

OPINION NO. 92-005**Syllabus:**

For purposes of R.C. 149.43, a copy of federal income tax Form W-2, prepared and maintained by a township as an employer, is subject to inspection as a public record.

**To: Robert L. Herron, Columbiana County Prosecuting Attorney,
Lisbon, Ohio**

By: Lee Fisher, Attorney General, March 18, 1992

You have requested an opinion addressing the following question:

Are duplicate copies of W-2 forms, kept by an Ohio township, public records, and thus subject to disclosure to the public pursuant to R.C. 149.43?

**Application Of R.C. 149.43 To Federal Income Tax Form W-2
Prepared and Maintained By A Township**

R.C. 149.43(B) sets forth the general requirements relating to the disclosure of public records. This section provides that "[a]ll public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours." A "public record" is defined as

any record that is kept by any public office, including, but not limited to, state, county, city, village, township and school district units, except medical records, records pertaining to adoption, probation, and parole proceedings, records pertaining to actions under section 2151.85 of the Revised Code and to appeals of actions arising under that section, records listed in division (A) of section 3107.42 of the Revised Code, trial preparation records, confidential law enforcement investigatory records, and records the release of which is prohibited by state or federal law.

R.C. 149.43(A)(1). Any record¹ maintained by a township, therefore, is subject to disclosure unless it is encompassed by one of the stated exceptions.

The records that are of particular concern to you are copies of "W-2 forms" prepared and maintained by the township as an employer. Form W-2 is a federal income tax form prescribed by the Secretary of the Treasury for the reporting by an employer of the wages and other compensation paid to an employee. See 26 U.S.C.S. §6011 (1991); 26 C.F.R. §1.6041-2 (1991). The first five exceptions listed in R.C. 149.43(A)(1) clearly do not apply to copies of Form W-2 maintained by the township.² Thus, the relevant question is whether state or federal law prohibits the release of copies of Form W-2 prepared and maintained by the township.

State Law Does Not Prohibit A Township From Disclosing Copies Of Form W-2 That The Township Has Prepared And Maintained

There are no provisions of the Revised Code that expressly prohibit the disclosure of Form W-2. However, there are several provisions of the Revised Code that impliedly maintain the confidentiality of Form W-2 under certain circumstances. For example, R.C. 5747.18 mandates the confidentiality except under certain enumerated exceptions of "[a]ny information gained as the result of returns, investigations, hearings, or verifications required or authorized by [R.C. Chapter 5747 (income tax)]." Since R.C. 5747.17 permits the Tax Commissioner to require the filing of copies of federal income tax returns, R.C. 5747.18 protects the confidentiality of Form W-2 to the extent that it is included as part of the copy of a federal income tax return filed pursuant to R.C. 5747.17. Additionally, R.C. 718.07 protects to some degree the confidentiality of municipal income tax returns and information. Thus, R.C. 718.07 maintains the confidentiality of Form W-2 if it is filed as part of a municipal income tax return. These statutes, however, prohibit disclosure of Form W-2 only under the limited circumstances expressed in the statutes. None of these provisions apply to a township's disclosure of a copy of Form W-2 maintained as a part of the township's records.

The Federal Statute That Prohibits The Release Of Federal Tax Returns And Return Information Does Not Apply To A Township's Disclosure Of Copies Of Form W-2 That The Township Has Prepared And Maintained

The general provisions making federal tax returns and return information confidential appear at 26 U.S.C.S. §6103 (1991). See generally 1991 Op. Att'y Gen. No. 91-053. This statute prohibits the release of certain federal tax return information by all officers and employees of the U.S. government and any officer or employee of a state, or other person who has access to returns or return information from the Internal Revenue Service. See also 26 U.S.C.S. §7213 and §7431 (1991) (providing criminal and civil penalties, respectively, for violations of §6103).

For purposes of 26 U.S.C.S. §6103 (1991), the term "return" is defined as follows:

The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title *which is filed with the Secretary* by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

¹ "Record" is broadly defined to include "any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C.149.011(G).

² The exceptions for medical records, records pertaining to adoption, probation and parole proceedings, trial preparation records, and confidential law enforcement investigatory records are obviously inapplicable. R.C. 2151.85 pertains to abortions for unmarried minors without notice to parent, guardian, or custodian, and R.C. 3107.42 protects the confidentiality of certain adoption records.

26 U.S.C.S. §6103(b)(1)(1991) (emphasis added). In pertinent part, "return information" is defined as

a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, *received by, recorded by, prepared by, furnished to, or collected by the Secretary* with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.

26 U.S.C.S. §6103(b)(2)(A)(1991) (emphasis added).

A copy of Form W-2 that is prepared and maintained by the employer is not a "return" or "return information" as defined by 26 U.S.C.S. §6103 (1991). "One element of the definition of 'return' [is] that it be 'filed with the Secretary.' 26 U.S.C. §6103(b)(1). Similarly, an element of the definition of 'return information' [is] that it be 'received by, recorded by, prepared by, furnished to, or collected by the Secretary.' 26 U.S.C. §6103(b)(2)." *Stokwitz v. U.S.*, 831 F.2d 893, 894 (9th Cir. 1987), *cert. denied*, 485 U.S. 1033 (1988). Since the copy of Form W-2 maintained by the township is not filed with, or received by, recorded by, prepared by, collected by or furnished to the Secretary, it is not a return or return information the confidentiality of which is protected by section §6103. The court in *Stokwitz* determined that "[s]ection 6103 establishes a comprehensive scheme for controlling the release *by the IRS* of information received from taxpayers." 831 F.2d 893 at 895 (emphasis in original). Thus, "section 6103 applies only to information filed with and disclosed by the IRS." *Id.* at 897; *see also* Op. No. 91-053 (26 U.S.C. §6103 does not apply to a state or local agency where the tax return at issue is provided by the taxpayer to that agency). Accordingly, 26 U.S.C.S. §6103 (1991) does not prohibit the disclosure of copies of Form W-2 maintained by the township.

Thus, the relevant federal statute prohibiting disclosure of federal tax returns and return information is inapplicable to copies of Form W-2 maintained by a township, and no state statute prohibits the disclosure by a township of such copies of Form W-2. As none of the other exceptions to R.C. 149.43(A)(1) apply, copies of Form W-2 maintained by the township are "public records," the release of which is not prohibited by R.C. 149.43(A)(1).

Conclusion

Based on the foregoing analysis, it is my opinion, and you are hereby advised, that for purposes of R.C. 149.43, a copy of federal income tax Form W-2, prepared and maintained by a township as an employer, is subject to inspection as a public record.