverse* requirement of damage (Sw. *omvänt skaderekvisit*).[60] The requirements of damage are stated in the preparatory works of the Secrecy Act to help achieve an eligible delimitation of the scope of confidentiality from a transparency perspective.[61]

The straight requirement of damage assumes disclosure to be the main rule, but confidentiality is possible if disclosure is assumed to cause damage. When applying the straight requirement of damage, the damage assessment is to be based on the information itself, which means that the question of whether or not confidentiality applies does not primarily have to be linked to a damage assessment in the individual case.[62] The decision should instead be based on whether the information as such is of a kind which indicates that disclosure may typically be *liable* to cause damage to the interest protected by the provision.[63] Emphasizing the nature of the information requested confers the advantage of rarely needing to deviate from the tenet of the right of public access to official documents entailing the right to anonymity.[64]

The reverse requirement of damage presumes confidentiality to be the main rule, by stating that confidentiality applies *unless* it is manifestly evident that the information may be disclosed without causing damage to the individual. The reverse requirement allows only a fairly limited scope with regard to the damage assessment, which, in practice, means that the official often cannot disclose information embraced by a reverse requirement of damage without having knowledge of the recipient's identity and the intended use of the information.[65] This constitutes a departure from the requesters' right to anonymity, which implies that issues of disclosure are primarily determined regardless of who requests the information or for what purpose. However, as noted previously, a public authority has the ability to inquire into

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[60] It has been suggested that these requirements should be replaced by a neutral requirement of damage (Sw. *neutralt skaderekvisit*), in order to ease the application of the rules. However, these proposals have been rejected, with reference to the possible harmful effects of a neutral requirement of damage on transparency, *see* SOU 2003:99, *supra* note 51 at 135–137 and 141–143; and PROP. 2008/09:150, *supra* note 20 at 350–351.

[61] PROP. 1979/80:2 DEL A, *supra* note 41 at 78; SOU 2003:99, *supra* note 51 at 141; PROP. 2008/09:150, *supra* note 20 at 350–351.

[62] Prop 1979/80:2 Del A, *supra* note 41 at (n 114) 80.

[63] *Id.*

[64] *Id.* at 81.

[65] *Id.* at 82.

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the identity of the requester and the purpose for the request under a requirement of damage, since the prohibition under FPA Chapter 2 § 14 para 3 for a public authority to inquire into a requester's identity or the purpose for the request applies *except insofar as such inquiry is necessary to enable the authority to judge whether there is any obstacle to release of the document.*[66]

Elimination of the risk of damage upon disclosure is also possible through setting up a restriction that limits the recipient's right to spread the information or exploit it.[67] The possibility for authorities to set up a restriction on the use of requested information is found in PAISA Chapter 10 § 14. A restriction can include a prohibition on the distribution of the contents of the document or of the publication of names or confidential information from the document.[68]

When dealing with the requirements of damage, there is reason to touch upon the term damage, or more particularly the terms *damage* (Sw. *skada*) and *harm* (Sw. *men*). *Damage* includes, first and foremost, pure economic loss. However, damage is considered to have a more far-reaching scope than merely economic loss. The preparatory works of the Secrecy Act provide that a company showing worse results in its business due to disclosure of information is an example of *economic damage*. Another example of economic damage is when disclosure of information has led to the individual being subject to successful recovery measures.[69] *Harm*, in this context, has a very broad meaning. It refers to injuries that typically arise as a result of disclosure of information on an individual's personal circumstances.[70] These primarily include non-pecuniary damage of various kinds, such as someone being exposed to others' contempt due to the disclosure of certain information.[71]

e. The Right of Public Access to Tax Documents

Tax confidentiality is generally protected under FPA Article 2, item 6 via *the protection of the personal or economic circumstances of individuals*.[72] The specific rules for ensuring tax confidentiality are found in PAISA Chapter 27, [Confidentiality for the Protection of Individuals in Activities Concerning Tax, Customs Duty, Etc.]

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[66] Tryckfrihetsförordning (1949:105) Chapter 2 § 14 para 3.
[67] PROP. 1979/80:2 DEL A, *supra* note 41 at 81.
[68] *Id.* at 349; DS JU 1977:11 DEL 2, *supra* note 49 at 268.
[69] DS JU 1977:11 DEL 1, *supra* note 54 at 134–135.
[70] PROP. 1979/80:2 DEL A, *supra* note 41 at 83.
[71] *Id.* at 83.
[72] Tryckfrihetsförordning (1949:105) Chapter 2 Article 2 item 6.

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The phrase *'personal and economic circumstances'* was adopted through Government bill 1975/76:160. The rapporteur stated that the wide variety of considerations to different personal interests is summarized in those words.[73] The preparatory works of the Secrecy Act however, do not provide any analysis of the meaning of the phrase. Rather it is stated that *'personal circumstances'* must be defined according to everyday usage, but that there should not be any doubt that the term refers to such diverse conditions as residential address, medical conditions, and private economy.[74] Nevertheless, the preparatory works continue, the terms *personal* and *economic circumstances* should be kept apart to some extent.[75] The main reason is that although confidentiality is there to protect not only private individuals but also legal persons, legal persons are considered not to have personal circumstances.[76] Another reason for separating the terms personal and economic circumstances pointed out in the preparatory works is the situation when information of a more *personal character* should be kept confidential while information on purely *economic circumstances* may be disclosed.[77]

Information on an individual's *economic circumstances* is considered typically sensitive from a privacy perspective. However, purely personal circumstances are rated as more deserving of protection than economic circumstances.[78]

Tax information may contain details on both personal and economic circumstances. The sensitivity of tax information can therefore vary greatly. A taxpayer can, for instance, apply for a deduction of fees paid for pension insurance. In such a case, the taxpayer's state of health could be an important factor in assessing the validity of the request. In many cases, the taxpayer would refer to a doctor's certificate regarding personal circumstances in order to qualify for such deduction.[79] Such information can be deemed sensitive and therefore worthy of strong confidentiality protection. Furthermore, matters on deferment with payment of tax might contain sensitive information on personal circumstances.[80] In the preparatory works, it is stated that disclosure of information on illness, as a basis for claiming a deduction for impaired ability

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[73] PROP. 1975/76:160, *supra* note 27 at 109.

[74] PROP. 1979/80:2 DEL A, *supra* note 41 at 84.

[75] *Id.* at 84.

[76] *Id.* at 84; *See also* RÅ84 Ab 264, where names of certain companies and amounts withheld was considered confidential.

[77] PROP. 1979/80:2 DEL A, *supra* note 41 at 84.

[78] SOU 1975:22 LAG OM ALLMÄNNA HANDLINGAR. BETÄNKANDE AV OFFENTLIGHETS- OCH SEKRETESSLAGSTIFTNINGSKOMMITTÉN, 205–206, 219–220.

[79] PROPOSITION 1979/80:2 MED FÖRSLAG TILL SEKRETESSLAG M.M. DEL B, 427.

[80] *Id.* at 431.

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to pay tax, is to be considered to cause harm to the individual.[81] Furthermore, confidentiality with regard to information obtained during an audit should be preserved as far as possible.[82] Information on membership of registered religious communities and trade union membership has been considered particularly sensitive. Information deemed less sensitive includes for instance information on registration number, name, company name and legal form, registration of the obligation to deduct tax or pay payroll taxes, types of business activities and liquidation or bankruptcy orders.[83]

2. The Core Substantive Content of Tax Confidentiality

As indicated above, Chapter 27 of the PAISA contains the provisions concerning the protection of an individual's personal or financial circumstances with regard to activities concerning tax, customs duty, and more. This discussion on the core content of tax confidentiality deals with §§ 1 and 2 of Chapter 27 of the PAISA.

Section 1 of Chapter 27 of the PAISA provides that

> *Confidentiality applies to information about an individual's personal or financial circumstances held in connection with activities relating to the determination of tax or to establishing the basis for determining such tax. Confidentiality also applies to information held in connection with activities relating to the assessment for taxes on real property.*[84]

Tax refers to tax on income and other direct taxes, and to sales tax, customs duty, and any other form of indirect taxes.[85] In addition to taxes, certain charges are sometimes levied. According to § 1 para 3, certain charges that are not taxes are to be treated as taxes. This applies to charges such as employer contributions, price regulation fees, and similar payments.[86] Furthermore, charges such as a tax surcharge and late filing and late payment penalties are equated with tax. The same applies to service fees and surcharges pursuant to the Act on Congestion Tax.[87]

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[81] PROP. 1979/80:2 DEL A, *supra* note 41 at 259.

[82] *Id.*

[83] PROPOSITION 2005/06:169 EFFEKTIVARE SKATTEKONTROLL M.M., 82.

[84] Offentlighets- och sekretesslagen (2009:400) Chapter 27 § 1.

[85] *Id.* at para 3.

[86] "Similar charges" refers to charges that are not directly tied to a performance by public authorities vis-à-vis the tax payer, PROP. 1979/80:2 DEL A, *supra* note 41 at 260.

[87] Lag (2004:629) om trängselskatt

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Determination of tax primarily refers to the charging of provisional or final tax, or adjustment or reduction of a deduction for provisional tax.[88] Determination of tax also includes reduction of tax or tax exemption.[89]

Activities relating to the determination of tax or establishing the basis for determining the tax, embrace activities found under the 2011 Tax Procedure Act.[90] These cover a wide range of activities, including certain matters on exemption and matters concerning advance rulings.[91] However, they not only cover tax matters, but also include record-keeping and other administrative activities.[92] Representing the public as a party in tax proceedings in court is also regarded as being an *activity relating to the determination of tax,*[93] as is the determination of pension-entitled income included with activities relating to the determination of tax.[94] Information concerning whether a certain income has been declared,[95] names, and withheld amounts of companies that are the subject of audits,[96] also fall under this provision.

There are certain activities that are not considered to be activities relating to the determination of tax or establishing the basis for determining the tax. One of these excluded activities is the assignment and registration of a corporate identity number in tax records.[97] Furthermore, consultancy activities are not included.[98] This means that the Tax Agency's consulting activities, such as telephone panels and answers to written questions, are not protected by confidentiality. The Tax Agency's position in this matter is that if the consultation is closely connected to a particular matter that is protected by confidentiality, then confidentiality should also apply to such consultation.[99] This position—that is, consultation activities are not protected by confidentiality, but confidentiality applies to information within consultation activities that is closely connected to a particular matter—is also maintained by the Tax Agency in matters relating to Enhanced Relationship[100] programs (Sw.

[88] PROP. 1979/80:2 DEL A, *supra* note 41 at 258
[89] *Id.* at 258.
[90] Skatteförfarandelag (2011:1244)
[91] PROP. 1979/80:2 DEL A, *supra* note 41 at 258.
[92] RÅ 1992 not. 502.
[93] PROP. 1979/80:2 DEL A, *supra* note 41 at 258.
[94] Offentlighets- och sekretesslagen (2009:400) Chapter 27 § 1 para 2.
[95] RÅ 1993 not. 568.
[96] RÅ84 Ab 264, *supra* note 76.
[97] RÅ 1996 ref. 82; RÅ 1996 not. 273.
[98] PROP. 1979/80:2 DEL A, *supra* note 41 at 258.
[99] SKATTEVERKET, OFFENTLIGT ELLER HEMLIGT 89 (4 ed. 2009).
[100] Horizontal Monitoring and Co-operative Compliance are other names for these types of activities.

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fördjupad dialog),[101] though the Supreme Administrative Court has decided that activities relating to Enhanced Relationships are of a consulting nature, and therefore such activities fall outside the scope of § 1.[102] Where to draw the line between information relating only to consultation activities and information in such activities that relate to a particular matter, is however not clear.

PAISA Chapter 27 § 2 stipulates confidentiality of information on an individual's personal and economic circumstances in terms of certain matters related to (but slightly on the side of) those activities coming within the provisions of the first section of Chapter 27. Such activities cover certain matters on audits or other controls on taxes, matters of tax compensation or tax refunds, matters related to the deferment of payment on tax, and matters concerning cash register.[103] According to para 3, decisions regarding matters specified in para 1 items 2 and 3 are exempted from confidentiality and are thus public. This means that information on individuals' personal and economic circumstances in decisions in certain matters on audits or other control on taxes (para 1 item 1) are protected by confidentiality.[104]

a. Levels of Confidentiality of Tax Information

The provisions dealt with above (with the exception of § 2 para 2 which is dealt with further below) require *absolute confidentiality*. The main reason for the high level of confidentiality in tax matters appears, according to the preparatory works, to be to protect taxpayer privacy.[105] The taxpayers' far-reaching duty to provide information about their economic circumstances is given particular weight.[106] It is held that most taxpayers would consider it a violation of privacy for information in their tax return to be made public, although some of this information is fairly unremarkable in itself.[107] Furthermore, it is said to be clear that the disclosure of information relating to a company's business and operating conditions can often cause damage to the company.[108] Given that most of the population is affected by the tax matters each year and that information may be reported on personal or financial circumstances of a sensitive nature for the individual in these matters, the

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[101] SKATTEVERKET, SKATTEVERKETS RIKTLINJE FÖR FÖRDJUPAD DIALOG (2014), commentary to item 13.

[102] HFD 2013 ref. 48.

[103] Offentlighets- och sekretesslagen (2009:400) Chapter 27 § 2 para 1 items 1–4.

[104] *See* RÅ 1988 not. 165.

[105] PROP. 1979/80:2 DEL A, *supra* note 41 at 256.

[106] *Id.*

[107] *Id.*

[108] *Id.*

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need for confidentiality in the tax field is strong.[109] Consequently, absolute confidentiality applies.[110]

One exception to the absolute level of confidentiality provided in the provisions explored above, is, as mentioned, PAISA § 2 para 2. This provision does not provide absolute confidentiality. Instead it contains a reverse requirement of damage, stating that

> *Confidentiality applies concerning an individual's personal and economic circumstances in matters under the Act on the Tax Agency's Handling of Certain Creditor Undertakings,*[111] ***unless it is clear that the information can be disclosed without causing damage or harm to the individual****. (emphasis added)*

Matters falling under the confidentiality protection in the above section are, for instance, those concerning a natural person's liability for payment of taxes of a legal entity (Sw. *företrädaransvar*).[112] Such matters entail, for the Swedish tax system, a unique possibility—agreements between a taxpayer and the Tax Agency. The general rule is that the Swedish tax regime provides no possibility for a taxpayer to enter into agreements with the Tax Agency concerning his or her tax liability. However, there is this limited possibility of entering into such an agreement, that is, the possibility for a natural person liable for payment of taxes of a legal entity, in accordance with Chapter 59 of the Tax Procedure Act, to enter into an agreement with the Tax Agency on adjustment of the tax due. This possibility, as indicated, is limited to a natural person's liability for the tax debts of a legal entity, and does not make way for entering into an agreement regarding a taxpayer's personal tax liability.[113] The possibility to enter into such an agreement, gives rise to issues of confidentiality regarding these agreements. This discussion relates to the public nature of decisions, which will be further dealt with in section 4(b) below, Tax Decisions Involving a Taxpayer Liable for A Legal Entity's Tax Debt.

According to PAISA Chapter 27 § 1 para 3 item 1, confidentiality does not apply to decisions in matters falling under § 2 para 2.[114]

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[109] *Id.* at 252.

[110] *Id.* at 257.

[111] Lag (2007:324) om Skatteverkets hantering av vissa borgenärsuppgifter. This Act applies to the recovery of debts where the government is the creditor, such as taxes and charges.

[112] SKATTEVERKET, HANDLEDNING FÖR FÖRETRÄDARANSVAR 126 (4 ed. 2009); SKATTEVERKET, HANDLEDNING FÖR BORGENÄRSARBETET 46 (3 ed.).

[113] PROPOSITION 2002/03:128 FÖRETRÄDARANSVAR M.M., 36.

[114] Offentlighets- och sekretesslag (2009:400) Chapter 27 § 1 para 3 item 1.

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b. Time Limits on the Duration of Tax Information Confidentiality

Time limits have often been employed in Swedish confidentiality legislation in order to restrict the extent of confidentiality. The confidentiality period is usually formulated as a maximum period, specifying the longest period of time that the information in an official document may be kept confidential. The confidentiality period varies from 2 to 70 years, depending on the interest to be protected. The variation depends on the legislator's assessment of how far the risk of damage typically extends for various types of information. Generally speaking, sensitive information relating to individuals' privacy, such as information about an individual's state of health, has been considered to be in greater need of protection than personal information in general or information related to public interests.[115]

Since time limits are to be considered as constituting the maximum time that the information in question may be kept confidential, the assessment of whether the information can be disclosed or not shall, within the specified confidentiality period, always be determined on the basis of an assessment of the risk of damage. This applies only with regard to provisions containing a requirement of damage, because it is only in such cases that an assessment of damage is made. Since the risk of damage usually decreases over time, such an assessment should in most cases lead to confidential information being disclosed before the end of the confidentiality period.[116]

The confidentiality period for tax information regarding an individual's economic circumstances[117] is 20 years,[118] which corresponds to the standards time limit for information regarding individuals' economic circumstances. Preparatory works proposed that the confidentiality period should be set at a maximum of 20 years in cases where the reason for confidentiality is due to the predominantly economic nature of the information.[119] Although in line with the proposal on setting the time limit to 20 years where the economic nature of the information is predominant, I consider it odd that there is no further discussion on the time limit for tax confidentiality in reference to privacy violations, since the sensitive nature of tax information is highlighted again and again in the preparatory works concerning access to tax information. The choice of 20 years as the standard time limit for economic circumstances suggests that privacy violations are of minor concern. This, in

[115] PROP. 1979/80:2 DEL A, *supra* note 41 at 86–87.
[116] *Id.* at 87; DS JU 1977:11 DEL 1, *supra* note 54 at 137–140.
[117] PROP. 1979/80:2 DEL A, *supra* note 41 at 87.
[118] Offentlighets- och sekretesslag (2009:400) Chapter 27 § 1 para 5 and § 2 para 4.
[119] SOU 1975:22, *supra* note 78 at 19, 225.

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my view, is inconsistent, bearing in mind the weight put on possible privacy violations when deciding on the appropriate level of confidentiality.

3. The Public Nature of Tax Decisions

a. Tax Decisions in General

As seen above, the need for protection of privacy is considered strong in the tax field, hence the high level of confidentiality in this area. The reasons given for a high degree of confidentiality in the tax area, according to the preparatory works of the Secrecy Act, must be set off against the constitutional principle that official documents are public and that confidentiality should be the exception to that rule.[120] The balance between the interest of public access and the interest of protection of privacy has resulted in most of the tax administration's decisions being public.[121]

A *decision* consists of both the decision itself and the reasons that settled the outcome.[122] The fact that a decision is public therefore means that the identities of both parts become public.

Regarding the reasons for the decision, public authorities are required under the Administrative Procedure Act[123] § 20 to justify their decisions[124] if they concern the exercise of public power. Confidentiality rules do not prevent information, which in and of itself is confidential, from being included in the rationale for reaching a particular decision. Nevertheless, since a decision as a rule is public, it is important that no more confidential information than that which is strictly necessary to meet the requirements of the Administrative Procedure Act § 20 is included in the rationale.[125]

Under PAISA Chapter 27 § 6, confidentiality does not apply to decisions determining tax or pension-entitled income.[126] Nor does confidentiality apply to decisions establishing the basis for determining the tax.[127] Decisions referred to in this provision include decisions on the charging or adjustment of provisional tax, decisions on taxation, decisions on the imposition of special tax assessment on real estate, decisions on the rectification of past decisions, as well

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[120] PROP. 1979/80:2 DEL A, *supra* note 41 at 253.

[121] *Id.* at 256–257; *See also* KONSTITUTIONSUTSKOTTET BETÄNKANDE 1979/80:37 MED ANLEDNING AV PROPOSITIONEN 1979/80:2 MED FÖRSLAG TILL SEKRETESSLAG M.M. JÄMTE MOTIONER, 34.

[122] SKATTEVERKET, *supra* note 99 at 95.

[123] Förvaltningslag (1986:223)

[124] Regards decisions whereby a matter is determined by an authority.

[125] SKATTEVERKET, RÄTT HANDLAGT 106 (5 ed. 2011).

[126] Offentlighets- och sekretesslag (2009:400) Chapter 27 § 6.

[127] *Id.*

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as decisions on additional assessment and decisions whereby tax assessment is adjusted or dropped.[128] *Disclosure of decisions* includes not only final decisions, but also preliminary decisions, which have been communicated during the process and which can be appealed by the taxpayer. Insofar as such decisions have legal effect or can be enforceable, they are regarded as decisions whereby tax is determined.[129]

Finally, there are decisions that do not determine tax or establish the basis for determining the tax, such as decisions on dismissal and write-off. These decisions are therefore confidential.

Some tax decisions are exempted from public disclosure despite the fact that they determine tax or pension-entitled income, or establish the basis for the determination of tax. These exemptions are explicitly mentioned in Article 6. For instance, advance rulings on taxation or tax issues are not public decisions. Such decisions are protected by absolute confidentiality provided under Chapter 27, § 1. It is important to remember that confidentiality under PAISA concerns *information* only and not the actual *documents*. For example, confidentiality with regard to advance rulings applies to information on an individual's personal or economic circumstances only, that is, confidentiality applies to the information identifying an individual in the ruling, and not to the entire ruling. In practice, this means that advance rulings are disclosed anonymously, that is, with personal identifying information redacted. If the circumstances make it possible to identify the individual to whom the information pertains, even if the disclosure is anonymous, the entire ruling may be kept confidential.[130] The legal conclusion held in the ruling is not confidential unless it reveals information that identifies who the ruling concerns.[131] As a side note, these rulings are accessible on the Tax Board's (Sw. *skatterättsnämndens*) website.

The public nature of tax decisions with its conflict of interests has been addressed in preparatory works of the Secrecy Act. In the inquiry report SOU 1975:22, presented during the drafting of the 1980 Secrecy Act, it is expressed that one could well imagine tax assessment being altogether a private matter between the individual and the tax authority. In taxation as in many other areas, however, public access has great importance from a rule of law perspective. Moreover, there will always be a legitimate need for information on tax assessment when it comes to credit reporting. Tax administration's decisions in tax matters must therefore remain public,

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[128] PROP. 1979/80:2 DEL A, *supra* note 41 at 260.

[129] *Id.*

[130] ROGER PERSSON ÖSTERMAN, FÖRHANDSBESKED I SKATTEFRÅGOR 43–44 (2013).

[131] SKATTEVERKET, *supra* note 99 at 169.

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according to the preparatory works of the Secrecy Act.[132] Furthermore, it is noted that the taxpayer, on the one hand, would want a thorough justification for the decision in order to ensure that his or her assessment is correct. On the other hand, the taxpayer is averse to the fact that the decision may reveal information otherwise protected by confidentiality. Moreover, it is held that it would be completely impossible to get any insight into how the assessment work is carried out, if tax decisions were confidential. Public decisions, however, put great responsibility on the tax officers, writing these decisions. Great carefulness is needed in order not to include any excess information in the justification.[133]

b. The Level of Confidentiality of Agreements Involving a Taxpayer Liable for a Legal Entity's Tax Debt

Returning to the issue of confidentiality concerning agreements between a taxpayer liable for payment of a tax debt pertaining to a legal entity and a tax authority, the rules governing these agreements are, as previously held, found in the Tax Procedure Act which entered into force in 2012. Prior to 2012, provisions governing these agreements were found in the Tax Payment Act (Sw. *skattebetalningslagen*).[134] That Act contained a provision under which a completed agreement was to be considered a tax decision.[135] Therefore, such agreements fell under PAISA Chapter 27 § 6 on the public nature of decisions and were thus available to the public. However, the 2012 Tax Procedure Act does not contain such a provision.[136] Furthermore, the preparatory works of the 2012 act explicitly contend that such agreements shall not be considered as tax decisions.[137] The Tax Agency's decision to offer an agreement is considered to be a decision of another kind, namely a type of decision called *partsbesked*, which could be translated as "party statement."[138] A party statement contains the position of an authority when they represent the public as a party in civil (and similar) matters, for instance, when requiring payment of a claim that cannot be enforced without a previous court

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[132] SOU 1975:22, *supra* note 78 at 224.

[133] SOU 1987:31, *supra* note 3 at 123–124.

[134] Skattebetalningslag (1997:483)

[135] Tax Payment Act Chapter 11§ 1 para 2 item 8.

[136] Many of the provisions on equivalence of terms and concepts (Sw. likställighetsbestämmelser) in the Tax Payment Act was not given any equivalent in the Tax Procedure Act, *see* SOU 2009:58 SKATTEFÖRFARANDET. SLUTBETÄNKANDE AV SKATTEFÖRFARANDEUTREDNINGEN, 348–351; PROPOSITION 2010/11:165 SKATTEFÖRFARANDET, 297–300.

[137] SOU 2009:58 *supra* note 136 at 1465–1466.

[138] *Id.* at 1466.

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judgment.[139] An agreement of the kind in question does not involve the exercise of authority nor does it conclude the issue of liability since it merely contains the Tax Agency's opinion on how the matter should be solved. Furthermore, it has no binding effects on the individual.[140] Agreements such as these are therefore considered party statements.[141] A completed agreement, being a party statement and not a tax decision, cannot be the subject to review (though the individual may bring an action before a court for a declaration of nullity of the agreement based on contractual rules).[142]

Deciding that completed agreements are not to be regarded as tax decisions but as party statements has a noteworthy consequence in terms of confidentiality. As indicated above, when completed agreements were considered to be tax decisions, they were public under PAISA Chapter 27 § 6. Now that they no longer are considered tax decisions, the question is raised whether such an agreement falls under the reverse requirement of damage in PAISA Chapter 27 § 2 para 2 regarding matters on, for instance, *personal liability*, or under § 2 para 3 item 1 prescribing public *access to decisions* in matters falling under para 2. Since information in matters concerning a natural person's liability for payment of taxes of a legal entity fall under the reverse requirement of damage in para 2, while decisions in such matters, according to para 3 item 1 are public, there is great reason to decide whether an agreement is to be considered as one that falls under this item or if it falls under the reverse requirement of damage in para 2.

There is not, to my knowledge, any discussion in the preparatory works of the Tax Procedure Act on this matter. It is therefore possible that during the (massive) work in drafting the 2012 Tax Procedure Act, this issue was not at all recognized as a consequence of the decision that completed agreements are no longer considered tax decisions. Since heavy weight is put on keeping authority decisions public as far as possible, I believe that if the preparatory works had recognized this consequence, the argument might have been different. There is no consistency in the law if a tax decision is to be public information, while an agreement, which is a decision (though not a tax decision but a party statement), is not. It would, on the contrary, be remarkable if agreements were to go from being totally transparent to being the subject of a reverse requirement of damage presuming confidentiality to be the main rule, even though they have not changed in character (that is,

[139] PROPOSITION 1985/86:80 OM NY FÖRVALTNINGSLAG, 51; SOU 2007:65 DOMSTOLARNAS HANDLÄGGNING AV ÄRENDEN, 125; *See also* HÅKAN STRÖMBERG & BENGT LUNDELL, ALLMÄN FÖRVALTNINGSRÄTT 61 (26 ed. 2014) on the distinction between a binding decision and other statements of an authority.

[140] SOU 2009:58 *supra* note 136 at 1466.

[141] *Id.*

[142] *Id.* at 1467.

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there is no change in how they are administered and what they contain) other than how they are categorized.

There is, to my knowledge, no indication in the preparatory works that the public nature of decisions of necessity only concerns decisions involving the exercise of authority. The current legislative text of PAISA Chapter 27 § 2 para 3 item 1 therefore makes way for an interpretation that includes agreements within the scope of the term decision, since these agreements are decisions but of the kind known as party statements.

4. Confidentiality of Tax Information in Court Proceedings

Allowing public access to Tax Agency decisions is one of the measures provided through legislation to meet the interest of transparency. Another means is to allow tax information in court proceedings, in principle, to be made public.[143]

PAISA Chapter 27 § 4, [Cases before the Court], provides a confidentiality provision that is directly applicable in court proceedings with regard to tax information. In contrast to the confidentiality required of the Tax Agency, which is absolute confidentiality under Chapter 27 §§ 1 and 2, § 4 sets forth the lowest level of confidentiality, the straight requirement of damage. It states that the confidentiality under §§ 1 and 2 applies in court proceedings if it can be assumed that disclosure would cause damage or harm to the individual.[144] In other words, there is a presumption of public access, but information on the individual's personal or economic circumstances may be kept confidential if the disclosure is considered to cause damage or harm to the individual.

The straight requirement of damage in § 4 applies only to information relevant to the case. In order to be relevant, the information has to relate to the matter that is subject to judicial review. For example, in the situation in which a tax assessment is under appeal, simply because a claim in a tax return regarding deductions has not been observed by the Tax Agency, does not mean that all information in the tax return is subject to the openness prevailing in tax proceedings.[145] Information that is not relevant to the case and is obtained from another authority where the information is confidential retains the confidentiality level it had at the disclosing authority.[146] Information that is not confidential at the disclosing authority is subject to the straight

[143] PROP. 1979/80:2 DEL A, *supra* note 41 at 256–257.
[144] Offentlighets- och sekretesslag (2009:400) Chapter 27 § 4.
[145] PROP. 1979/80:2 DEL A, *supra* note 41 at 258–259.
[146] Offentlighets- och sekretesslag (2009:400) Chapter 27 § 4 last sentence.

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requirement of damage.[147] Additionally, if the information is not of relevance in the case and has not been obtained from an authority, but from the taxpayer, the straight requirement of damage applies.[148]

As held previously, when applying the straight requirement of damage, the damage assessment is to be based on the information itself, which means that the question of whether or not confidentiality applies does not primarily have to be linked to a damage assessment in the individual case. The decision should instead be based on whether the information as such is of a kind which indicates that disclosure may typically be *liable* to cause damage to the interest protected by the provision.[149]

The preparatory works of the Secrecy Act mention a few situations where the requirement of damage may be deemed to be met. For instance, if there is information on illness as a basis for claiming a deduction for reduced ability to pay tax, it may be generally assumed that disclosure would cause damage to the individual.[150] Information relating to income and deductions may also normally be considered confidential, according to preparatory works.[151] It is held that in most cases, information gathered through tax audits and similar inspections should be deemed to meet the requirement of damage.[152]

The proper application of the straight requirement of damage in tax proceedings has been before the court in a number of cases. This case law alters, to a certain extent, what is held in the above statements in preparatory works. This is discussed further below.

a. Information on Illness and Deductions

In applying the straight requirement in PAISA Chapter 27 § 4, the Supreme Administrative Court has found that information on illness and deductions does not always enjoy confidentiality protection under § 4.[153] In RÅ81 2:35, the Court argued that information on the taxpayer's illness when completing the tax return (resulting in the taxpayer submitting incorrect information), and information on an incorrect deduction, were to be considered as being of such general nature that disclosure would not cause any damage or harm. Hence, the court contended that the information was not protected by confidentiality under § 4. Additionally, RÅ81 Ab 179 concerned information

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[147] PROP. 1979/80:2 DEL A, *supra* note 41 at 259.
[148] See RÅ 2007 ref. 60.
[149] PROP. 1979/80:2 DEL A, *supra* note 41 at 80–81.
[150] *Id.* at 259.
[151] *Id.*
[152] *Id.*
[153] RÅ81 2:35; RÅ81 Ab 179.

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in requested documents revealing certain deductions. The court found that the discussion in the requested documents was rather general and contained no details regarding any amounts. Disclosure of the information was therefore considered not to cause damage or harm to the individual.

In these situations, case law thus somewhat contradicts the preparatory works, which (as mentioned above) state that information on income and deductions should normally be considered confidential. The court thus appears to apply the straight requirement of damage, as provided in § 4, while the reasoning in the preparatory works is closer to the reverse requirement of damage.

b. Information Gathered through Tax Audits (and similar Inspections)

The statement in the preparatory works to the effect that information gathered through tax audits and similar inspections is considered to be of such sensitive nature that in most cases it should be confidential, appears to presume a higher level of confidentiality than that intended by a straight requirement of damage. That is, it is stated that the information should be considered confidential in *most* cases, suggesting that confidentiality should be the main rule, as opposed to the straight requirement of damage which presumes public access to be the main rule. This is also maintained in case law, as is shown below.[154]

The court stated in RÅ83 2:9 that it seems reasonable that when applying the rules on disclosure, the confidentiality of information provided in tax returns and attachments as well as information obtained during audits and other controls should be preserved as far as possible.[155] Therefore, documents that the court received from the tax board, with the exception of a notification on deviation from the tax return, and a memorandum of a tax audit, were considered to be protected by confidentiality under § 4. The court referred to this case in RÅ85 Ab 137, and cited the statements therein. In that case, the court contended that the requested audit memoranda contained information the disclosure of which could cause harm or damage to the individual, except for one memorandum that only contained information that the taxpayer should have declared additional income regarding four specified years and the amounts for each of these years.

Furthermore, RÅ 1986 not 613 concerns a request for information that had been obtained during a tax audit. The purpose of the request was to examine the grounds of the court ruling. The court stated that the disclosure of

[154] *See also* Jesper Ekroth & Eleonor Kristoffersson, *Skattesekretess i domstol*, SKATTENYTT 80–101, 90 (2011).

[155] RÅ83 2:9.

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such information could cause damage or harm to the individual. The court however approved disclosure regarding certain parts of the memorandum, since it was considered that the risk of damage or harm could be eliminated through a restriction on the passing on of the information or its use for any other reason but to examine the ground for the ruling.[156]

Moreover, the court dealt with the issue of confidentiality under § 4 with regard to information obtained during tax audits in RÅ 1986 not 623, RÅ 1990 not 286, and RÅ 1996 not 179. In RÅ 1986 not 623, the court concluded that disclosure of information contained in certain attachments in a case on additional assessment could lead to damage or harm for the individual, and thus considered confidential. RÅ 1990 not 286 concerned a request to obtain a decision on impoundment and an attached preliminary memorandum.[157] The court contended that while the preliminary memorandum contained information that was considered to cause damage or harm to the individual, most of the information in the decision was contained in another public decision, which meant that the decision could be disclosed with the redaction of one sentence. In RÅ 1996 not 179, an audit memorandum was requested, which contained information revealing the names of board members of foreign companies. The court referred to the statement in preparatory works[158] and to RÅ83 2:9, RÅ85 Ab 137 and RÅ 1990 not 286, holding that information on an individual's personal or economic circumstances obtained during a tax audit, in general could not be disclosed without causing damage or harm. The court found no reason to deviate from this, therefore confidentiality was considered to apply to the names of the board members.

Thus case law has supported the statement in the preparatory works that information gathered through tax audits and similar inspections is considered to be of such a sensitive nature that in most cases it should be confidential. The court appears, in accordance with the preparatory works, to grant a higher level of confidentiality to this type of information than what is intended by a straight requirement of damage, which presumes public access to be the main rule.[159]

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[156] RÅ 1986 not 613.

[157] A preliminary memorandum (Sw. *förhandspromemoria*) is a document that is drawn up during the course of certain audits and contains a description of the tax auditor's findings during the audit, SKATTEVERKET, HANDLEDNING FÖR SKATTEREVISION. REVISIONSPROMEMORIAN 32 (2 ed. 2006).

[158] PROP. 1979/80:2 DEL A, *supra* note 41 at 259

[159] *See also* Ekroth and Kristoffersson, *supra* note 154 at 90.

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c. Information in Advance Rulings

The courts have also differentiated the confidentiality requirements of tax information included in advance rulings. In RÅ 1986 not 322, the court decided that only part of an audit memoranda that contained the description of the documents of the case concerning an advance ruling was protected by confidentiality. In RÅ 1992 ref 9, the court contended that for an applicant in a case on an advance ruling, it is routinely of utter importance that confidential information submitted in the case is not disclosed. However, the Court did order disclosure of the documents with the confidential information redacted.[160]

In RÅ 2002 not 156, the taxpayer requesting the advance ruling waived confidentiality and consented to disclosure of the information. The court decided that the information could be disclosed, except for the names of applicants in two other related cases on advance rulings as the disclosure of which was considered to cause damage or harm to those individuals.[161] Finally, in RÅ 2002 not 172, the court decided that disclosure of documents in a matter on advance ruling could be disclosed provided that information revealing the applicant's name, address, personal number, corporate number, organizational structure, business sectors, ownership, and shareholding were redacted.

As Eleonor Kristoffersson and Jesper Ekroth contend, the court seems (as it does in relation to information obtained through tax audits and other controls dealt with above) to consider information in advance rulings to be of a highly sensitive nature and appears therefore to apply a reverse rather than a straight requirement of damage in cases on advance rulings.[162]

5. Confidentiality of Tax Information in Court Judgments

Concerning court proceedings, in Sweden great importance is traditionally placed on the courts as far as possible, being subject to public inspection. Transparency is thought to help strengthen legal certainty for individuals as well as the public's confidence in the enforcement of the law.[163] The preparatory works preceding the Secrecy Act of 1980 provide that the public should have as great an insight into court activities as possible and that it is of the utmost importance that the courts' judgments should be public.[164] Therefore, confiden-

[160] RÅ 1992 ref 9.

[161] RÅ 2002 not 156.

[162] Ekroth and Kristoffersson, *supra* note 154 at 97 and 100–101.

[163] DS 2014:33 OFFENTLIGHET OCH SEKRETESS FÖR UPPGIFTER I DOMSTOLSAVGÖRANDEN, 24.

[164] PROP. 1979/80:2 DEL A, *supra* note 41 at 102.

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tiality provisions that apply to information held in relation to a court's judicial or law enforcement activities cease to apply if that information is included in a judgment.[165] This means that tax information, which in principle enjoys confidentiality protection under PAISA Chapter 27, loses its confidentiality protection when it is included in a judgment. However, PAISA Chapter 43 § 8 [Cessation of Secrecy in Certain Cases], provides the court with the possibility to decide that a confidentiality provision that applies to certain information shall continue to apply to the information when it is part of a judgment. This allows the courts to take into account both the interests in favor of public court judgments, and the interests in favor of preserving confidentiality when necessary with respect to the circumstances in the individual case.[166]

Additionally, the court may not decide on continued confidentiality if the information is presented in a public hearing, since a confidentiality provision that applies to information held in relation to a court's judicial or law enforcement activities ceases to apply in the case if the information is presented at a public hearing.[167] However, the provision continues to apply in the case if the information is presented in a hearing behind closed doors.[168]

In the preparatory works of the PAISA concerning confidentiality in court proceedings, it is explicitly suggested that the court should be able to decide on continued confidentiality regarding information which identifies a taxpayer in judgments concerning advance rulings.[169] Numerous cases from the Supreme Administrative Court show that the court regularly exercises this option to decide on continued confidentiality for taxpayer identifying information in cases concerning advance rulings. In these judgments, taxpayer identifying information is redacted.[170] Information in advance rulings is thus again considered as being of a highly sensitive nature.

6. Confidentiality-Breaking Rules—Exceptions to Tax Information Confidentiality

Though the starting point is that confidentiality applies both to individuals and between authorities, and to some extent even within

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[165] Offentlighets- och sekretesslag (2009:400) Chapter 43 § 8.

[166] Ds 2014:33, *supra* note 163 at 26.

[167] According to Offentlighets- och sekretesslag (2009:400) Chapter 43 § 5.

[168] *Id.*

[169] Ds 2014:33, *supra* note 163 at 35–36.

[170] *See for instance* RÅ 1992 not. 367; RÅ 1993 not. 96; RÅ 1993 not. 265; RÅ 1994 not. 381; RÅ 1996 not. 123; RÅ 1996 not. 245; RÅ 1997 not. 180; RÅ 1999 ref. 33; RÅ 1998 not. 213; RÅ 1999 not. 36; RÅ 2000 not. 86 (although it should not be particularly difficult to identify the company with the help of other information in the judgment); RÅ 2001 not. 164; RÅ 2002 not. 210.

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authorities, in some cases confidential information needs to be provided both to individuals and to other authorities. For instance, a supervisory authority needs to obtain confidential information from the operations that it has to monitor, the police need to obtain information from other authorities in tackling so-called white collar-crime, and schools need to cooperate with social services for interventions regarding children and youths. There are confidentiality-breaking rules that apply at a more general level, such as those mentioned in subsection II.(C.)(1.)(d.), concerning confidentiality in relation the individual himself, and rules that allow exchange of confidential information between authorities. PAISA Chapter 27 §§ 7–8, [Secrecy Breaking Rules], provide confidentiality-breaking rules specifically related to tax information.

These two sections provide rules that override the confidentiality set forth in §§ 1 and 4. Section 7 item 2 stipulates for instance that information can be disclosed, notwithstanding confidentiality, in accordance with the provisions in the Tax Database Act.[171] Chapter 2 § 5 of the Tax Database Act contains a straight requirement of damage, that is, the presumption is that the information is public.[172] It is stated that the information may be disclosed unless, for a particular reason, it can be assumed that a disclosure would cause damage to the individual or to someone closely related to him.[173] An enumeration of the information that may be disclosed is also found in the Tax Database Act Chapter 2 § 5. Information that may be disclosed in accordance with this provision is, *inter alia*, name and personal or corporate identity number, legal form, type of business activity, registration of liability to make tax deduction or pay employer's contribution, and a decision on liquidation or bankruptcy.[174] Section 8 of PAISA Chapter 27 provides the possibility to disclose information regarding an individual's bankruptcy to the trustee, notwithstanding confidentiality.[175]

D. Summary of Swedish Tax Confidentiality Rules

The core of the Swedish tax confidentiality legislation is found in PAISA Chapter 27, [Confidentiality for the Protection of Individuals in Activities Concerning Tax, Customs Duty, Etc.] The basis for these rules is

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[171] Lag (2001:181) om behandling av uppgifter i Skatteverkets beskattningsverksamhet

[172] *Id.* at Chapter 2 § 5.

[173] *Id.*

[174] RÅ81 2:47; RÅ83 Ab 124, information concerning whether an individual is registered for VAT and information concerning whether a company is registered as an employer is not covered by this provision, and is therefore not public.

[175] Offentlighets- och sekretesslag (2009:400) Chapter 27 § 8.

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laid down in constitutional law via Chapter 2 of the Freedom of the Press Act.[176] The FPA provides the right of public *access* to official documents, a specific feature of the Swedish constitutional tradition, and enumerates the possible restrictions to this right. Tax confidentiality falls under FPA Chapter 2 Article 2 item 6, stating that the right of access to official documents may be restricted if restriction is necessary with regard to the protection of the personal or economic circumstances of individuals. The aim of the confidentiality rules is that the requirement of confidentiality shall apply only to the extent necessary to protect the interest underlying the confidentiality provision, that is, to avoid any form of confidentiality for safety's sake.

Tax confidentiality as a restriction on the right of access to official documents was enacted through changes in the FPA in 1903 and later transferred from the FPA to the Secrecy Act of 1937. This act underwent thorough systematization in the late 1970s, resulting in a new Secrecy Act of 1980. Today, the rules governing confidentiality of individuals' tax information are found in PAISA Chapter 27.

Confidentiality applies under PAISA Chapter 27 § 1 to *information* concerning an individual's personal or financial circumstances held in relation to activities relating to the determination of tax or establishing the basis for determining the tax. The main reason for the high level of confidentiality in tax matters, as pointed out in preparatory works, is the taxpayers' far-reaching duty to submit information about their economic circumstances. It is held that most taxpayers would consider it a violation of privacy if information in their tax returns were to be made public. Another reason advanced in the preparatory works of the Secrecy Act is the sheer volume of people for whom tax information is held each year.

However, according to the preparatory works, the high level of confidentiality in tax matters needs to be set off against the constitutional principle that official documents are public and that confidentiality should be the exception to that rule. The high level of confidentiality in PAISA Chapter 27 § 1 is therefore compensated by a high level of transparency with regard to tax court proceedings (PAISA Chapter 27 § 4) and public decisions (PAISA Chapter 27 § 6). Transparency with regard to taxpayer information in court proceedings is restricted through a straight requirement of damage, that is, transparency is the presumption but the information may be kept confidential if it is concluded that disclosure would cause damage to the individual. The straight requirement of damage in § 4 provides a stark contrast to the absolute confidentiality provided in § 1. Although transparency under § 4 is not complete, public access is the presumption, which puts heavy weight on the right of public access to official documents.

[176] Tryckfrihetsförordning (1945:105).

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In relation to tax information in court proceedings, tax confidentiality is further weakened by the rules in PAISA Chapter 43. According to § 8 of PAISA Chapter 43, a confidentiality provision that applies to information held in relation to a court's judicial or law enforcement activities ceases to be applicable in the case if the information is included in a judgment. This means that tax information that enjoys confidentiality protection under PAISA Chapter 27, in principle, loses its confidentiality protection when it is included in a judgment. However, the court is authorized to decide that a confidentiality provision that applies to certain information shall continue to apply to the information when it is part of a judgment.

An even starker contrast to the absolute confidentiality in PAISA Chapter 27 § 1 is § 6, which provides total transparency of decisions. This is the most eye catching feature of the Swedish tax confidentiality regime. The reason for such wide transparency is basically that the constitutional right of public access to official documents is the starting point of Swedish confidentiality legislation and confidentiality is the exception. A rule prescribing complete confidentiality is not very consistent with this basis.[177] Certain expressly mentioned decisions, such as advance rulings, are exempted from this rule. However, concerning advance rulings, confidentiality applies only to information identifying a specific taxpayer and not to the legal conclusion of the ruling.

Consequently, in short, the Swedish rules on tax confidentiality provide that information in a tax return is protected by confidentiality (note that it is the information in a tax return that is protected by confidentiality, not the tax return itself), but the tax decisions are public. This means that information on the calculated income from a particular source is public, but the separate information on income or deduction or the acquisition source is confidential.[178] For instance, the total amount of earned income or capital income is public because it occurs in a decision, but the source(s) and any deductions are confidential because that information stems from the tax return. Nonetheless, if a tax return is being audited, for instance regarding a deduction, and the Tax Agency deviates from the tax return and is thus obligated to issue a decision containing the reasons for the decision, the deduction that would otherwise be protected by confidentiality under PAISA Chapter 27 § 1 becomes public information under PAISA Chapter 27 § 6. Information that is protected by confidentiality under PAISA Chapter 27 § 1 may furthermore be publicly accessible under PAISA Chapter 27 § 4.

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[177] PROP. 1979/80:2 DEL A, *supra* note 41 at 256.

[178] PROPOSITION 1989/90:74 OM NY TAXERINGSLAG M.M., 299.

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Part III: The United States of America

A. The Historical Development of Tax Confidentiality Legislation in the United States of America

Public access to individual tax return information in the United States has fluctuated widely over time, ranging from broad accessibility when the income tax was first introduced to the extensive restrictions on public disclosure that are in effect today. This section provides a brief presentation of the historical development of tax confidentiality legislation in the United States.

1. Late 1800s

The first federal income tax legislation in the United States, creating the Civil War income taxes, was introduced in 1861. In 1862, provisions for public access were added. These provisions provided that the tax assessor's list was to be published in public newspapers and publically posted in at least four public places within each assessment district.[179] A year later, these publication provisions came to include tax returns.[180] Major newspapers soon began publishing the incomes of leading citizens. In 1865, the New York Tribune even published a list of rich and famous citizens.[181]

In 1870, privacy provisions were incorporated via the Revenue Act of 1870. Section 11of the act stated:

> *That no collector, deputy collector, assessor, or assistant assessor shall permit to be published in any manner such income returns or any part thereof, except such general statistics, not specifying the names of individuals or firms, as he my make public, under such rules and regulations as the commissioner of internal revenue shall prescribe.*[182]

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[179] HOWARD M. ZARITSKY, LEGISLATIVE HISTORY OF TAX RETURN CONFIDENTIALITY: SECTION 6103 OF THE INTERNAL REVENUE CODE OF 1954 AND ITS PREDECESSORS 1–5 (1974).

[180] *Id.*

[181] *Id.* at 65. *See also* Joshua D Blank, *In Defense of Individual Tax Privacy*, 61 EMORY LAW J. 265–348, 275–276 (2011).

[182] ZARITSKY, *supra* note 179 at 8.

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2. Early 1900s

A federal income tax on corporations was imposed in 1909 by the Tariff Act of 1909. The Act included a specific provision making corporate returns public. However, this provision was soon changed, as the Act was amended in 1910 so that returns would be open to inspection only upon order of the President under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President.[183]

The Revenue Act of 1913 contained a provision providing that tax returns constituted public records, open to inspection to the extent authorized in rules and regulations prescribed by the Secretary of the Treasury and approved by the President. The Act prescribed that corporate returns were to be public while providing total secrecy for individual returns.[184]

In 1924, and again in 1934, Congress enacted legislation providing for limited disclosure of individual and corporate federal income tax returns. Under the Revenue Act of 1924, the taxpayer's name and address and the amount of tax paid became available to the public. It furthermore provided for publication of the amount of tax refunds.[185] However, changes were made in 1926, so that only the name and address, and not the amount of tax actually paid, was open to the public.[186] The Revenue Act of 1934 entailed what could be called the Pink Slip Requirement, as the Act provided that taxpayers were to supplement their tax returns with a pink sheet of paper—the "pink slip"—which would contain certain tax data about the taxpayer, such as name and address, total gross income, total deductions, net income, total credits, and tax liability.[187] The limitation on disclosure provided in the Revenue Act of 1934 meant that only this pink slip, not the entire tax return, was to be open to the public.[188] However, the Revenue Act of 1934 was repealed as early as 1936, after substantial debate over the propriety of the pink slip provisions.[189]

3. The Tax Reform Act of 1976 to Present

Current tax confidentiality rules were introduced with the enactment of the Tax Reform Act of 1976. Prior to the enactment of the Tax Reform Act of 1976, as has been shown, tax returns were regarded as public records.

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[183] *Id.* at 10, 27.

[184] *Id.* at 55–58.

[185] Marjorie E. Kornhauser, *Doing the Full Monty: Will Publicizing Tax Information Increase Compliance*, 18 CAN. J. LAW JURISPRUD. 95, 21 (2005).

[186] Zaritsky, *supra* note 179 at 60.

[187] *Id.* at 60.

[188] *Id.*

[189] *Id.* at 61.

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However, tax returns were generally open to inspection only under certain regulations as approved by the president, or under Presidential order.

Under these rules and regulations, many agencies could access tax information held by the Internal Revenue Service ("IRS"), and nearly every federal agency enjoyed some degree of access to tax returns or return information. In the early 1970s, Congress became concerned that the system of access to tax information was being abused. These concerns were mostly based on Congress having learned that the Nixon Administration was using tax information obtained from the IRS as a political tool. Concerns were raised that Congress had not specifically considered whether all the agencies which had access to tax information in fact should have been allowed such access. Furthermore, the rules on access had not been reviewed by the Congress for 40 years.

In response to the perceived abuse of the existing disclosure provisions, and in order to significantly tighten the restrictions relating to the use of information collected by the IRS by other government agencies, Congress enacted the Tax Reform Act of 1976, containing a general provision against the disclosure of information compiled by the IRS. According to these new rules, tax returns and return information were to be treated as confidential and subject to disclosure only when authorized by statute. By doing this, Congress attempted to balance the particular office or agency's need for the information with the citizen's right to privacy.[190]

Congress also considered the impact of the disclosure upon the continuation of compliance with the US voluntary assessment system.[191] The question was raised of whether the public's reaction to the perceived abuse of privacy would seriously impair the effectiveness of the voluntary assessment system.[192] Congress eventually decided that the information that American citizens were compelled to disclose to the IRS by the tax laws was entitled to essentially the same degree of privacy as those private papers maintained in the taxpayer's home.[193]

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[190] SENATE REPORT NO. 938, 94TH CONG., 2D SESS., 315–318 (1976); IRS, DEPARTMENT OF THE TREASURY, DISCLOSURE & PRIVACY LAW REFERENCE GUIDE 1–7 – 1–9.

[191] *See Flora v. United States,* 362 U.S. 145, 176 (1960) in which the Supreme Court stated that "our system of (income) taxation is based upon voluntary assessment and payment..." Voluntary does not indicate that filing a tax return is voluntary, but refers to a tax system based on taxpayers' voluntary compliance with the tax laws. *See*, for instance, John Potts Barnes, Lawyer and the Voluntary Assessment System, 40 TAXES - TAX MAG. 1034, 1035 (1962).

[192] S. REP. NO. 938, *supra* note 190 at 317.

[193] *Id.* at 328.

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Although there have been many amendments to the law since the time of the enactment of the Tax Reform Act of 1976, the basic statutory scheme established in 1976 remains in place today.[194]

B. Current US Tax Confidentiality Law

1. The Basis for Tax Confidentiality

The rules governing tax confidentiality discussed in this article are found in the Freedom of Information Act ("FOIA")[195] and the Internal Revenue Code ("IRC").[196]

Congress passed FOIA in 1966 in order to facilitate public access to government records. The purpose of the Act is "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."[197] The intention of FOIA has been interpreted by several courts. It has been stated that the intention was opening administrative processes to the scrutiny of the press and general public[198] and that the dominant objective of the FOIA is disclosure, not confidentiality.[199] At the same time, Congress recognized the necessity of protecting certain citizen's interests such as the right to privacy. It is stressed that this necessary balance of interests is not an easy task.[200]

FOIA requires, *inter alia*, that every federal entity presented with a request for records under the statute must make such records promptly available to any person.[201] This disclosure requirement does not apply, however, if the requested information falls within one of nine exemptions enumerated in FOIA § 552(b).[202] The nine exemptions are explicitly made exclusive, stating that "[t]his section does not authorize withholding of information or limit the availability of records to the public, except as

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[194] U.S. DEPARTMENT OF THE TREASURY, OFFICE OF TAX POLICY, REPORT TO THE CONGRESS ON SCOPE AND USE OF TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS. VOLUME I: STUDY OF GENERAL PROVISIONS 3 (2000).

[195] 5 USC 552, *et. seq*.

[196] 26 USC 1, *et. seq*.

[197] SENATE REPORT NO. 813, 89TH CONG., 1ST SESS., 3 (1965).

[198] *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 17 (1974), *Bannercraft Clothing Company v. Renegotiation Board*, 466 F.2d 345, 352 (1972). *See also Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

[199] *Air Force v. Rose*, *supra* note 198 at 361.

[200] S. REP. NO. 813, *supra* note 197 at 3.

[201] 5 USC 552(a)(3)(A).

[202] *See* 5 USC 552(b).

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specifically stated in this section."[203] It has furthermore been held in court that FOIA exemptions are to be narrowly understood.[204]

The nine exemptions to disclosure provided in FOIA § 552(b) apply to:

1. national defense or foreign policy or classified information,
2. matters that are related solely to the internal personnel rules and practices of an agency,
3. statutorily exempted from disclosure by other Congressional acts,
4. matters involving trade secrets or commercial or financial confidential information,
5. confidential inter-agency materials,
6. private personal or medical files,
7. records compiled by law enforcement agencies in certain circumstances,
8. matters involving regulation or supervision of financial institutions, or
9. certain geological and geophysical information regarding national infrastructure.[205]

Of particular importance to tax confidentiality is exemption 3 listed above. For FOIA § 552(b)(3) exempts from disclosure information specifically exempted from disclosure by another statute, provided that such statute:

> *i. requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or*
> *ii. establishes particular criteria for withholding or refers to particular types of matters to be withheld.*[206]

For the purposes of the disclosure of tax information resulting from a FOIA request, Internal Revenue Code ("IRC") § 6103 [Confidentiality and Disclosure of Returns and Return Information], satisfies the requirements of exemption 3.[207] Therefore, tax information submitted to the IRS, as a general

[203] 5 USC § 552(d).
[204] *FBI v. Abramson,* 456 U.S. 615, 630 (1982).
[205] *See generally* 5 USC 552(b).
[206] 5 USC 552(b)(3).
[207] *See generally* 26 USC 6103.

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rule, is considered confidential and "return information shall be confidential," subject to a number of exceptions. Courts are in agreement that IRC § 6103 qualifies as an exemption statute under FOIA § 552(b)(3).[208]

Apart from IRC § 6103, it is IRC § 6110, [Public Inspection of Written Determinations], that is also of great interest for this article. As mentioned above, IRC § 6103 sets forth the general rule on tax confidentiality. However, IRC § 6110 opens the text of written determinations to public inspection. Both of these provisions are examined in more detail below.

2. Non-Disclosure of Tax Information under IRC § 6103

As stated above, information need not be released to the public if it is specifically exempted from disclosure by statute. IRC § 6103 constitutes such a statute embraced by the FOIA exemptions. IRC § 6103(a) in particular sets forth the general rule that tax returns and return information are confidential and may not be disclosed by officers or employees of the United States, or certain other individuals with access to such information, except as authorized by the statute.[209]

a. Definitions

Certain definitions are of relevance before proceeding with the details of IRC § 6103. First, it is stated that a *return* is any tax or information return, including schedules and attachments or amendments or supplements, which is required or permitted to be filed and is filed by a taxpayer with the Secretary of the Treasury.[210] According to the Internal Revenue Manual ("IRM"), a photocopy of a return is considered to be a return for this purpose.[211]

Second, *return information* is broadly defined. It includes any information gathered by the IRS with regard to a taxpayer's liability under the federal tax code.[212] It covers information such as taxpayer identity, the nature, source, or amount of income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies,

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[208] *Landmark Legal Foundation v. IRS*, 267 F.3d 1132, 1134 (D.C. Cir. 2001); *Long v. IRS*, 742 F.2d 1173, 1177 (9th Cir. 1984); *Church of Scientology of California v. IRS*, 792 F.2d 146, 159 (DC Cir. 1986).

[209] 26 USC 6103(a).

[210] *See generally* 26 USC 6103(b).

[211] IRM 9.3.1.2.2 (09-25-2006) Definition of Disclosure Terms. The IRM serves as the single official compilation of the policies, delegations of authorities, procedures, instructions and guidelines relating to the organization, function, administration and daily operations of the IRS, see IRM 1.4.1.7 (01-20-2012) Performance Management).

[212] *See generally* 26 USC 6103(b)(2).

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over assessments or tax payments.[213] This detailed enumeration is supplemented by also protecting any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary of the Treasury with respect to a return, or with respect to the determination of the existence, or possible existence, of liability of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.[214]

Return information also includes information confirming that a person has filed a return, that a person is under investigation, and the fact that the IRS has, in its possession, copies of public records which were secured from a county clerk's office pursuant to an audit or investigation of a taxpayer.[215] As has been stated in court, "return information" has "evolved to include virtually any information collected by the Internal Revenue Service regarding a person's tax liability."[216] Thus, return information covers almost all information pertaining to a taxpayer, which is in the possession of the IRS.

Notice the statutory definition of return information includes the wording *"received by."* This means that tax information not received or disclosed by the IRS, does not constitute return information and, therefore, is not protected by IRC § 6103.[217] The courts have held that IRC § 6103 "does not prohibit the disclosure of tax return information that comes from a source other than the IRS."[218]

According to IRC § 6103(b)(2), excluded from the term *return information,* and thus from confidentiality, are statistical compilations that cannot be associated with, or otherwise identify, a particular taxpayer.[219] This is commonly referred to as the Haskell Amendment.[220] Considering the legislative history, the circumstances under which the Haskell Amendment was adopted, and the plain language of the section, the Court has found that mere redaction of identifying details does not deprive return information of

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[213] 26 USC 6103(b)(2)(A).

[214] *Id.*

[215] IRM 9.3.1.2.3 (09-25-2006) Definition of Disclosure Terms.

[216] *Landmark Legal Foundation, supra* note 209 at 1135; Allan Karnes & Roger Lively, *Striking Back at the IRS: Using Internal Revenue Code Provisions to Redress Unauthorized Disclosures of Tax Returns or Return Information*, 23 SETON HALL LAW REV. 924, 933 (1992).

[217] JOHN A. GALOTTO, CHRISTOPHER P. LA PUMA & NEERAJ PAI, TAX MANAGEMENT PORTFOLIO, NO. 625 OBTAINING INFORMATION FROM THE GOVERNMENT - DISCLOSURE STATUTES (1995) 84–85.

[218] *Shell Petroleum, Inc. v. U.S.,* 46 Fed. Cl. 719, 722 (2000); S*ee also Baskin v. U.S.,* 135 F3d 338, 342 (5th Cir. 1998).

[219] 26 USC 6103(b)(2)

[220] Named after the amendment's sponsor, United States House Representative, Harry G. Haskell.

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protection under IRC § 6103(b).[221] The return information is still subject to confidentiality under IRC § 6103.[222] It has been argued that return information consists of more than merely identifying information,[223] and in the same case, the court furthermore held that, in addition to non-identification, some alteration by the government of the form in which the return information originally was recorded would be equally insufficient to deprive it of confidentiality.[224]

However, while mere redaction of taxpayer identifying information from return information does not make disclosure possible, documents containing both return information and non-return information cannot be completely withheld.[225] IRC § 6103(a) prohibits three categories of persons from disclosing returns and return information. The first includes officers and employees of the United States. The second regards officers and employees of any State or local law enforcement agency, local child support enforcement agency, or other specified local agencies. The third includes certain other persons who have had access to returns or return information under particular IRC § 6103 exceptions. The prohibitions set forth in IRC § 6103 do not apply to persons not explicitly listed in IRC § 6103.[226]

b. Exceptions from Non-Disclosure under IRC § 6103

As stated, IRC § 6103(a) contains the general tax information non-disclosure rule. Tax returns and tax return information must be kept confidential, unless a statutory exception applies. However, all of the provisions included in IRC § 6103(c) to § 6103(o) contain exceptions from this general rule of non-disclosure. They permit the IRS, in specified circumstances, to disclose returns and return information to certain entities and persons for specific purposes. This list of exceptions from the general non-disclosure rule is quite extensive, and therefore, in the following paragraphs, only those exemptions that are of particular interest for this article, are examined. These exemptions are included in IRC § 6103(c), (h)(4), (k), and (m).

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[221] *Long v. IRS*, 596 F.2d 362 (9th Cir. 1979).

[222] Up until this point, *Long* had been the leading case, providing disclosure of return information upon the mere redaction of identifying information. *Id.*

[223] *Scientology, supra* note 208 at 158.

[224] *Id.* at 163.

[225] GALOTTO, LA PUMA, AND PAI, *supra* note 217 at 88.

[226] *Hrubec v. National Railroad Passenger Corporation*, 49 F.3d 1269, 1270 (7th Circ. 1995); *Dietl v. Mirage Resorts, Inc.*, 180 F. Supp. 2d 1150, 1153 (D. Nev. 2002).

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First, IRC § 6103(c) authorizes the IRS to disclose a taxpayer's return or return information to any person or persons the taxpayer may designate in a request for, or consent to, disclosure.[227] This type of consent is generally referred to as *general purpose consent*.[228] General requirements for a request for or consent to such disclosure are set forth in Income Tax Regulations ("Reg.") § 301.6103(c)-1(b).[229] The request for, or consent to such disclosure must, according to the Regulations, be in the form of a written document pertaining solely to the authorized disclosure and it must be signed and dated by the taxpayer who filed the return or to whom the return information relates.[230] Furthermore, the document must contain certain specified information, such as the taxpayer's identity information, the identity of the person or persons to whom the disclosure is to be made, the type of return or return information that is to be disclosed, and the taxable year or years covered by the return or return information.[231]

Next, IRC § 6103(h) entails an exception which authorizes disclosure to certain Federal officers and employees for the purposes of tax administration.[232] Under IRC § 6103(h)(4), tax returns and tax return information may be disclosed in judicial or administrative proceedings if the taxpayer is a party to such proceedings or the proceedings have arisen from the taxpayer's tax liability.[233] The principal purpose behind this exception is to regulate the sensitive returns and return information that is disclosed in proceedings which are often public.[234] This exception is of special interest for this article, since it offers a way for the public to access otherwise confidential returns and return information. This issue is further developed in subsection (B)(4) below.

Additionally, IRC § 6103(k) governs disclosure of certain returns and return information for tax administration purposes. IRC § 6103(k)(1) provides that return information relating to accepted offers-in-compromise under IRC § 7122, [Compromises], must be disclosed to the general public to comply with the public disclosure requirements of IRC § 7122.[235] Under IRC § 7122(a), the IRS may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense. In short, an offer-in-compromise is an agreement between the

[227] 26 USC 6103(c).
[228] IRS, DEPARTMENT OF THE TREASURY, *supra* note 194 at 2–19.
[229] 26 CFR § 301.6103(c)-1(b)
[230] *Id.*
[231] *Id.*
[232] 26 USC 6103(h).
[233] *See generally* 26 USC 6103(h)(4).
[234] IRS, DEPARTMENT OF THE TREASURY, *supra* note 194 at 3–7 – 3–8.
[235] 26 USC § 7122.

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taxpayer and the IRS that settles a tax debt for less than the full amount owed.[236] An accepted offer-in-compromise is a legally binding agreement between the IRS and the taxpayer, and is enforceable by either party.[237]

A offer-in-compromise shall be placed on file with the IRS entailing the opinion and the reasons for it, including the amount of tax assessed, the amount of interest, and any additional amount, addition to the tax, or assessable penalty imposed by law on the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise.[238] Offers-in-compromise are available for viewing in the Public Inspection File by scheduled appointment at certain locations.[239] Public inspection of an offer-in-compromise concerns only information mentioned above. All other information must be redacted for the public inspection file. Subsequently, only a redacted copy of the offer in compromise documentation is actually available for public inspection.[240] The IRS carefully redacts significant information enumerated in the IRM.[241]

Finally, the last exception to the IRC § 6103 general non-disclosure rule here presented is § 6103(m)(1). This exception provides that the IRS may disclose taxpayer identifying information to the press for the purpose of notifying those who are entitled to refunds if the IRS, after a reasonable effort and lapse of time, is unable to locate such persons.[242] However, this provision does not authorize the IRS to disclose return information identifying individuals convicted of tax offenses.[243]

c. Procedures for Disclosure under IRC § 6103

IRC § 6103(p) sets forth the general procedures and guidelines for the disclosure of returns and return information when disclosure of such information is required per the exceptions provided in IRC § 6103(c)–(o). Procedures include guidelines for the reproduction of returns and the manner in which return information may be reproduced.

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[236] 26 CFR § 301.7122-1(b) provides the grounds for compromise.

[237] IRM 4.18.1.2 (01-07-2011) Offers in Compromise Received in Exam. Introduction.

[238] See IRC § 7122(b). Note, IRC § 7122(b) does not require a report relating to amounts less than $50,000.

[239] See IRS Offer in Compromise Public Inspection File Locations, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Offer-in-Compromise-Public-Inspection-File-Locations (last visited Dec 18, 2014).

[240] IRM 5.8.8.8(2) (08-08-2014) Public Inspection File.

[241] IRM 5.8.8.6(6) (01-01-2015) Required Actions Prior to Closing an OIC as an Acceptance.

[242] 26 USC 6103(m)(1).

[243] *Johnson v. Sawyer*, 120 F.3d 1307, 1321 (5th Cir. 1997).

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IRC § 6103(p)(2)(A) governs the reproduction of returns. It states that a reproduction of a return shall, upon written request, be furnished to any person to whom disclosure or inspection of such return is authorized under this section.[244] It furthermore states that a reasonable fee may be prescribed for furnishing such reproduction.[245] IRC § 6103(p)(2)(B) governs how the return information may actually be provided. Return information disclosed to any person under the provisions of this title may be provided in the form of written documents, reproductions of such documents, films or photoimpressions, or electronically produced tapes, discs, or records, or by any other mode or means which the Secretary determines necessary or appropriate.[246] As under the previous section, a reasonable fee may be prescribed for furnishing such return information.[247]

Furthermore, IRC § 6103(p)(4) provides requirements for certain federal agencies, to which the IRS may lawfully disclose information, to safeguard returns and return information.[248] The agencies are required, *inter alia*, (1) to establish a system of records to keep track of all disclosure requests, the date of request, and the reason for the request; (2) to establish a secure area in which to store the information; and (3) to restrict the access of persons to that information.[249] However, the section furthermore states that these security requirements do not apply if information has been disclosed in judicial or administrative proceedings and made a part of the public record thereof.[250]

3. Disclosure of Tax Information under IRC § 6110

IRC § 6110, [Public Inspection of Written Documents], opens to public inspection, with certain identifying and other information deleted, written determinations and certain types of background materials relating thereto.

IRC § 6110 was added to the Internal Revenue Code by the Tax Reform Act of 1976. Congress noted that it had been argued that the "private ruling system" had developed into a body of secret law known only to a few members of the tax profession and that the confidentiality surrounding those written determinations had generated suspicion that the tax laws were not being applied on an even-handed basis.[251] Congress explained that private

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[244] 26 USC 6103(p)(2)(A).
[245] *Id.*
[246] 26 USC § 6103(p)(2)(B).
[247] *Id.*
[248] *See generally* 26 USC 6103(p)(4).
[249] *Id.*
[250] *Id.*
[251] S. REP. NO. 938, *supra* note 190 at 305–306.

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rulings should be made public because that was the only way by which all taxpayers could be assured of access to the ruling positions of the IRS which would tend to increase the public's confidence that the tax system operates fairly and in an even-handed manner with respect to all taxpayers.[252]

a. Partial Disclosure of Written Determinations

The IRS regularly provides written legal analysis and advice in response to specific requests from individual taxpayers. These written responses fall under the statutory term "*written determinations*" and come in the form of Rulings, Determination Letters, Technical Advice Memoranda, and Chief Counsel Advice.[253] However, these terms are not themselves defined in the statute. The following paragraphs focus only on written determinations in the form of rulings.

A *Ruling*, or a Private Letter Ruling, is a written statement issued to a taxpayer that explains how the IRS will interpret and apply tax laws to the taxpayer's specific set of facts. It generally recites the relevant facts, sets forth the applicable provisions of law, and shows the application of the law to the facts.[254] A Private Letter Ruling is issued to establish with certainty the federal tax consequences of a particular transaction *before* the transaction is carried out or before the taxpayer's return is filed. If the taxpayer fully and accurately has described the proposed transaction in the request and carries out the transaction as described, the ruling is binding on the IRS.[255]

Private Letter Rulings are to be made available for public inspection under IRC § 6110, which also creates an affirmative obligation to the IRS to make certain written determinations, such as rulings, are actually available for public inspection.[256]

Before the IRS may disclose a written determination under § 6110, it must redact information that would identify any person about whom the determination is concerned.[257] According to Income Tax Regulations, such information includes names, addresses and any identifying numbers.[258] Identifying numbers include telephone, license, social security, employer identification,

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[252] *Id.*

[253] 26 USC 6110(b)(1)(A). *See also* GALOTTO, LA PUMA, AND PAI, *supra* note 217 at 133.

[254] *See generally* 26 CFR § 301.6110-2(d)

[255] Understanding IRS Guidance - A Brief Primer, http://www.irs.gov/uac/Understanding-IRS-Guidance-A-Brief-Primer (last visited August 24, 2015).

[256] GALOTTO, LA PUMA, AND PAI, *supra* note 217 at 133.

[257] 26 USC 6110(c)(1).

[258] *See generally* 26 CFR 6110-3(a)(1)(i).

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credit card, and selective service numbers.[259] The IRS must also redact any other identifying details that would permit a person generally knowledgeable with respect to the appropriate community to identify any person.[260] In determining whether information would permit identification of a person, the IRS will consider information publicly available at the time the ruling is issued as well as information that will subsequently become available.[261] The *appropriate community* is defined as that group of persons who would be able to associate a particular person with a category of transactions of which one is described in the ruling.[262]

Additionally, the IRS must delete any information, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.[263] Personal privacy information encompasses embarrassing or sensitive information that a reasonable person would not reveal to the public under ordinary circumstances, such as a pending divorce, medical treatment, adoption of a child, the amount of a gift, political preferences, etc.[264] A clearly unwarranted potential invasion of personal privacy exists if the potential harm caused by the disclosure of the personal information outweighs any public interest purpose.[265] Presumably this weighing test is applied with the recognition that the taxpayer is to remain unidentified.[266]

Prior to disclosure, the person to whom the written determination pertains shall, through a Notice of Intention to Disclose, be notified by the IRS of intention to disclose such written determination.[267] The content of the Notice is described in the Income Tax Regulations and includes a copy of the text of the written determination (or background file document), which the IRS proposes to make open to public inspection or subject to inspection pursuant to a written request, on which is indicated the material that the IRS proposes to delete, any proposed substitutions, and any third-party communication notations to be placed on the written determination.[268] The Notice shall furthermore state that the document will be open to public inspection and inform the recipient of their right to contest the scope of deletions.[269] Taxpayers may challenge the proposed redaction of too little identifying data,

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[259] 26 CFR § 301.6110-3(a)(1)(i).
[260] 26 CFR § 301.6110-3(a)(1)(ii)
[261] *Id.*
[262] *Id.*
[263] *See generally* 26 USC 6110(c)(5).
[264] 26 CFR § 301.6110-3(a)(5).
[265] *Id.*
[266] GALOTTO, LA PUMA, AND PAI, *supra* note 217 at 146.
[267] *See* 26 USC 6110(f)(1).
[268] 26 CFR § 301.6110(a)(2)
[269] *Id.*

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while a member of the public may challenge the withholding of too much identifying data.[270]

Most written determinations are routinely open to public inspection in the IRS's Freedom of Information Reading Room and are available on the Internet.[271]

b. Non-Disclosure of Closing Agreements

A number of categories of documents are exempted from automatic disclosure in compliance with IRC § 6110 either by specific statutory exclusion or because they are excluded from the definition of written determinations. One category of documents excluded from the definition of written determinations, and thus not included for disclosure within the scope of IRC § 6110, is closing agreements.

Under IRC § 7121, [Closing Agreements], the IRS is authorized to enter into a written agreement with any taxpayer relating to the liability of such person in respect of any internal revenue tax for any taxable period.[272] A Closing Agreement is, in short, a final, binding agreement between the IRS and the taxpayer relating to the taxpayer's tax liability for one or more years. According to Income Tax Regulations,

> *[a] closing agreement may be entered into in any case in which there appears to be an advantage in having the case permanently and conclusively closed, or if good and sufficient reasons are shown by the taxpayer for desiring a closing agreement and it is determined by the Commissioner that the United States will sustain no disadvantage through consummation of such an agreement.*[273]

In other words, if the taxpayer shows good reasons for requesting a Closing Agreement and provides necessary facts and documentation, and the government will sustain no disadvantage, a Closing Agreement will ordinarily be entered into.

Closing Agreements are not written determinations subject to disclosure under IRC § 6110 because they are generally the result of a negotiated settlement

[270] U.S. DEPARTMENT OF THE TREASURY, *supra* note 194 at 27.
[271] See IRS Written Determinations, (2013), http://apps.irs.gov/app/picklist/list/writtenDeterminations.html (last visited August 24 2015).
[272] 26 USC § 7121(a).
[273] 26 CFR § 301.7121-1(a).

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and, as such, do not necessarily represent the IRS view of the law.[274] Furthermore, IRC § 6103(b)(2)(D) explicitly defines Closing Agreements authorized under IRC § 7121 as return information.[275] Thus, closing agreements are protected under the general non-disclosure rule of IRC § 6103(a).

However, the taxpayer and the IRS may agree that public disclosure of a Closing Agreement, or any of its terms, is warranted. In such cases, the taxpayer may sign a waiver of confidentiality as part of the Closing Agreement. The procedures for such waiver are provided in the Income Tax Regulations and are the same procedures as apply to general consent.[276] In general, such public disclosure would be through an IRS news release, or a jointly authored statement, which would be released at the time the Closing Agreement is executed.[277]

4. Disclosure or Re-Disclosure of Returns and Return Information in Judicial and Administrative Proceedings

It was stated above that IRC § 6103(h)(4) is of special interest for this article, since it offers a way in which the public may gain access to tax information otherwise protected by confidentiality. The exception to the general non-disclosure rule set forth in IRC § 6103(h)(4), permits, as described above, disclosure of returns and return information in judicial and administrative tax proceedings. This section of the article deals with the possibility of re-disclosure of tax information contained in public court records due to disclosure under this exception.

No provision of the Internal Revenue Code expressly authorizes the disclosure of returns and return information solely on the basis that the information has become a matter of public record due to lawful disclosure per IRC § 6103(h)(4). The absence of express statutory authority for the disclosure of such information has generated conflicting judicial opinion as to whether IRC § 6103 prohibits such disclosure. The question of whether return information continues to be protected by IRC § 6103 once it is made public through disclosure under IRC § 6103(h)(4) has been addressed by a number of courts with varying results.

Some courts have held that, due to the absence of an explicit exception to disclosure under IRC § 6103, information that has been made

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[274] S. REP. NO. 938, *supra* note 190 at 307; H.R. REP. NO. 94-658, 94TH CONG., 2D SESS., 316 (1976).

[275] 26 USC 6103(b)(2)(D).

[276] *See generally* 26 CFR § 301.7121-1(a),

[277] Department of the Treasury, Internal Revenue Service & Office of Chief Counsel, NOTICE CC-2008-014 PROCEDURES FOR CLOSING AGREEMENTS WITH TAXPAYER CONSENTS TO PUBLICIZE (2008).

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public nonetheless remains confidential in the hands of the IRS. These courts have focused on the literal language of IRC § 6103 which leads them to the conclusion that, because none of the exceptions in IRC § 6103 include public records, disclosure of tax information in public records is a violation of IRC § 6103.[278] Others have held that once tax information is in the public domain it loses its confidentiality protection under § 6103.[279] Still other courts have held that the question turns on the source of the information, that is, the IRS may release otherwise confidential information if its immediate source is a public document. If the disclosure is taken directly from a public record, the disclosure does not contain tax information as statutorily defined and therefore IRC § 6103 has not been violated.

The court found in *Rice v. U.S.* that all the information contained in press releases issued by the IRS regarding criminal proceedings against Rice, came from public court documents and proceedings.[280] The court further determined that because the IRS had not released confidential taxpayer information about Rice from its records, but rather obtained the information for the releases from public sources, the disclosure was proper.[281] In *Thomas v. U.S.,* the court stated that among the items that the IRS made public in its press release were the taxpayer's identity, his tax liability, and the fact that penalties had been assessed against him.[282] These items fell within the definition of return information in IRC § 6103(b)(2).[283] Nevertheless, the Court found that the publication of these items in a press release was not an unauthorized disclosure because the information was not retrieved from a tax return but from public court records.[284] However, the court in *Johnson v. Sawyer* reasoned that if the disclosed information is retrieved directly from a tax return, then IRC § 6103 is violated regardless of whether the information is also part of a public record.[285]

As mentioned above, the safeguards provided in IRC § 6103(p)(4) are not necessary if information has already been disclosed in judicial or administrative proceedings and made part of the public record. It is stated in the legislative history that the safeguards do not apply when return information is

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[278] *Mallas v. U.S.*, 993 F.2d 1111, 1120 (4th Cir. 1993); *Rodgers v. Hyatt,* 697 F.2d 899, 906 (10th Cir. 1983).

[279] *Rowley v. U.S.,* 76 F.3d 796, 801 (6th Cir. 1996); *Lampert v. U.S.*, 854 F.2d 335, 338 (9th Cir. 1988).

[280] *See generally Rice v. U.S.*, 166 F.3d 1088 (10th Cir. 1999).

[281] *Id.* at 1091–1092.

[282] *See generally Thomas v. U.S.*, 890 F.2d 18 (7th Cir. 1989).

[283] *Id.* at 20.

[284] *Id.* at 20–22.

[285] *Johnson*, *supra* note 243 at 1318–1319.

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open to the public generally.[286] In *Johnson,* the court also concluded that the receiving agency did not have to comply with the safeguards provided in IRC § 6103(p), because the information had already been disclosed publicly in judicial proceedings.[287] However, the court held that this did not mean that the information could be disclosed by the receiving agency (or the IRS), in a press release.[288] The court contended that the information was still protected by the general nondisclosure rule in IRC § 6103(a).[289] According to the court, IRC § 6103(p)(4) does not create an exception to the general rule of nondisclosure.[290] The court referred to the legislative history and noted that "the committee did *not* say that the rule of nondisclosure does not apply where the information is open to the public generally."[291]

The conclusion could therefore be that IRC § 6103(p)(4) does not authorize *re-disclosure* of return information contained in public court records, but only provides an exception from the rules on safeguards. Re-disclosure of information disclosed under IRC § 6104(h)(4) may therefore not be based on IRC § 6103(p)(4). Nevertheless, does this exception from the safeguards not imply that confidentiality protection is no longer provided when return information is contained in public court records? If return information were still to be protected by the general non-disclosure rule in IRC § 6103(a), notwithstanding its existence in (public) court records, would it not be appropriate to apply the safeguards as regards that information? The court recognized in *Johnson* that IRC § 6103(p)(4) indicates that when Congress drafted IRC § 6103 it considered the possibility that some tax return information might be otherwise available to the public, for instance, in court records, because it had been disclosed in judicial proceedings.[292]

Although no provision of the Internal Revenue Code expressly authorizes disclosure of returns or return information contained in a public record, the above suggests that disclosure of tax information might constitute a violation of IRC § 6103 if the disclosed information is retrieved from the IRS, while disclosure of the same information is not a violation of IRC § 6103 if the information is retrieved from a public court record. Returns and return information that would otherwise be confidential under the general non-disclosure rule may thus be publicly accessible if contained in a public court record.

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[286] S. REP. NO. 938, *supra* note 190 at 343–344.
[287] *Johnson, supra* note 243 at 1320–1321.
[288] *Id.* at 1321
[289] *Id.*
[290] *Id.* at 1320–1321.
[291] *Id.* at 1321.
[292] *Id.*

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C. Summary of United States' Tax Confidentiality Rules

One of the reasons for choosing to include the United States in the country comparison is that public access to individual tax return information in the United States has fluctuated widely over time. It has ranged from broad accessibility to the high level of confidentiality in effect today. Changes from a high level of accessibility to a high level of confidentiality seem to have been made after massive public debate and as a reaction to misuse of accessible tax information.

The current provisions governing tax confidentiality in the United States, falling under FOIA exemption 3, are found in the Internal Revenue Code. The tax confidentiality provisions dealt with in this part of the article are IRC §§ 6103 and 6110.

At first sight, the US tax confidentiality regime appears to afford a very high level of confidentiality. This is because of the general non-disclosure rule in IRC § 6103(a) which states that returns and return information are confidential. The high level of confidentiality is based on taxpayers' right to privacy protection and on the conclusion that a high level of confidentiality supports voluntary compliance.[293] Disclosure of information embraced by this general rule is only permitted if authorized by the statute. However, there are a few exceptions to this general non-disclosure rule, opening up the system for public inspection making the tax administration more transparent than initially assumed.

One of these features is the exception to the general non-disclosure rule found in IRC § 6103(k)(1), which provides transparency for accepted offers-in-compromise. The exemption in IRC § 6103(m) provides that the IRS may disclose taxpayer identity information to the press for the purpose of notifying those who are entitled to refunds if the IRS, after a reasonable effort and lapse of time, is unable to locate such persons. Another transparency provision is IRC § 6110, opening up (redacted) Private Letter Rulings to public inspection. Both of these sections afford insight into how the tax administration conducts its activities. The Private Letter Rulings are accessible after certain identifying and other information has been deleted.

One category of documents excluded from the definition of written determinations and thus not included in the scope of IRC § 6110 is Closing Agreements. Closing Agreements are not written determinations subject to disclosure under IRC § 6110 because they are generally the result of a negotiated settlement and, as such, do not necessarily represent the IRS view of the law.[294] Furthermore, IRC § 6103(b)(2)(D) defines Closing Agreements

[293] S. REP. NO. 938, *supra* note 190 at 317–318.
[294] *Id.* at 307; H.R. REP. NO. 94-658, *supra* note 274 at 316.

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executed under IRC § 7121 as return information. Thus, Closing Agreements fall under the general non-disclosure rule in IRC § 6103(a).

Even greater transparency than that afforded by the exceptions above is provided by the interpretation of the exemption found in IRC § 6103(h)(4). This exemption affords that tax returns and return information may be disclosed in a judicial or administrative proceeding if the taxpayer is a party of such proceeding or the proceeding arose from the taxpayer's tax liability. In short, under this provision—or at least under the prevailing interpretation of this provision—tax information otherwise protected by the high level of confidentiality afforded by the general nondisclosure rule is made publicly accessible without redaction of identifying information. This is because the dominant view permits re-disclosure of information which is lawfully disclosed under IRC § 6103(h)(4), if the information is retrieved from public court records (the same tax information found in public court records may, naturally, be found in IRS records, but information may be disclosed only if it is retrieved from the former and not the latter).

Part IV: Comparison

What follows is a discussion on the major similarities and differences between the two jurisdictions' tax confidentiality legislation. This does not involve a detailed comparison, rather it offers considerations with regard to the regimes at large, answering the research questions set forth in Part I.

A. How Did Tax Confidentiality Legislation Develop in Each Jurisdiction?

In Sweden, it was a constitutional right to obtain a transcript of a tax return under the Freedom of the Press Act until 1903, when a proposal for Regulation on Income Tax led to changes within the act. These changes included an exemption from disclosure regarding, *inter alia,* information submitted by the taxpayer to the tax administration for the determination of tax. This is historically the most prominent change in terms of the content of tax confidentiality legislation. In 1937, this exemption, together with other exemptions included in the FPA, transposed into a separate ordinary law—the Secrecy Act of 1937. The Secrecy Act of 1937 prescribed absolute confidentiality for tax information for a 20-year period. Absolute confidentiality in tax matters, including the time limit of 20 years, remained

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throughout the new Secrecy Act of 1980, and is still present in the current Public Access to Information and Secrecy Act passed in 2009.[295]

Swedish rules governing tax confidentiality have not included confidentiality of the results of the tax assessment, although the need for such a rule has been raised on occasion. However, the issue, when raised, has revolved around a prohibition on *publication* of taxpayers' taxable income and the result of the tax assessment, not the actual disclosure of the documents.[296]

In the United States, tax confidentiality provisions were first enacted in 1862, as an amendment to the first federal income tax legislation enacted in the United States, introducing the Civil War income tax in 1861. This legislation provided that all returns should be open for examination. Between this legislation coming into force, and the current tax confidentiality legislation introduced with the enactment of the Tax Reform Act of 1976, the transparency of individual tax returns has changed several times. First with the Revenue Act of 1870 which provided that income returns were confidential, and then in 1909, when Congress imposed a federal income tax on corporations, providing that the returns "shall constitute public records and be open to inspection as such." Next, the Revenue Act of 1913 contained a provision providing that tax returns constituted public records open to inspection to the extent authorized in the rules and regulations prescribed by the Secretary of the Treasury and approved by the President. Under the Revenue Act of 1924, the taxpayer's name and address, and the amount of tax paid were open to the public. Changes were also made in 1926 so that only the name and address but not the amount of tax was open to the public.

The next change came with the so called Pink Slip Requirement, enacted by the Revenue Act of 1934, requiring that taxpayers supplement their tax returns with a pink sheet of paper which contained the taxpayer's name and address, total gross income, total deductions, net income, total credits, and tax liability. The limitation of disclosure provided in this legislation was that only this pink slip, not the entire tax return, was to be open to the public. By 1936, the Revenue Act of 1934 was repealed after substantial debate over the propriety of the pink slip provisions. Due to concerns regarding the misuse of tax returns and return information, including misuse by the Nixon Administration, Congress enacted the Tax Reform Act of 1976, containing a general provision against the disclosure of information compiled by the Internal Revenue Service. This basic statutory scheme established in 1976 remains in place today.

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[295] Although a reverse requirement was proposed during the drafting of the Secrecy Act of 1980. *See* Ds Ju 1977:11 Del 1, *supra* note 54 at 57.

[296] SOU 1927:2, *supra* note 17 at 214–215.

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Comparing the development of tax confidentiality legislation in Sweden and the United States, the development in Sweden can be said to move from very open to slightly less open, since it was possible under constitutional law[297] to obtain a copy of a tax return up until 1903, when a rule prescribing confidentiality of tax information on individual taxpayers was introduced into the FPA. Tax confidentiality has however not included confidentiality of the results of the tax assessment. Tax confidentiality in the United States on the other hand, has fluctuated widely over time, providing great transparency at times while at other times prescribing a high level of confidentiality.

The point in time when the two countries' legislation had similar consequences was when the Pink Slip was employed in the Unites States. This Pink Slip could be said to have revealed similar information to the information publicly available in Sweden. That is, information such as name and address, total gross income, and tax liability was, at that time, public information both in Sweden and in the United States (under the Pink Slip era). Deductions were however not public information in Sweden unless contained in a publicly accessible tax decision, while they were included in the public information on the Pink Slip.

Subsequently, while public access to individual tax return information in the United States has fluctuated widely over time, ranging from broad accessibility when the income tax was first introduced to the extensive restrictions on public disclosure that are in effect today, the content of tax confidentiality legislation in Sweden has been, by and large, static since its first appearance. One reason for this difference may be the principle of public access to information, a specific feature of the Swedish constitutional tradition incorporated into the FPA since 1766, giving every citizen a constitutional right to freely access almost all documents relating to the administration of justice and public administration, and to publish these documents at will. The tradition of open government is not as strong in the United States. The Freedom of Information Act, which provides the public with a statutory right of access to government documents, was introduced 1966, that is, 200 years after the same right was incorporated into the Swedish constitution.

Another difference between tax confidentiality legislation in Sweden and the United States is that tax confidentiality in the United States has never been constitutional, but is, from its first introduction in 1862 up until today, to be found in the statutory law. Tax confidentiality in Sweden, on the other hand, was, on its introduction in 1903, constitutional, since it was a part of the 1766 FPA.

[297] Tryckfrihetsförordning (1949:105) Chapter 2 Article 2 para 4

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B. What Is the General Legal Framework of Tax Confidentiality Legislation in Each Jurisdiction?

Swedish tax confidentiality legislation is governed by the Freedom of the Press Act and the Public Access to Information and Secrecy Act. The FPA provides the fundamental right of public access to official documents and the ultimate limits of restrictions on this right with the enumeration of interests that may override it. The PAISA contains rules on these possible restrictions, that is, rules on confidentiality. Tax confidentiality falls under an exemption to the right of public access to official documents, found in FPA Chapter 2, Article 2, item 6, which prescribes that personal or economic circumstances of individuals can be protected by restricting access to official documents containing such information.

Tax confidentiality in the United States, as examined in this article, includes the analysis of the Freedom of Information Act and the Internal Revenue Code. Application of these two legislations are relevant to determining (1) whether Federal tax returns and return information are confidential, (2) if such information may (or must) be disclosed, and, (3) if it is subject to disclosure, the rules applicable to such disclosure. FOIA stipulates public access to government documents, while providing for certain exemptions that legitimate confidentiality. Most notably, FOIA § 552(b)(3), which authorizes confidentiality under the Internal Revenue Code. The IRC contains two basic provisions of interest for this article that control the disclosure of returns and return information. These are IRC § 6103, [Confidentiality and Disclosure of Returns and Return Information], and IRC § 6110, [Public Inspection of Written Determinations].

Swedish tax confidentiality is thus governed by first, the FPA, providing the constitutional right of public access to official documents, and second, the PAISA, containing the rules on confidentiality. This is where one difference between Sweden and the United States concerning the general legal framework for tax confidentiality legislation is found. As held in the foregoing subsection, US tax confidentiality has never been found in constitutional law during its emergence and development. This is still the case regarding the current legislation, since none of the laws governing disclosure of Federal tax returns or return information in the United States is constitutionally mandated. This undoubtedly means that the right of access to government information is more strongly protected in Sweden than in the United States, which is also reflected in the respective confidentiality legislation—Swedish tax confidentiality legislation offers a more transparent tax administration than the US tax confidentiality regime. This is further dealt with in subsequent subsections.

Although the US FOIA is not enshrined in the constitution, it resembles the Swedish FPA in its structure. Just as the FPA provides the

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public with a right of access to official documents and enumerates certain (seven) exemptions to this right, FOIA provides a right of access to information from the federal government and enumerates certain (nine) exemptions to this right. Tax confidentiality falls under the FOIA § 552(b)(3) exemption three in the United States and under FPA Chapter 2, Article 2, item 6 exemption in Sweden.

The specific provisions on tax confidentiality are found in separate laws, both in Sweden and in the United States. In Sweden the specific rules on tax confidentiality are found in PAISA Chapter 27, that is, they are found in a special law on confidentiality. In the United States, rules on tax confidentiality are found in the Internal Revenue Code, which contains the federal statutory tax law. Thus, the tax confidentiality rules are found in connection to tax law in the United States, while found in the context of other confidentiality rules in Sweden.

One observation when comparing PAISA and the IRC is that the IRC expressly prescribes confidentiality of tax returns through IRC § 6103(a), while confidentiality as expressed in PAISA concerns information (not documents); PAISA Chapter 27 § 1 states that confidentiality applies to *information* on personal or economic circumstances of individuals. This has, however, not always been the case. The Secrecy Act of 1937 contained an enumeration of documents (*inter alia,* tax returns) that were considered confidential. Confidentiality today only protects the information in a tax return and not the tax return itself *per se*. This is because a tax return in Sweden is considered an official document under the rules in FPA Chapter 2, since it is held and received by the Tax Administration.

The phrase '*information on personal or economic circumstances of individuals*' in PAISA Chapter 27 § 1 could be said to correlate with the term '*return information*' in the IRC. Return information is defined in detail in IRC § 6103(b)(2), according to which it encompasses a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, tax payments, or any part of a written determination, APAs, and closing agreements. In this sense, the IRC is more distinct and clearer than the PAISA, since no such definition is found in the latter. Nor do the Swedish preparatory works of the confidentiality legislation provide any detailed guidance on this phrase at a general level, since no analysis of the meaning of the phrase is provided therein. It is merely stated that personal circumstances have to be defined according to everyday usage, mentioning residential address, medical conditions and private economy as information that comes under this phrase.[298] However, the phrase could be said to be further demarcated when put in a tax

[298] Prop. 1979/80:2 Del A, *supra* note 41 at 84.

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confidentiality context. This is because the preparatory works of the Secrecy Act mention certain types of information that is of more or less sensitive character. It is held that disclosure of information on illness as a basis for claiming a deduction for impaired ability to pay tax is to be considered to cause harm to the individual.[299] Furthermore, confidentiality with regard to information obtained during an audit should be preserved as far as possible.[300] Moreover, information on membership of registered religious communities and trade union membership has been considered particularly sensitive.[301] Information deemed less sensitive includes for instance information on registration number, name, company name and legal form, registration of the obligation to deduct tax or pay payroll taxes, types of business activities and liquidation or bankruptcy orders.[302] Consequently, the Swedish preparatory works of the Secrecy Act specify certain types of information expressly covered by the IRC.

On the one hand, an enumeration such as the one in the IRC has the benefit of being clear as to what information confidentiality protects. On the other, a solution such as the one in the PAISA, which might be considered more difficult in its application due to the lack of clarity, has the benefit of perhaps being less static, since it widens the scope for interpretation in individual cases with regard to what information should and should not be protected. This might, however, be considered as lacking legal certainty, since it could be difficult to predict whether certain information is confidential or not.

Like the PAISA *confidentiality-breaking rules*, the IRC contains exemptions to the general rule of non-disclosure. This applies for instance in terms of transfer of confidential information to other authorities (PAISA Chapter 10 and IRC §§ 6103(d) & (h)). However, these confidentiality-breaking rules are kept more general in the PAISA than those of the IRC. The exemptions to confidentiality in the IRC appear to be more detailed than those in the PAISA, as some of the IRC sections containing exemptions to the general nondisclosure rule are several pages in length.[303] One explanation for this could be that most of the confidentiality breaking rules in the PAISA are designed to be applied not only with regard to tax information, while the confidentiality rules in the IRC apply only to tax information.

There are, as mentioned, confidentiality-breaking rules in the PAISA that apply only to tax information. These are, however, not at all as detailed as the IRC exemptions. This corresponds to the observation that, overall, the IRC contains more detailed provisions than the PAISA. This may simply be

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[299] *Id.* at 259.

[300] *Id.*

[301] PROP. 2005/06:169, *supra* note 83 at 82.

[302] *Id.*

[303] For instance IRC § 6103(i), which is approximately five pages, and IRC § 6103(l), which is about seven pages long.

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explained by the fact that Swedish preparatory works, which contain many details lacking in the legislative texts, have such a high value as a legal source in Sweden. The preparatory works are seen as an aid to the dominant legal source, the legislative text. That is, the preparatory works are used in interpreting legislation. The detail lacking in the statutory language is thus often supplied by the preparatory works.[304]

The issue of the differences as to the level of detail of statutes might have other explanations as well. For instance, Michael Bogdan asserts that how law is interpreted in a particular country has an impact on the wording of statutes: a country where judges interpret statutes more restrictively in accordance with the exact literal meaning of the words, such as in the Anglo-American countries, probably ends up with more detailed statutes than a country, such as the Continental European countries, where the wording of the law is interpreted more flexibly.[305]

C. What Is the Basis for the Tax Confidentiality Schemes in Each Jurisdiction?

The main reason behind the Swedish rules providing a high level of tax transparency is the right of public access to official documents to promote an open and transparent government. Tax confidentiality as an exception to this right is based on the interest of protecting taxpayer privacy, which is also the main reason justifying the high level of tax confidentiality in the United States.

Though the reason for the actual provisions prescribing confidentiality seems to be the same both in Sweden and in the United States—to provide protection of taxpayer privacy—there is a clear difference in attitude towards confidentiality legislation. In Sweden, the constitutional tradition of widespread transparency in public administration and the emphasis on the right of public access to official documents as the starting point of confidentiality legislation means that confidentiality is the exception to the main rule of transparency. Consequently, restrictions on the principle of public access to information are applied very carefully. The aim is to avoid any form of confidentiality for safety's sake. In the United States, the interest of protecting taxpayer privacy seems to be the starting point of tax confidentiality legislation, so that confidentiality is the main rule and disclosure the exception. This observation is based on the fact that the US tax confidentiality legislation appears to be highly centred on the general rule of non-disclosure and that the

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[304] STIG STRÖMHOLM, RÄTT, RÄTTSKÄLLOR OCH RÄTTSTILLÄMPNING: EN LÄROBOK I ALLMÄN RÄTTSLÄRA 358–374 (5 ed. 1996).

[305] MICHAEL BOGDAN, CONCISE INTRODUCTION TO COMPARATIVE LAW 34 (2013).

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exemptions to this are very detailed and therefore narrower than the Swedish exemptions. This might simply be explained by returning to the idea of open government, that the right of public access to government information has been found in the Swedish constitution since 1766 and is deeply rooted in Swedish society, but such a right was enacted in the United States legislation in 1966 through FOIA.

Additionally, in the United States taxpayer compliance is an explicit basis for the provisions which provide a high level of tax confidentiality. It is assumed that a high level of confidentiality supports voluntary compliance, holding that if the taxpayers are to comply, they need to know that the information they reveal to the IRS is kept confidential. To my knowledge, taxpayer compliance has not been considered in the drafting of tax confidentiality legislation in Sweden or in any other document related to the confidentiality legislation.

D. What Is the Main Content of the Tax Confidentiality Provisions in Each Jurisdiction?

The Swedish rules on tax confidentiality provide a high level of confidentiality (absolute confidentiality) with regard to information in tax returns.[306] The two main exemptions to the absolute confidentiality afforded by this section are the transparency of tax administration decisions in PAISA Chapter 27 § 6, and the straight requirement of damage with regard to tax information in court proceedings in PAISA Chapter 27 § 4. These two exemptions to the high level of confidentiality make the Swedish tax administration very transparent.

The United States tax confidentiality regime also affords a high level of confidentiality to tax returns and return information. IRC § 6103 embodies the policy that returns are confidential and provides that returns and return information may not be disclosed by the IRS, other Federal employees, State employees, and certain others having access to the information except as provided in IRC § 6103.

The United States exceptions to the general non-disclosure rule in IRC § 6103 authorize disclosure in particular circumstances. These exemptions allow for tax information to be disclosed in certain specified situations, but in almost every case in which the public may gain access to information held by the tax administration, taxpayer identifying information needs to be redacted prior to disclosure. For instance, IRC § 6110 makes the text of any written determination issued by the IRS available for public inspection. Prior to disclosure, IRC § 6110 requires the IRS delete specific categories of

[306] Offentlighets- och sekretesslagen (2009:400) Chapter 27 § 1.

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information, such as the taxpayer's name. The Swedish rules also provide for redaction of taxpayer identifying information, though not as explicitly as the provisions of the US tax confidentiality legislation. PAISA Chapter 27 § 6 item 1 prescribes confidentiality regarding information on an individual's personal or economic circumstances in advance rulings. In practice, this means that such information is redacted while the rest may be disclosed. Also PAISA Chapter 27 § 4 with its requirement of damage allows for redaction of information that is considered to be confidential. Nonetheless, the possibilities for redacting taxpayer identifying information are not quite as extensive as in the United States. The Swedish rules contain more provisions prescribing either full confidentiality or total transparency, that is, there are fewer situations in which redaction of information are possible. The United States tax confidentiality regime thus affords a higher level of tax confidentiality than the Swedish one.

It is stated above that the Swedish and the United States tax confidentiality regimes both prescribe a very high level of confidentiality in terms of tax returns, or at least (from a Swedish point of view, since tax returns are official documents) the *information* in tax returns. There seems to be consistency regarding the fact that all of the information in tax returns might not be of a highly sensitive nature and therefore confidential, but that they contain so many details concerning individual taxpayers, that there is a predominant interest to keep return information confidential. For instance, in the Swedish preparatory works of the Secrecy Act, it is stated that most taxpayers would consider it a violation of privacy for information in their tax return to be made public, although some of this information is fairly unremarkable in itself.[307] In *Johnson v. Sawyer*, the court stated

> Congress was not determining that all the information on a tax return would always be truly private and intimate or embarrassing. Rather, it was simply determining that since much of the information on tax returns does fall within that category, it was better to proscribe disclosure of all return information, rather than rely on ad hoc determinations by those with official access to returns as to whether particular items were or were not private, intimate or embarrassing. Because such determinations would inevitably sometimes err, ultimately a broad prophylactic proscription would result in less disclosure by return handlers of such sensitive matters than would a more precisely tailored enactment.[308]

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[307] PROP. 1979/80:2 DEL A, *supra* note 41 at 256.
[308] *Johnson, supra* note 243 at 1322.

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Another reason for this high level of confidentiality in terms of (information contained in) tax returns, although not explicitly expressed either in Sweden or in the United States, could be that tax returns do not reveal any information on how the tax administration carries out its duties. Rather they display only raw tax information submitted by the taxpayers. The purpose behind a right of access to government information is to gain insight into government activities. Because tax returns do not afford such insight there is no great defense in having transparent tax returns.

Besides the high level of confidentiality in terms of tax returns, both systems afford a high level of transparency with regard to tax information in court proceedings. Transparency in terms of court proceedings is held to be vital in both Sweden and the United States. As held repeatedly, transparency is one of the basic principles of public administration in Sweden. Citizens, businesses, etc. are thus provided great possibilities for insight into the work of public authorities. Openness in terms of government activities provides opportunities for quality control of the authorities. The principle of public access to information is expressed in various ways, the most prominent being the right of access to official documents. Another facet of openness is access to court hearings. Besides falling back on the classic purposes of the right of public access to information—to ensure legal certainty, and efficiency in public administration and democracy[309]—public court hearings are held to increase and consolidate respect for the law and confidence in the power vested in the courts.[310] Transparency regarding the work of the courts is strengthened by the rules on the right of public access to official documents, by which judgments are considered publicly accessible documents.

In the United States, there have been numerous court decisions revolving around the public nature of court proceedings. For instance, in *Rodgers v. Hyatt*, the court stated that "[i]t is […] well established that what transpires in open court is a matter of public record."[311] In *Rice v. U.S.*, the court held that "[l]ike it or not, a trial is a public event."[312] Reasons justifying access are, *inter alia,* to ensure that individual judicial proceedings are conducted fairly,[313] that the discussion and criticism of governmental affairs and government officials is an informed one,[314] to contribute to public

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[309] SOU 2001:3 OFFENTLIGHETSPRINCIPEN OCH DEN NYA TEKNIKEN. DELBETÄNKANDE AV OFFENTLIGHETS- OCH SEKRETESSKOMMITTÉN, 51.

[310] LAGUTSKOTTETS BETÄNKANDEN 1823 NR 27, 95.

[311] *Rodgers, supra* note 278 at 902.

[312] *Rice, supra* note 280 at 1092; *See also Craig v. Harney* 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546, 1254.

[313] *Richmond Newspaper, Inc. v. Virginia,* 448 U.S. 555, 570 (1980); *Globe Newspaper Co v. Superior Court*, 457 U.S. 596, 607 (1982).

[314] *Globe*, *supra* note 313 at 606.

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understanding of and confidence in the legal system and its function,[315] and to permit the public the opportunity to monitor the judicial process.[316] The reasons behind the high level of transparency regarding court proceedings are therefore similar in Sweden and the United States, which explains the similarity as to the high level of transparency concerning tax matters in court proceedings in both jurisdictions.

That said, a concluding similarity between the two jurisdictions is that disclosure of information is source-based. That is to say, whether the information may be disclosed depends on the source of the information—whereas confidentiality depends on whether the information is contained in a tax return, a tax decision, or a ruling of the court. However, the two jurisdictions differ in terms of the level at which the information may be disclosed.

As stated, both the Swedish and the United States tax confidentiality systems afford a high level of confidentiality with regard to tax returns, which means that information contained in a tax return may not be publicly disclosed either in Sweden or the United States. Both countries recognize, although in different ways, greater transparency as regards tax information in court proceedings. This has the consequence that tax information that is kept confidential if contained in a tax return may be disclosed if the information exists in court records. Sweden has a specific rule governing tax transparency in court proceedings and a rule stating that a confidentiality provision ceases to apply when the information is included in a ruling (notwithstanding the possibility of the court to decide that the confidentiality provisions shall continue to apply). The US tax confidentiality legislation lacks an express provision governing this issue, but it is dealt with in numerous court cases. The current position appears to be that tax information retrieved from public court records (lawfully disclosed under IRC § 6103(h)(4)) may be re-disclosed but not if it is retrieved from IRS records (which continue to enjoy confidentiality protection under the general nondisclosure rule).

However, the source-based approach in Sweden includes not only court proceedings and judgments, but also tax administration decisions. Information is embraced by total confidentiality if contained in a tax return, but is subject to full disclosure if found in a tax administration decision. This is the most prominent feature that differentiates the Swedish source-based approach from that of the US tax confidentiality regime. Information that may be disclosed under PAISA Chapter 27 § 6, is, in the United States, protected under the general rule of non-disclosure, since it falls under the term 'return

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[315] *Richmond*, *supra* note 313 at 573.
[316] *Globe*, *supra* note 313 at 607.

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information.' All information relating to audits, investigations, settlements, etc. are protected under IRC § 6103.

One reason for having a source-based approach, that is, to have confidential tax returns but public court decisions, concerns the workload of the respective organizations.[317] The burden on the tax administration is heavier than the courts, since not every tax return or tax assessment is appealed to the court. Therefore, if tax returns were to be public, in total or after a damage assessment, this would increase the workload on the tax administration. Another approach, instead of the source-based approach, is to state that certain information is always to be protected by confidentiality and/or that certain information is always to be disclosed, or in other words, to hold a 'once public, always public' standard.

When speaking of a source-based approach, there is reason to return to what was previously stated concerning the adjustment of the Swedish confidentiality rules from document-oriented to being information-oriented. It was noted in the preparatory works of the Secrecy Act that with the implementation of ADP at the tax administration, the law applicable at that time[318] resulted in a situation where confidentiality was dependent on the source of information.[319] That is, if information existed in one of the types of document enumerated in the legislation it was confidential, but if the same information existed in a tax record (deemed as an official document) the information was public. A source-based approach might, based on this, be questioned. However, there is a significant difference between this source-based approach and the one described in the foregoing paragraphs. This difference, in my view, justifies a source-based approach such as the one described above but not the one referred to in this paragraph.

The source-based approach, leading to information being confidential at the tax administration while being accessible via court proceedings, is based on the levels of transparency which could and/or should be expected at different authorities. That is, transparency in court proceedings is (as held above) considered as being of great value both in Sweden and in the United States, which has led to tax information in court proceedings being more transparent than at the tax administration. The other type of source-based approach is more concerned with the fact that information could be confidential or public *at the same authority,* depending on the source of the information. This type of source-based approach is more difficult to justify, which is also noted in Swedish preparatory works.[320] Though it might be held

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[317] PROP. 1979/80:2 DEL A, *supra* note 41 at 252–253.
[318] The Secrecy Act of 1937
[319] PROP. 1979/80:2 DEL A, *supra* note 41 at 252.
[320] *See id.* at 251–252.

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that a certain type of information is more likely to cause damage in one situation while not in another and therefore to defend to some extent, a difference in confidentiality level at one and the same authority, the issue of whether information at the tax administration is confidential or public should not, in my view, be determined on the basis of the source of the information in the way described above.

This latter type of source-based approach could be held to be manifested in PAISA Chapter 27 § 6, which prescribes the appropriate disclosure of tax administration decisions. It might be argued that this section effectively means that confidentiality concerning a particular type of information is dependent on whether the information is found in a tax return or in a tax decision. However, it should not be the case that the information is kept confidential when retrieved from the tax return if at the same time it appears in a decision, since PAISA protects information and not documents. If it has been included in a public decision, the information is public and the tax return containing it should therefore be possible to disclose if other, confidential, information in it is redacted. A request for access to a certain specific tax return may be denied, since most of the information in the return falls under the confidentiality protection in PAISA Chapter 27 § 1, but information that is contained in a tax decision should be disclosed since it is public under PAISA Chapter 27 § 6 though the immediate source is not the decision itself. This could be compared with RÅ 1990 not 286 where the court decided that most of the requested information was contained in another public decision, therefore the decision could be disclosed with the redaction of only one sentence.[321]

This might appear contradictory with reference to the discussion on and division of different source-based approaches, where I contend that one approach is permissible but not the other, since the above leads to different levels of accessibility at one and the same authority. This is, however, in my view justifiable. This standpoint is based on the following conclusion: the more final the decision, the more important is transparency. In other words, the demand for disclosure is strong when the government exercises primarily legal decision making authority. Public access to judicial decisions representing a final stage in tax matters is crucial for the realization of the right to information. Consequently, the nearer to a final judgment the decision is the higher the demands to justify confidentiality of information. Tax returns do not represent any exercising of authority *per se* and transparency with regard to tax returns does appear neither necessary nor appropriate, *inter alia,* because transparent tax returns do not facilitate the public's ability to gain insight into tax administration activities. Since the purpose behind the right to

[321] RÅ 1990 nor 286.

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information is access to information on government activities, non-disclosure of tax returns does not put up unwarranted barriers to the right to information. That is, it is justifiable that information is confidential when contained only in a tax return but not when existing in a tax decision, since a tax decision is a final decision while a tax return is not.[322]

Another similarity aside from the source-based approach concerns advance rulings. Both frameworks provide transparency in relation to advance rulings, but only in redacted form.[323] Both Sweden and the United States seem to recognize that there is a public interest in affording access to the legal conclusion in advance rulings, but that there is a strong need to protect the information pertaining to the specific taxpayer, since the information may reveal highly sensitive details on business activities, etc. Swedish preparatory works of the Secrecy Act stress that the interest of confidentiality protection is particularly strong where advance rulings are concerned.[324] This is strengthened by the case law of the Supreme Administrative Court in terms of its decisions on the continuance of confidentiality in accordance with PAISA Chapter 43 § 8 regarding cases on advance rulings, showing that taxpayer identifying information is often redacted. In the United States, Congress has noted that private rulings should be made public, because this is the only way by which all taxpayers can be assured of access to the ruling positions of the IRS and that this will tend to increase the public's confidence that the tax system operates fairly and in an even-handed manner with respect to all taxpayers.[325]

Regarding the redaction of advance rulings, a feature similar to that of the Swedish requirement of damage is found in US tax confidentiality law. The IRS must delete information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.[326] Such a clearly unwarranted potential invasion of personal privacy exists if the potential harm caused by the disclosure of the personal information outweighs any public

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[322] This refers only to the difference in confidentiality level between tax administration decisions and tax returns. A reason for confidentiality concerning tax returns alone has been provided above, suggesting that since the purpose behind a right of access to government information is to gain insight into government activities there is no great argument in defense of transparent tax returns because tax returns do not afford such insight.

[323] *See* Offentlighets- och sekretesslag (2009:400). Chapter 27 § 6 item 1 and IRC § 6110.

[324] PROP. 1979/80:2 DEL A, *supra* note 41 at 256; SOU 2003:99, *supra* note 51 at 759.

[325] S. REP. NO. 938, *supra* note 190 at 305–306.

[326] *See* IRC § 6110(c)(5)

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interest purpose. Presumably this weighing test is applied with the recognition that the taxpayer is to remain unidentified.[327]

One major difference between Sweden and the United States concerns the possibility for a taxpayer to enter into agreements with the tax administration concerning his or her tax liability. The general rule is that the Swedish tax framework provides for no such agreements. However, there is one limited possibility for entering into an agreement with the Tax Agency: the possibility for a natural person liable for payment of taxes of a legal entity in accordance with Chapter 59 of the Tax Procedure Act, to enter into an agreement with the Swedish Tax Agency on adjustment of that tax. Matters on the issue of personal liability fall under the reverse requirement of damage in PAISA Chapter 27 § 2 para 2. As already mentioned, the law is not entirely clear with regard to the level of confidentiality concerning these agreements. Preparatory works of the Tax Procedure Act state that these agreements are no longer to be considered tax decisions, but rather party statements. When such agreements were considered tax decisions there was no doubt that they were public, since they fell under § 6, which prescribes full disclosure of decisions. Though the agreements are not tax decisions, I argue that a party statement is a type of decision, and therefore the agreements could be embraced by full disclosure under § 2 para 2 item 1 instead of the reverse requirement of damage in § 2 para 2.

In the United States, it is possible for a taxpayer enter into two different kinds of agreements: the offer-in-compromise and closing agreements. The offer-in-compromise resembles the Swedish agreement, in that it compromises a tax debt. A closing agreement provides the taxpayer with the opportunity of settling personal tax liability through a closing agreement. Offers-in-compromise are partially disclosed, while closing agreements are protected by total confidentiality. This appears to be defended on the basis that these agreements do not necessarily represent the IRS view of the law.[328]

To conclude, the main similarity regarding the content of the rules is that information submitted in a tax return by the taxpayer to the tax authority is confidential both in Sweden and in the United States. Information in court decisions is public in both countries, although the Swedish rule contains a requirement of damage. The major difference between the Swedish and the US tax confidentiality regime is that information in a tax decision from the Swedish Tax Agency is, in principle, public in its entirety, a feature not found in the US tax confidentiality scheme. Such information comes under the protection of the general rule of non-disclosure, since it is considered 'return information.' Again, the difference in approaches towards confidentiality

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[327] *See generally* 26 CFR Reg. § 301.6110-3(a)(5). GALOTTO, LA PUMA, AND PAI, *supra* note 217 at 146.

[328] S. REP. NO. 938, *supra* note 190 at 306–307.

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legislation shines through, since the US system provides a much higher level of privacy protection than the Swedish one, which rests on the right of public access to official documents.

E. Conclusions

Regarding the historical development of tax confidentiality legislation in Sweden and in the United States the difference is quite marked. The major change in Swedish legislation was made in 1903 when a rule prescribing confidentiality of tax information on individual taxpayers was first enacted. Prior to that, it was possible to obtain a copy of a tax return. The content of the rules governing tax confidentiality has stayed mostly the same since its introduction: tax returns have been protected by confidentiality, while tax confidentiality provisions have not encompassed confidentiality of tax decisions. In the United States, on the other hand, public access to individual tax return information has fluctuated greatly over time, ranging from broad accessibility to the extensive restrictions on public disclosure that are in effect today. This difference might be explained by the heavy weight put on the right of access to official documents in Sweden and its basis in the constitutional law, constituting a point of reference in the drafting of any new confidentiality legislation.

Regarding the general legal framework for tax confidentiality legislation in Sweden and the United States, the main difference recognized in this article is that the Swedish tax confidentiality legislation is governed by both constitutional law and ordinary law (the FPA, providing right to public access to official documents, and the PAISA providing the specific rules restricting this right), while none of the laws governing disclosure of Federal tax returns or return information in the United States are based in constitutional law. Nevertheless, certain similarities in the legal frameworks have been observed. Both the FOIA and the PAISA provide the public with a right of access to government information and then enumerate certain exemptions to the right. Tax confidentiality falls under one of these exemptions in both countries. One difference recognized in relation to the specific confidentiality rules is that in Sweden the tax confidentiality rules are found in a specific confidentiality act together with other confidentiality provisions, while in the United States, tax confidentiality rules are found in the IRC, which contains the federal statutory tax law.

Another difference recognized is that the IRC explicitly prescribes confidentiality of tax returns, while Swedish tax confidentiality protects only information (not documents). In Sweden, a tax return is considered an official document under the rules in FPA Chapter 2.

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The reason behind the rules providing tax confidentiality appear to be the same in both Sweden and in the United States, namely to provide protection of taxpayer privacy. However, there is a distinct difference concerning the general attitude towards confidentiality legislation. In the United States, the interest of protecting privacy in itself seems to be the starting point for tax confidentiality legislation. In Sweden, the right of public access to official documents, found in constitutional law from 1766 and deeply rooted in the Swedish society, is clearly the starting point for Swedish confidentiality legislation. Hence, confidentiality is the exception rather than the rule. This explains the high level of confidentiality concerning tax returns both in Sweden and in the United States, but also the high level of transparency regarding tax decisions in Sweden.

In terms of the high level of confidentiality with regard to tax returns, both countries highlight the importance of keeping the information confidential because most of the information in a tax return is generally of a highly sensitive nature. Although not explicitly stated in either Sweden or in the United States, one reason for this emphasis on keeping the tax returns confidential and not accessible for disclosure could be that tax returns do not reveal any information on how the tax administration carries out its duties, but rather display only unprocessed tax information submitted by the taxpayers. Because the purpose behind the right to access government information is to gain insight into government activities, there is no great argument in defense of transparent tax returns.

Another similarity besides the high level of confidentiality in terms of tax returns, is that both systems afford a high level of transparency with regard to tax information in court proceedings. This may be explained by the fact that Sweden and the United States appear to argue similar reasons in favor of a high level of transparency in court proceedings: that openness functions as a source of information for free debate, that it provides a controlling function to ensure legal certainty and that judicial proceedings are conducted fairly, and increases and consolidates the public's knowledge of, respect for, and confidence in the law, the legal system and its enforcement.

As a consequence of this, disclosure of information could be said to be source-based both in Sweden and in the United States, that is, whether the information may be disclosed or not depends on the source of the information. If the information is contained in a tax return, then the information is confidential, but if it is contained in public court records, then the information is public. A distinct difference in the source-based approach is that tax decisions are (in principle) public in Sweden, while they are not in the United States. The higher level of transparency in Sweden is explained by the heavy emphasis on the right of public access to official documents as the starting point of confidentiality legislation.

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