

OP. NO. 05-021

TAXATION: GENERAL PROVISIONS.

ADMINISTRATION OF GOVERNMENT: DATA COLLECTION & DISSEMINATION

Design, establishment, and maintenance of secure data processing system containing confidential taxpayer information primarily is question of fact for local commissioner of revenue; commissioner should balance administrative discretion with statute governing secrecy of certain information obtained in performance of his duties and Government Data Collection and Dissemination Practices Act. Information contained on and access to such system is subject to secrecy. Design and construction of system without access to confidential data is not necessarily subject to secrecy provisions that prohibit commissioner from divulging certain information.

The Honorable Ray Ergenbright
Commissioner of the Revenue for the City of Staunton
June 14, 2005

Issues Presented

You inquire concerning your responsibilities as a commissioner of the revenue to ensure the secrecy of taxpayer information in your custody that relates to the establishment and maintenance of a secure data processing system intended for your official use and for other permitted purposes. The specific situations concern a local commissioner's office that has the resources to establish its own internal system, and a commissioner that must use employees of the locality that are not under his supervision to create and maintain such a system.

Response

It is my opinion that the design, establishment, and maintenance of a secure data processing system containing confidential taxpayer information primarily is a question of fact to be determined by the local commissioner of the revenue. It is further my opinion that the commissioner should balance his administrative discretion with the prohibitions and restrictions contained in § 58.1-3 and the Government Data Collection and Dissemination Practices Act.¹ For purposes of these statutes, I note that the information contained on and the access to such a system is subject to secrecy. Finally, it is my opinion that the design and construction of the system without access to the confidential data is not necessarily subject to the secrecy provisions of § 58.1-3, which prohibits a commissioner from divulging certain information obtained in the performance of his duties.

Applicable Law and Discussion

You inquire concerning the proper and acceptable design, establishment, and maintenance of an in-house data processing system ("data system") to be used

by a local commissioner of the revenue ("commissioner") in the discharge of his official responsibilities in the day-to-day administration of the office. You state that the vast majority of the data expected to be housed on such data system generally would be confidential taxpayer information governed by § 58.1-3.

Where permitted by applicable law, the commissioner may share certain information with other departments of the locality's government² and with members of the general public and others.³ In addition to the requirements of § 58.1-3,⁴ § 2.2-3801(2) of the Government Data Collection and Dissemination Practices Act defines "personal information."⁵ The Act states that "[t]here shall be a clearly prescribed procedure to prevent personal information collected for one purpose from being used for another purpose."⁶ Although there may be questions concerning the interplay of these statutes with the disclosure requirements of The Virginia Freedom of Information Act,⁷ the Information Act's disclosure requirements generally are superceded by the secrecy provisions of § 58.1-3.⁸

Thus, the interplay of such statutes and the nature of the information contained in the commissioner's records requires that the data system be tailored to meet the statutory requirements for each category of information placed on the data system. Further, the administration of a data system must comply with the Government Data Collection and Dissemination Practices Act, particularly § 2.2-3803. I note, however, that § 2.2-3803(A)-(B) does not specify the methods for compliance, but leaves the method to the discretion of the "agency."⁹ A 2003 amendment to the Act,¹⁰ amends the definition of the term "agency" to include "constitutional officers."¹¹ The situation thus becomes a "facts and circumstances" decision to be made by each individual commissioner.¹² Commissioners, as constitutional officers, are vested with the authority and power to administer the operations of their offices in a manner and to the extent they, in their discretion, see fit.¹³ For these reasons, it is virtually impossible to establish general rules for the guidance of the commissioners. Therefore, the design and maintenance of a data system is a factual determination for the commissioner.¹⁴

It may be instructive, however, to observe the legal parameters within which these factual decisions must be made. Section 58.1-3 establishes a general principle that constitutional officers and other local tax and revenue officials must refrain from disclosing information about the transactions, property, income, or business of any taxpayer.¹⁵ That general rule was originally enacted by the 1926 Session of the General Assembly,¹⁶ and its application continues, "[e]xcept in accordance with a proper judicial order or as otherwise provided by law."¹⁷ Prior opinions of the Attorney General, however, have construed these exceptions narrowly and consistently have concluded that most information concerning individual taxpayers may not be disclosed to other officials of the locality for purposes unrelated to the collection of taxes.¹⁸

In the first situation you present, the commissioner, or other appropriate local tax or revenue officer, has the in-house resources to design, establish, and maintain his own data system. Thus, there is no objection to the storage of confidential information on a data system that has been entered by, and the access limited to, the local revenue officer's personnel only.¹⁹ A written admonition to these employees reminding them of their obligations under § 58.1-3 certainly is permissible.²⁰

Moreover, with respect to the second scenario in which a commissioner must rely on the locality's general governmental data processing system, this Office

previously has held that the use of such a system is permissible where the data entry personnel are *employees of the commissioner*,²¹ even where such information is contained on a locality-owned data processing system. There, however, can be no "uncontrolled access to the data base which includes"²² confidential taxpayer information, nor any "unrestricted access"²³ to the locality's system by the locality's non-revenue personnel.²⁴ By necessity, this means that the locality may design, build, and maintain a data system. The question, however, then becomes the ability of locality personnel that are not employed by the commissioner to enter or access such information, which may be only done pursuant to a specific statutory exemption.²⁵ It certainly would never permit "unrestricted access" by personnel of a locality that are not employed by the commissioner.²⁶

In appropriate circumstances, personnel of a locality that are not employees of the commissioner may be permitted to design, build, and maintain a data system that includes the entry of confidential information under the theory that such information may be, or become, accessible by such employees pursuant to the "line of duty" disclosure exception to § 58.1-3.²⁷ The "line of duty" exception in § 58.1-3(A)(2) permits local tax or revenue officers to divulge taxpayer information to *other local tax or revenue officers or employees* necessary for the performance of the officers' or employees' duties.²⁸ Thus, where the duties of such locality's personnel not employed by the commissioner are incidental or complimentary to the commissioner's duties, such access may be permissible under certain prescribed circumstances.²⁹ The noncommissioner employees, however, are obligated to protect the confidentiality of the information to the same extent as if they were employees of the local taxing official.³⁰

In summary, both the content of, and the restrictions on access to, the information in question by local personnel not employed by the commissioner must be considered. It is not, however, a question of data system design, implementation, and maintenance where the protected information is not readily accessible to locality personnel not employed by the commissioner. For example, a commissioner's employees may enter all the confidential information after the data system is designed and built; or, the commissioner's employees may directly download the confidential information from other systems. Accordingly, these are matters that must be left to the discretion of the local commissioner to decide based on all of the facts and circumstances present in his locality.

Conclusion

Accordingly, it is my opinion that the design, establishment, and maintenance of a secure data processing system containing confidential taxpayer information primarily is a question of fact to be determined by the local commissioner of the revenue. It is further my opinion that the commissioner should balance his administrative discretion with the prohibitions and restrictions contained in § 58.1-3 and the Government Data Collection and Dissemination Practices Act.³¹ For purposes of these statutes, I note that the information contained on and the access to such a system is subject to secrecy. Finally, it is my opinion that the design and construction of the system without access to the confidential data is not necessarily subject to the secrecy provisions of § 58.1-3, which prohibits a commissioner from divulging certain information obtained in the performance of his duties.

¹Va. Code Ann. §§ 2.2-3800 to 2.2-3809 (LexisNexis Repl. Vol. 2001 & Supp. 2004). Section 2.2-3808.2 expires July 1, 2005. See 2003 Va. Acts ch. 988, cl. 2,

at 1564, 1564. Section 2.2-3808.3 is not set out in the *Code* and "shall not become effective unless reenacted by the 2005 Session of the General Assembly." See 2004 Va. Acts ch. 736, cl. 2, at 1066, 1067. The 2005 Session of the General Assembly did not reenact this provision.

²See, e.g., Va. Code Ann. § 58.1-3(D) (LexisNexis Repl. Vol. 2004).

³See, e.g., § 58.1-3(A)(1), (3)-(4), (B), (D) (LexisNexis Repl. Vol. 2004); § 58.1-3.1 (LexisNexis Repl. Vol. 2004); see also § 58.1-3934 (LexisNexis Repl. Vol. 2004) (providing that "[s]uch governing body shall then have power to employ other delinquent tax collectors").

⁴A commissioner of the revenue "shall not divulge any information acquired by him in the performance of his duties with respect to any transactions, property, including personal property, income or business of any person, firm or corporation. Such prohibition specifically includes any copy of a federal return or federal return information required by Virginia law to be attached to or included in the Virginia return." Section 58.1-3(A).

⁵"*'Personal information'* means all information that describes, locates or indexes anything about an individual including his real or personal property holdings derived from tax returns ... [or] financial transactions '*Personal information*' shall not include routine information maintained for the purpose of internal office administration whose use could not be such as to affect adversely any data subject nor does the term include real estate assessment information." Section 2.2-3801(2) (LexisNexis Supp.2004).

⁶Section 2.2-3800(C)(9) (LexisNexis Supp. 2004).

⁷See §§ 2.2-3700 through 2.2-3714 (LexisNexis Repl. Vol. 2001 & Supp. 2004).

⁸See 1993 Op. Va. Att'y Gen. 221, 223 and opinions cited therein (noting that Freedom of Information Act does not require tax officials to reveal information whose disclosure is prohibited by § 58.1-3).

⁹See § 2.2-3803(A) and (B) (LexisNexis Supp. 2004); see generally 2002 Op. Va. Att'y Gen. 3.

¹⁰2003 Va. Acts ch. 272, at 294, 294-95 (amending and reenacting § 2.2-3801, including amendments to definition of "agency").

¹¹Section 2.2-3801(6).

¹²See 1997 Op. Va. Att'y Gen. 167, 171 n.28 (noting that information disclosed should not exceed that which is necessary; determination of extent or format of disclosure depends on particular facts and circumstances).

¹³See, e.g., Op. Va. Att'y Gen.: 2002 at 58, 60; 1987-1988 at 161, 162 (concluding that treasurer, as constitutional officer, is independent of control of local governing body and, except as abrogated by statute, retains complete discretion in day-to-day operations of office, personnel matters, and manner in which duties of office are performed); see also Op. Va. Att'y Gen.: 2004 at 52, 55 (forthcoming July 2005) (noting that sheriff generally has discretion in day-to-day

operations of his office), *available at* <http://www.vaag.com/media%20center/Opinions/2004opns/04-035w.htm>; 1997 at 60, 61 (noting that prior opinions of Attorney General consistently conclude that absent constitutional or statutory provision to contrary, sheriff has exclusive control over day-to-day operations of his office and assignment of his personnel).

¹⁴ See Op. Va. Att'y Gen.: 1987-1988 at 506, 507 (concluding that to extent that unrestricted access to commissioner's confidential data is problem, commissioner should examine what arrangements can be made to provide appropriate security for computer data files maintained by his office); 1982-1983 at 727, 728 (concluding that although determination of whether or not to compile and present certain data is within discretion of commissioner, once prepared, it is subject to requirements of statute).

¹⁵ See 1997 Op. Va. Att'y Gen., *supra* note 12, at 168.

¹⁶ See 1926 Acts of Assembly ch. 147, Item 6, at 252, 255 (enacting statute making it "unlawful for any member or ex-member of the [State tax] commission, or for any assessor or commissioner of the revenue, or for any employee or agent of the commission, to divulge any information acquired by him in respect to the transactions, property, income or business of any person, firm or corporation while in the performance of his duties under this act").

¹⁷ Section 58.1-3(A).

¹⁸ See, e.g., Op. Va. Att'y Gen.: 1997, *supra* note 12, at 169 (concluding that treasurers in Southwest Virginia coalfield region may share with Virginia Coalfield Economic Development Authority names of coal, oil, and gas producers, and their respective contribution amounts, to enable Authority to determine constitution of its board of directors); 1993 at 59, 64-65 (concluding that § 15.1-163(B), requiring commissioner of revenue to provide information requested by governing body, is not in conflict with § 58.1-3; if conflict exists, superseding language in act amending § 15.1-163 would cause that section to prevail); 1987-1988, *supra* note 14, at 507-08 (concluding that commissioner of revenue is prohibited from granting local department of social services direct access to computer data files to verify information on applications for public assistance because social services is not authorized to view certain information on system); 1985-1986 at 311, 312 (concluding that commissioner of revenue may not grant county administrator or employees in administrator's office access, which is not authorized by statute, to property and income data in his files); 1973-1974 at 412 (concluding that under § 58-46, predecessor to § 58.1-3, county assessor and finance director may not give county public utilities commission information about taxpayers' property, except information entered on public assessment rolls or books); 1970-1971 at 18, 19 (concluding that despite charter provision authorizing city council to investigate conduct of city office or department, neither council nor city manager has right to examine records of city assessor made confidential by § 58-46, predecessor to § 58.1-3); 1963-1964 at 17, 18 (concluding that under § 58-46, commissioner of revenue may not divulge to board of supervisors information reported on individual personal property tax returns).

¹⁹ See 1974-1975 Op. Va. Att'y Gen. 524, 525 (concluding that "line of duty" exemption contained in § 58-46, predecessor to § 58.1-3, does not prohibit dissemination of gross receipts reported by licensed businesses to local tax or revenue employees, provided that furnishing such information is for performance

of their public duties). In the 1974 opinion, the employees of the Division of Data Processing were employees of the Department of Finance. *Id.* Therefore, the opinion concludes that as employees of a revenue officer, the commissioner could provide such information to them as necessary to make the computerization operable. *Id.* The employees of the Division were, however, prohibited from divulging information concerning the licensees. *Id.*

²⁰*Id.*

²¹See Op. Va. Att'y Gen.: 1985-1986, *supra* note 18, at 311; 1974-1975, *supra* note 19, at 525.

²²See 1985-1986 Op. Va. Att'y Gen., *supra* note 18, at 312.

²³For the purposes of this opinion, the term "unrestricted access" means that there would be no restrictions or safeguards on the data that could be accessed. See 1987-1988 Op. Va. Att'y Gen., *supra* note 14, at 508 n.1.

²⁴See 1985-1986 Op. Va. Att'y Gen., *supra* note 18, at 311; see also 1987-1988 Op. Va. Att'y Gen., *supra* note 14, at 506.

²⁵See 1985-1986 Op. Va. Att'y Gen., *supra* note 18, at 312.

²⁶See Op. Va. Att'y Gen.: 1987-1988, *supra* note 14, at 507; 1985-1986, *supra* note 18, at 312.

²⁷See, e.g., Op. Va. Att'y Gen.: 1999 at 185, 186; 1974-1975 at 523, 524 (interpreting "line of duty" provision in § 58-46, predecessor to § 58.1-3); *id.* at 524, 525 (interpreting § 58-46).

²⁸See 1999 Op. Va. Att'y Gen., *supra* note 27, at 186.

²⁹*Id.*

³⁰*Id.* at 187 n.5; see also § 58.1-3(F).

³¹See *supra* note 1.

[Back to June 2005 Opinion Index](#)