

HB

211

STATE OF ALASKA

JAY S. HAMMOND, Governor

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER / POUCH 5 — JUNEAU 99801

April 14, 1975

The Honorable Terry Gardiner
Chairman
House Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, AK 99811

Dear Mr. Gardiner:

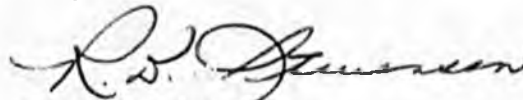
re House Bill No. 211

House Bill No. 211, an Act relating to the administration of state tax and revenue laws was introduced on February 26, 1975 and was referred to the House Commerce, Judiciary and Finance Committees.

For the consideration of the House Judiciary Committee, I am enclosing a copy of a memorandum dated March 12, 1975 from Frederick P. Boetsch, Deputy Commissioner of the Department of Revenue outlining the administrative need for the proposed legislation which is housekeeping in nature and advising of no administrative costs.

If you or any members of your Committee have any questions on the material submitted, kindly advise the writer by telephone at 465-2397 and I will contact Mr. Boetsch who will return to Juneau by mid-week for further material or testimony.

Very truly yours,



R. D. Stevenson
Special Assistant

RDS:sp
Enclosure

cc Frederick P. Boetsch
Deputy Commissioner
Department of Revenue

MEMORANDUM

TO: R. D. Stevenson
Special Assistant
Department of Revenue

DATE : March 12, 1975

FROM: Frederick P. Boetsch
Deputy Commissioner for Taxation
Department of Revenue

SUBJECT: HB 211

House Bill 211 is an administrative housekeeping measure designed to provide uniformity in the administration of our various tax laws. It also provides for the hiring of out-of-state agents to audit the books and records of out-of-state taxpayers, in addition to our present power to enforce collection of taxes by this means.

Presently, each of our tax laws have separate administrative procedures with respect to civil penalty, interest, disclosure of tax returns and reports, taxpayer remedies, and payment of taxes. This frequently creates confusion in the mind of the taxpayer and his representatives. It also causes administrative difficulties since a different procedures apply to each tax type. Finally the lack of uniformity is probably unfair to the taxpayer since it unnecessarily complicates his compliance with our various tax laws.

This bill, then, would eliminate the various administrative procedures mentioned from the different specific tax chapters and place these provisions under the general administrative chapter, of Title 43.

Since the propose of this bill is to provide for administrative uniformity in procedures and ease of compliance with our tax laws by taxpayers, we see no direct effect on Treasury, However, anything which eases compliance and provides for fair and more uniform standards in general has a postive effect on taxpayer compliance and, hence, on the Treasury.

We anticipate no administrative costs in connection with this bill.

FPB: sp

STATE OF ALASKA

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER

POUCH S—JUNEAU 99801

JAY S. HAMMOND, Governor

March 13, 1975

The Honorable Bob Bradley
Chairman
House Commerce Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99811

Dear Mr. Bradley:

re House Bill No. 211

House Bill No. 211, an Act relating to the administration of state tax and revenue laws was introduced on February 26, 1975 and was referred to the House Commerce, Judiciary and Finance Committees.

For the consideration of the Commerce Committee, I am enclosing a copy of a memorandum dated March 12, 1975 from Frederick P. Boetsch, Deputy Commissioner of the Department of Revenue outlining the administrative need for the proposed legislation which is housekeeping in nature.

If you or any members of your Committee have any questions on the material submitted, kindly advise the writer by telephone at 465-2397 and I will contact Mr. Boetsch for further material or testimony.

Very truly yours,

R. D. Stevenson
Special Assistant

RDS:sp
Enclosure

cc The Honorable Terry Gardiner
Chairman
House Judiciary Committee
The Honorable Hugh Malone
Chairman
House Finance Committee
Frederick P. Boetsch
Deputy Commissioner for Taxation
Department of Revenue

STATE
of ALASKA

MEMORANDUM

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Special Assistant
Department of Revenue

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Deputy Commissioner for Taxation
Department of Revenue

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We anticipate no administrative costs in connection with this bill.

FPB: sp

JUR

March 23, 1972

The Honorable Bill Ray
Senator
Alaska State Senate
Juneau, Alaska 99801

Dear Senator Ray:

Pursuant to your request, we have reviewed the federal tax statutes and our statute on publicity of returns and disclosure of information contained in individual returns.

The inspection of federal returns by states is clearly prohibited by §§ 6103 of the Internal Revenue Code, unless the purpose of such inspection is for the administration of state tax laws. If for this purpose, then inspection will only be permitted upon the written request of the governor. Section 6103 (b)(2) provides in part as follows:

All income returns filed with respect to the taxes imposed by chapters 1, 2, 3, and 6 . . . shall be open to inspection by any official, body, or commission, lawfully charged with the administration of any State tax law, if the inspection is for the purpose of such administration or for the purpose of obtaining information to be furnished to local taxing authorities as provided in this paragraph. The inspection shall be permitted only upon written request of the governor of such State. . . Any information thus secured by any official, body, or commission of any State may be used only for the administration of the tax laws of such State . . . (emphasis added)

It appears from the language of this section that any inspection request not within the meaning of the phrase "administration of state tax laws" would be denied.

As this exchange is administered, these returns are not made available on any basis outside the Department of Revenue including internal State law enforcement agencies. Section 7213(a)(2)

would make it unlawful for any state officer or employee to disclose any information contained in a federal return.

The Alaska Statute on this subject is not as explicit as the federal statute, but the same purpose and intent can be assumed from the existing language. AS 43.20.190(a) provides in part:

Except when required in official investigation. . . it is unlawful for an officer or employee of the state to divulge or make known the amount of income or the particulars set out as disclosed in a report or return under this chapter.

Under this language, it is unlawful for any state employee or officer to reveal any information unless the purpose of such disclosure is within the meaning of the phrase "except when required in official investigation." It has been held that the intent and purpose of state and federal statutes imposing secrecy in respect to income tax returns is to prevent disclosure of confidential information to those who do not have a legitimate interest in it.

As this law has been administratively interpreted by the State, tax information is not shared by the Department of Revenue with other agencies of the State including internal law enforcement agencies except where a possible violation of the State's tax laws is indicated.

A great deal of tax information is computerized in the interest of efficiency. There has never been any proposal to connect the Department of Revenue data processing activity with the Justice Information System data processing activity. Under the circumstances it serves no purpose and only a potential for mischief and confusion would occur from such an endeavor.

We trust this discussion will be helpful.

Sincerely,

John E. Havelock
Attorney General

JEH:ss
jcr

cc: Revenue
Governor's Office
Public Safety

November 21, 1972

The Honorable Mike Bradner, Chairman
Legislative Audit Committee
915 Kallum Street
Fairbanks, Alaska 99701

Dear Mr. Bradner:

At the request of the Budget and Audit Committee of the Legislature, the Division of Legislative Audit is examining Department of Health and Social Services records relating to the Adult Public Assistance and Aid to Families with Dependent Children programs to determine whether recipients are in fact eligible and for what amount of payment.

As one method of verifying income information submitted to the Department of Health and Social Services by individuals receiving services from the Department, the Committee would like the Legislative Audit Division to examine State income tax returns on file with the Department of Revenue, and wage information submitted by employees and employers to the Department of Labor in connection with administration of the State Employment Security Act.

Information collected under each of these Acts is protected by specific statutory provisions guaranteeing confidentiality to the records in the Departments of Labor 1/ and Revenue 2/ respectively and establishing criminal penalties. On the other hand, under a third provision of statute, the Division of Legislative Audit is entitled to have access to the records of every State agency whether confidential or not. 3/

You have asked whether the Legislative Auditor has the authority to examine such records and you have advanced cogent reasons for his being allowed to do so. You have

1/ AS 23.20.110(a)

2/ AS 43.20.190(a)

3/ AS 24.20.271(b)

stated that there is no reason to believe that the Legislative Auditor is any more likely to divulge information obtained than Department personnel would in the performance of their duties. You have further stated that in any published reports, specific names and raw data would not be made public. You have also expressed the view that Article IX, Section 14 of the Constitution of Alaska requires the Departments of Revenue and Labor to open their records to review, regardless of confidentiality. This provision states that there shall be a legislative auditor who "shall conduct post-audits as prescribed by law and shall report to the legislature and to the governor." Finally, you have indicated that such access is inherent in the general investigative authority of legislative bodies and is even required by the separation of powers doctrine and that, as a practical matter, any curtailment of the Legislative Auditor's access to any State agency records will drastically reduce the ability of the Legislature to review operations of the executive branch.

Initially, it should be noted that the confidentiality of the records in question is not for the benefit or convenience of the executive branch of government nor for the convenience of the legislative branch, but constitutes a recognition by the Legislature, through the enactment of law, of a right of privacy adhering to the individual submitting the data.

This right of privacy was recently given constitutional standing by the people of Alaska through the adoption of an amendment affirming that, "The right of the people to privacy is recognized and shall not be infringed." 4/ The Legislature is directed to implement this section, but to the extent that it has not done so, under Article XII, Section 9 of the Constitution of Alaska, the provisions of the Constitution "shall be construed to be self-executing whenever possible." In proposing this provision to the people we deem that the Legislature must have been aware not only of the likely effect of Article XII, Section 9, but of the body of legal authorities and literature which have historically given meaning to the concept of the right of privacy. 5/ Ratification and

4/ Article I, Section 22, adopted August 22, 1972 (actual effective date: October 13, 1972)

5/ The literature on the legal basis of the right of privacy is voluminous. A recent introduction may be found in 77 Yale L.J. 475, 481 (1963) or 67 Michigan L. Rev. 1091, 1223 (1959). The original definition of the right in America may be found in the work of Samuel D. Warren and Louis D. Brandeis 4 Harv. L. Rev. 193 (1890).

adoption of the amendment by the people does not freeze into constitutional doctrine every aspect of this literature but sets the main trends which compel the conclusions set out in this opinion.

While readily acknowledging the supremacy of the judicial branch in the expounding of the Constitution of Alaska, this opinion should be considered as a definitive interpretation of the laws of Alaska for officers of the executive branch until an order of a court of competent jurisdiction rules otherwise. 6/

In my opinion, the data collected by the Department of Labor and the Department of Revenue is within the ambit of the protection intended to be afforded by the Right of Privacy recognized by Article I, Section 22 of the Constitution of Alaska. Each of these departments 7/ holds private information in trust to the individual submitting it to the extent of the obligation of the right of privacy.

The Supreme Court of the United States has recognized the right as constituting a zone of fundamental concern for personal rights and liberties which predates the Bill of Rights of the Constitution of our country in origin. Many of the guarantees of the Bill of Rights describe specific areas of this zone. Griswold v. Connecticut, 381 U.S. 479 (1965).

The right of freedom of speech declared in Article I, Section 5 of the Constitution of Alaska and the corresponding right to remain silent found in Section 9 of Article I have been enriched by the adoption of this amendment establishing a right of privacy binding on judicial, legislative and executive branches alike.

Section 14 of Article I relating to search and seizure must be interpreted with due regard to the right of privacy as must Section 20 relating to the quartering of soldiers. The list of potential applications of the constitutional right of privacy is not here exhausted.

The right of association, for instance, which has been expounded by the Supreme Court largely within the

6/ In the absence of judicial enforcement, executive interpretation is a necessity. c.f. Laird v. Tatum, 40 U.S. L.W., 4350 (June 27, 1972).

7/ In the interest of brevity, this opinion will discuss the application of the Right of Privacy to income tax records. A parallel analysis leads us to our identical conclusion regarding Employment Security Records.

context of the First Amendment to the Constitution of the United States, is yet one more aspect of the right of privacy. This right has already been construed as prohibiting under certain circumstances the gathering or distribution of information by government about individuals. Hentoff v. Ichord, 318 F.Supp. 1175 (D.C. 1970). In NAACP v. Alabama, 357 U.S. 449 (1957), the Court noted that even though the intent of the governmental action challenged may appear to be totally unrelated to protected liberties, if the natural effect is to inhibit the exercise of a right, then it is constitutionally suspect. The Court thereupon concluded that the membership lists of the association "were so related to the right of the members to pursue their lawful private interests privately" that they were immune from state scrutiny.

The right of privacy is not absolute but lies in fine balance with the right of government and of the public to gather and use information for the purpose of assuring the common good. The particular private and public interests involved must be weighed and a balance struck between the impact on the individual and on society of a particular practice in information treatment. American Communications Association v. Douds, 339 U.S. 382 (1950); Barber v. Time, Inc., 159 S.W.2d 291 (Mo.)

Though the right of privacy may be a "passive" right, it nonetheless enjoys the shelter of that penumbra of vigilance which requires that governmental action having an adverse impact on it must be supported by compelling reasons 8/ to be sustained.

In assaying the propriety of a particular government information practice in the light of the Constitution, a number of questions should be asked, the answers to which will determine the balance between the proper use of information by government and the right of privacy.

First, what is the expectation of the individual to whom the information relates? Is the information more or less personal? Is it the kind of information which the average citizen of ordinary sensibility would view as close to or remote from sensitive areas of personality? Nader v. General Motors Corp., 255 N.E.2d 765 (N.Y.)

9/ By use of the term "compelling" we do not intend to join the semantic debate on the degree of specific gravity to be accorded particular principles in the balancing process. c.f. Dunn v. Blumstein, 31 L.ed. 274 (1972). In my view a rigorous policy analysis provides its own balancing rationale.

If the information was given voluntarily with full expectation that it would be used in any manner which the government chose, then privacy as a legal right is not applicable. A voluntary surrender of privacy is involved. See also Brents v. Morgan, 299 S.W. 965 (Ky.). On the other hand, if information is obtained from the individual under duress or totally involuntarily, it is subjected to a more restricted trust in its storage and use by the government.

Income tax returns do not constitute a truly voluntary source of information. As an involuntary source, the returns are specially entitled to the cautious judgment of the administrator in interpreting laws protecting the privacy of the individual. It is undoubtedly within the reasonable contemplation of the individual submitting income tax returns that an auditing function will be performed on the data he furnishes for the purpose of assuring its accuracy and for the purpose of assuring the efficiency and honesty of those administering the tax laws. It is unlikely that the individual contemplates the use of financial revelations in his return to cross-check other filings he may have made at other times for other purposes.

Second, is the inquiry essential to a government function and the scope of inquiry limited to the necessities of the case? Not every end of government justifies the means. The information gathering or distribution process should not pick up information irrelevant to the public governmental purpose nor distribute private information beyond the dictates of necessity. 9/

The State is prohibited by statute from invading the right of privacy of the individual through the use of wire tapping or eavesdropping techniques for the purpose of checking welfare fraud; nor can the home of the welfare recipient be subject to search without a warrant showing probable cause supported by oath or affirmation. Similar protection is afforded the citizen's income tax returns though they may already be in the hands of a government agency.

Income tax returns contain a broad range of information of varying intimacy constituting a self-portrait of the individual taxpayer. A person who has access to the tax returns, though he may wish only to obtain net income figures, is exposed to a wide range of additional confidential information.

9/ United States v. Robel, 389 U.S. 258 (1967).

The inherent general investigative authority of legislative bodies, which you specify as establishing authority for this access, is subject to constitutional limitations designed to protect the rights of the individual. The constitutional fathers of Alaska were particularly concerned that the claim of legislative or executive prerogative should not be used to override rights retained by the people. To the extent that recognition of the right of privacy reduces the ability of the Legislature to review operations of the executive branch or limits the ability of the executive branch to operate with optimum efficiency, this is a price which the people have placed upon their liberty. Section 7 of Article I of the Constitution of Alaska proclaims:

"No person shall be deprived of life, liberty or property without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed."

In my opinion the right of privacy is a "liberty" within the meaning of this provision of the Constitution. Limitations on this liberty may not be imposed without procedural due process, the investigative power of the Legislature notwithstanding.

The prevalence of welfare fraud is undoubtedly a proper area for legislative inquiry by a legislative committee of competent jurisdiction. Nevertheless, if the Committee prepares rules of procedure and practice for the Legislative Audit Division as later suggested in this opinion, the Committee may wish to reconsider whether the broader purpose for which the information is being sought constitutes a proper exercise of the post-audit function under the relevant statutes,^{10/} since the inquiry seems to be not so much whether the executive branch is faithfully and efficiently executing its duties under the statute but whether the public is. We do not here express an opinion on this question which is primarily one for legislative consideration.

Third, assuming the underlying purposes of the government are legitimate and pressing, are there alternative ways in which the government can accomplish its business without passing through the penumbra of the right of privacy?

^{10/} see Kent v. Dulles, 357 U.S. 116 (1958); Schmiedes v. Smith, 399 U.S. 17 (1968).

While the purpose of tracking and defeating welfare fraud is laudible, there are many ways in which this purpose can be accomplished without invading the privacy of income tax records. 11/

You have indicated that the information sought would be used to support findings expressed ultimately in numbers or percentages. I would recommend that you discuss with the agencies involved the use of coding procedures and appropriate executive agency personnel to determine whether the ultimate purpose can be accomplished without expanding the number of personnel having access to records which identify persons or in any manner intrude upon the right of privacy retained by the people in accordance with the principles described in this opinion.

Fourth, what kind of security is afforded the information? The right of privacy includes a right to adequate data protection so that information obtained and used legitimately is not incidentally subject to use in some other manner that lies beyond the legitimate need of the government to know.

Under the practices and procedures of the Department of Revenue, the information contained in income tax returns is held confidential even from other officers of State government. Access within the Department of Revenue itself is based upon a "need to know."

The Committee's request on behalf of the Legislative Auditor is not for the purpose of determining whether the Department of Revenue is effective and efficient in managing the tax laws but is intended to serve the purpose of cross-checking the performance of a program administered by the Department of Health and Social Services. It is significant that the internal auditors of the Department of Health and Social Services, and of the whole executive branch, housed in the Budget and Audit Division of the Department of Administration, are themselves denied the access now sought for the Legislative Auditor.

Any individual member legislator or member of the Committee staff may peruse the files of the Division, examining the raw data contained therein. No matter how improbable

11/ The effect of widening circulation of private records in impairing the candor of individuals later reporting should be noted as a public interest incidentally protected by the right of privacy.

it may be that an individual legislator or staff member might examine these files and copies of income tax returns or data contained therein, the fact is that no prohibition, safely restricting access to described individuals having a need to know, exists. 12/

The right to privacy does not extend only to privacy against publication to the general public. It applies to lesser audiences also, including audiences of government officers not engaged directly or indirectly in business pertinent to that for which the private information is collected. While there is no reason to suppose that the Legislative Auditor, as a person, is more likely to divulge information to unauthorized persons than members of the Income Tax section of the Department of Revenue, the lack of well-articulated rules regarding storage of information and restricting access to the files of the Division, means that the situation of any income tax records in the Division is in fact precarious considering the sensitivity of the rights involved.

Fifth, to what extent is due process afforded the individual whose right of privacy is at hazard? The procedures and safeguards by which information is collected, stored and distributed should be articulated in rules available to the public. In some instances the individual may have a right to be notified of a proposed use of information about himself and to be afforded an opportunity to voice objection, with provision for appellate review.

Critical, in my opinion, to the determination of the rights and obligations of the parties in the present situation is the doubt as to the subsequent security of the information to be obtained and the absence of guarantees of procedural due process to the individual whose privacy may be in the process of being surrendered or impaired. Greene v. McElroy, 360 U.S. 474 (1959). Compare Hannah v. Larche, 363 U.S. 420 (1960).

AS 24.20.271(6) provides that the Legislative Audit Division shall

"have access at all times to the books, accounts, reports or other records, whether confidential or not, of every state agency;"

12/ For historical and survey background see S. Wheeler, On Record: Files and Fossiers in American Life (1969).

The Honorable Mike Bradner
Fairbanks, Alaska

November 21, 1972

- 9 -

Under AS 24.20.201(a) (1) the Legislative Budget and Audit Committee is empowered to

" . . . adopt rules for the conduct of its business and prescribe procedures for the comprehensive fiscal analysis, budget review and post-audit functions;"

To the best of my knowledge this section has never been implemented. No rules have ever been proposed or formally adopted. ^{13/} There has been no opportunity for the public to have access to proposed rules or comment on them. There is no procedure which limits in a satisfactory manner access to the files of the agency on a need to know basis. Nor, to initiate a search of records pertaining to an individual citizen is a statement required which sets out with specificity the purpose for which the search is made. c.f. Watkins v. United States, 354 U.S. 178 (1957); Barenblatt v. United States, 360 U.S. 109 (1959).

Applying this outline of principles to the practice proposed by the Committee, it is my opinion that an infringement of the Constitution would be involved in implementation of this application for record review in the manner suggested. Accordingly, the Departments of Labor and Revenue are instructed to deny access to the records involved under the circumstances presented in this instance.

By this opinion we do not deny that in a proper case, for the performance of the audit function, under appropriate procedural guarantees, the Legislative Auditor may have access to income tax returns or other confidential personal data in the files of every department of government. For proper purposes relating to the efficiency and honesty of the administration of the Department of Revenue, and under appropriate procedural safeguards, he may do so. However, at the present time the regulations and safeguards to be provided by the Committee are nonexistent or inadequate. They afford neither procedural protection to the individual whose privacy may be jeopardized nor adequate regard for the larger concerns of the society in the right of privacy.

Respectfully submitted,

John E. Havelock
Attorney General

cc: Commissioner Benson
Commissioner of Revenue

^{13/} c.f. U.S. Smelting, Refining and Mining Co. v. Local Boundary Commission, 499 P.2d 140 (Alaska 1971).

H 13 211

1. housekeeping - Admin procedures
2. Makes uniform - different procedures for remedies
3. allows to employ tax agents

240 - informal hearing on taxpayer remedies

Problem - tax payers confused about remedies available on different types of taxes

~~Add~~ 025 - authority for outside auditors

1. large Corp. - income tax - Multi-state tax
- ~~to~~ will do if request

1972 - 2 opinions 43.20.190
tax returns suspected by Legis Audit

- ① Test - What does Invl anticipate who will have access to his info (tax return)
- ② Does Agency have leg purpose - Alternative sources of info
- ③ Security for info - subint procedures set out for due process

Opinions

No access for Leg Audit
" " for Regis