Office of Chief Counsel
Internal Revenue Service
memorandum

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to:

Janet R. Miner
Director, Office of Safeguards
Communications, Liaison & Disclosure SB:CLD:S

from:

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subject: Disclosure of Federal Tax Information to Indian tribal child support enforcement agencies

By memorandum dated March 9, 2009, you provided us with a copy of an Indian Nation Program Agreement [Agreement], executed by the State of Washington Department of Social and Health Services [DSHS] and the Confederated Tribes of the Colville Reservation. Among other things, this Agreement provides for the administration of refund offsets for Indian tribal child support enforcement obligations and includes the disclosure of certain items of Federal Tax Information [FTI] to the Indian tribal child support enforcement agency [CSEA]. You inquired whether the disclosure of FTI contemplated by the Agreement was authorized by section 6103. You also asked that we address more generally the circumstances under which Indian tribal CSEAs may have access to FTI.

In 1997, this office issued advice that set forth a comprehensive analysis of sections 6103(l)(6), (8), and (10) of the Internal Revenue Code [the Child Support Enforcement Disclosure Provisions], which set forth the parameters under which FTI may be disclosed to, and used by, CSEAs. In 2000, we issued additional advice, specifically on the authority of Indian tribal governments to access FTI for specified purposes, including child support enforcement. After reviewing these memoranda and considering whether there have been amendments to Titles 26 and 42 that would change our prior advice, we reaffirm the analyses and conclusions reached in those memoranda.

To summarize our 1997 advice, we found that Congress clearly distinguished between government and private agencies in the context of enacting pre-title IV-D[1] child support measures, in enacting title IV-D itself, in amending section 6103 in the Tax Reform Act of 1976, and in amending provisions of section 6103 and title IV-D in the years following Congress' overhaul of section 6103. In our view, Congress used the term "child support enforcement agency" in the provisions of section 6103 to signify agencies of "political subdivisions," *i.e.*,

[1] Child support programs are authorized under Part D of Title IV of the Social Security Act, 42 U.S.C. § 651, *et seq*. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [PRWORA], Pub. L. No. 104-193, § 375, amended 42 U.S.C. §§ 654 and 655 with respect to the delivery of child support enforcement services on tribal lands.

agencies of federal, state, or local units of government. Thus, individuals or entities that may represent or operate on behalf of, or in lieu of, such agencies under contract cannot be considered CSEAs themselves. In our 2000 memorandum, we focused particularly on the question of whether Indian tribal governments may be considered state equivalents that may receive FTI under the Child Support Enforcement Disclosure Provisions. We concluded that neither section 6103 generally, the Child Support Enforcement Disclosure Provisions specifically, nor section 7871 (which enumerates the Code provisions wherein Indian tribal governments are to be treated the same as states) provided support for the argument that Indian tribal governments are "federal, state, or local CSEAs" to which disclosure of FTI is authorized. At the same time, we acknowledged certain arrangements available to states and Indian tribal governments for delivery of child support programs under Title IV-D that would permit the disclosure to, and use of, FTI by state or local CSEAs for the benefit of Indian tribal governments.

Whether the Agreement in question can be considered one of these arrangements is the matter to which we now turn.

LEGAL ANALYSIS

I. Indian Tribal CSEAs' Access to FTI

Effective March 30, 2004, the Administration for Children and Families [ACF] and the Office of Child Support Enforcement [OCSE], both of which are within the Department of Health and Human Services [DHHS], issued final regulations to implement direct funding to Indian tribal governments under section 455(f) of the Social Security Act (the Act), 42 U.S.C. § 655(f), as amended by PRWORA. See 45 C.F.R. Chapter III. Section 455(f) of the Act authorizes direct funding of Indian tribal IV-D programs after applying to the DHHS to become IV-D agencies and demonstrating the capacity to meet the following objectives of the Act: (1) the establishment of paternity, (2) the establishment, modification, and enforcement of support orders, and (3) the location of absent parents. Prior to the enactment of section 455(f) of the Act, Indian tribal IV-D programs were administered through the state CSEAs. For tribes that demonstrate this capacity, they are essentially performing the equivalent of the states' CSEA function. However, there is no support either in the Code or these regulations for the conclusion that this equivalent performance equates to a tribe being considered a "state" or "local" CSEA under sections 6103(l)(6), (8), or (10).

Effective March 30, 2004, the ACF and the OCSE issued final regulations outlining the safeguard procedures an Indian tribe or tribal organization must include in its plan, whereby the use or disclosure of personal information received by or maintained by the Indian tribal IV-D CSEA is limited to purposes directly connected to the administration of the IV-D program. See 45 C.F.R. § 309.80. In a comment addressed in the preamble to the regulations, a commenter asked who would be prosecuted if a state contracts with an Indian tribe and an unauthorized disclosure of FTI occurs. The commenter suggested that states should have hold harmless regulations regarding release from liability of prosecution if an Indian tribe commits the unauthorized disclosure. The ACF and the OCSE responded that "[c]urrent law does not allow a State to release [FTI] to a Tribal IV-D agency . . . . Any agreement negotiated between a Tribe and a State must address safeguarding and comply with all applicable Federal law and

regulations." Thus, the ACF and the OCSE both acknowledged that federal law does not authorize Indian tribal IV-D agencies to receive FTI from the states.

Also effective March 30, 2004, the ACF and the OCSE issued final regulations requiring an Indian tribe or tribal organization to specify procedures under which the Indian tribal IV-D agency will extend the full range of services available under its IV-D plan to respond to all requests from, and cooperate with, state and other Indian tribal IV-D programs. See 45 C.F.R. § 309.120. In a comment addressed in the preamble to the regulations, a commenter noted that the use of tax offset and locate functions must be done through the states because Indian tribes do not have direct access to the necessary tools. The ACF and the OCSE concurred, noting that the Indian tribe and state could enter into cooperative agreements whereby the tribe would refer cases to the state for submission for federal tax refund offset. Once again, the ACF/OCSE response was the agencies' acknowledgement that Indian tribes cannot directly access FTI and that one workaround is for the tribes to cede control over certain cases directly to the states, which do have the authority to receive FTI.

In a June 11, 2008 Notice of Proposed Rule Making [NPRM], the ACF and the OCSE proposed 45 C.F.R. § 310.15, regarding requirements for computerized Indian tribal IV-D systems and office automation. These requirements for Indian tribal IV-D CSEAs differ markedly from the state IV-D CSEAs' security and confidentiality rules for computerized enforcement systems that the ACF and the OCSE established in final regulations made effective in 1998. Compare proposed 45 C.F.R. § 310. with final 45 C.F.R. § 307.13(c). Pursuant to 45 C.F.R. § 307.13(c), state IV-D CSEAs must, *inter alia*, have procedures to ensure that all personnel with access to confidential program data in the computerized support enforcement system are informed of the requirements and penalties in section 6103. There is no reference to the requirements and penalties in section 6103 in proposed 45 C.F.R. § 310.15. Interestingly, the proposed 45 C.F.R. § 310.15(c) is a nearly verbatim recitation of the state IV-D CSEA requirement in 45 C.F.R. § 307.13(c), with the glaring omission of any reference to section 6103. The OCSE even goes so far as to comment that "the proposed safeguard is consistent with the security and privacy measures required in the state computerized support enforcement systems in [45 C.F.R.] § 307.13."

Furthermore, effective May 22, 2009, the ACF and the OCSE amended 45 C.F.R. § 307.13(a) to specifically prohibit the disclosure of "IRS information" outside of the IV-D program except to the extent that "the IRS information is restricted as specified in the Internal Revenue Code." See 45 C.F.R. § 307.13(a)(4). Thus, a fair reading of these rules, and the preamble language that accompanied the computerized Indian tribal IV-D rule, is that the OCSE did not envision that FTI would be disclosed to, and therefore maintained in, the computerized systems of Indian tribal CSEAs. The disparity between the recent NPRM and the state IV-D CSEA requirements illustrates *by omission* that the OCSE, consistent with its public answers to the comments noted above, does not intend for tribes to have access to FTI for their delivery of their child support enforcement programs.

Section 6103(l)(10) permits the disclosure of FTI to any agency seeking a refund offset authorized under section 6402(c). Section 6402(c) authorizes the IRS to reduce the amount of any overpayment to be refunded to a person who made an overpayment by the amount of "past-due support," as defined in section 464(c) of the Act, 42 U.S.C. § 664(c), owed by that person, when a state has notified the IRS, in accordance with 42 U.S.C. § 664, of this past-due support. 42 U.S.C. § 664(a) states that, "Upon receiving notice from a State agency

administering a plan approved under this part that a named individual owes past-due support which has been assigned to such State pursuant to [42 U.S.C. § 608(a)(3)] or [42 U.S.C. § 671(a)(17)], the [IRS] shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual)." Section 6402(c) further requires the IRS to remit the amount of offset to the state collecting the past-due support and to notify the person who made the overpayment of this offset for past-due support. Treas. Reg. § 301.6402-5, regarding the offset of past-due support against overpayments, outlines the offset procedures and places all of the obligations on the DHHS and states to make requests, without a single reference to Indian tribal CSEAs.

Thus, the language from both Titles 26 and 42 contemplates requests for refund offsets for child support enforcement purposes to originate solely from state CSEAs. In spite of the liberal language permitting "any agency" to receive offset FTI under section 6103(l)(10), it includes the requirement that the IRS be notified by a state in accordance with 42 U.S.C. § 664, which authorizes only states to make these requests for refund offsets to the IRS. Indian tribes are not mentioned at all in either provision and thus have no authority to request or receive FTI for refund offset purposes directly under section 6103(l)(10).

II. Indian Nation Program Agreement

As noted previously, there are several arrangements for delivery of IV-D program services on Indian tribal lands that would permit disclosure of FTI.[2] In situations involving state assumption of jurisdiction over Indian lands, to the extent the Title IV-D program services are delivered by a state or local child support enforcement agency; that is, a political subdivision, such agency would be able to obtain FTI under the child support enforcement disclosure provisions to perform its Title IV-D responsibilities on Indian land. Paragraph 1(b) of the Agreement, which provides that "[n]othing in this Agreement shall be construed as a waiver of Indian tribal sovereign immunity," makes clear that this Agreement is not this type of arrangement. Similarly, where a tribe permits a state to deliver child support program services on Indian lands, such agency would be able to obtain FTI to perform its Title IV-D responsibilities on Indian land. The Agreement does not provide for the state of Washington to deliver the full range of child support program services to the Colville nation. Rather, it limits the state's role to the processing of refund offsets. Consistent with section 6103(l)(6)(B), certain items of FTI – pertaining to refund offsets – may be disclosed by state CSEAs to their agents or contractors. For the reasons set forth below, however, the Colville nation is not an agent or contractor of the state of Washington's CSEA.

Paragraph 2(q) of the Agreement states explicitly that "[f]or purposes of this Indian Nation Program Agreement, the Tribe is <u>not considered an employee or agent</u> of [the State of Washington Department of Social and Health Services]." (Emphasis added). Because the

[2] We wonder whether an arrangement could be reached whereby a state would submit refund offset requests on behalf of an Indian tribal government and simply return the proceeds to the tribe without identifying the source of the funds. Such an arrangement would not implicate the disclosure of any FTI, but would assist in child support enforcement. OCSE officials have told us that courts expect CSEA legal representatives to explain the precise source and nature of proceeds that are applied to arrearages, but we do not know the nature of court involvement with tribal matters, if any. Accordingly, this alternative might have greater viability for delivering refund offset services for custodial parents on tribal lands.

Indian tribe and the state explicitly agreed that the tribe is not an agent of the state, we cannot rely on the limited exception for disclosure of certain FTI to agents of state CSEAs in section 6103(l)(6)(B). We recommend that you discuss with OCSE officials whether Washington (and states with similar agreements) would be receptive to striking such language. Without application of the limited exception, the tribe is not authorized to receive any items of FTI.

In a May 11, 2007 document entitled "Policy Interpretation Questions," the ACF and the OCSE responded to a question regarding when a state IV-D program may submit arrearages owed to an Indian tribal IV-D program for Federal tax refund offset. The ACF and the OCSE responded that such arrearages could be submitted as long as: (1) the tribe entered a cooperative agreement with the state under 45 C.F.R. § 309.60(b), (c)[3], (2) the cooperative agreement included a statement that the Indian tribal IV-D program will comply with all safeguarding requirements with respect to Federal tax refund offset in accordance with 45 C.F.R. § 309.80, 42 U.S.C. § 454(26), and section 6103, and (3) evidence that the tribe's application for IV-D services under 45 C.F.R. § 309.65(a)(2) includes a statement that the applicant is applying for state IV-D services for purposes of submitting arrearages for Federal tax refund offset, again evincing their understanding that section 6103 does, in fact, apply to Indian tribal CSEAs and that Indian tribal CSEAs must be in compliance with section 6103.

If the above three conditions were not being met, the ACF and the OCSE responded that a state could not submit arrearages owed in Indian tribal IV-D cases for federal tax refund offset until such time as the Indian tribal IV-D program amended its cooperative agreement to meet all of the above three conditions, including a statement that the Indian tribal IV-D program will comply with all safeguarding requirements. These responses also indicate the OCSE's intention that cooperative agreements between tribes and states include a reference to section 6103.

If an Indian tribal CSEA enters into a qualifying arrangement with a state, it would then be authorized to receive the three items of FTI authorized by section 6103(l)(6)(B) for refund offset purposes; but only where the Indian tribal CSEA meets the safeguard requirements imposed by section 6103(p)(4). Although paragraph 4(i)(1) of the Agreement requires the Indian tribe to be in compliance with IRS Publication 1075, *Tax Information Security Guidelines for Federal, State, and Local Agencies and Entities*, that provision is not the authority for disclosure of FTI. Since an Indian tribe is not a "federal, state, or local" agency for section 6103 purposes, and where it has not entered into a qualifying arrangement with a state, the safeguard provisions of Publication 1075 do not apply to the Indian tribe.

In any event, we note that paragraph 4(i)(11) of the Agreement neglects to require Indian tribal compliance with section 6103. Instead, paragraph 4(i)(11) merely states that in accordance with section 6103, any information concerning individuals who owe a support obligation or for whom

[3] Under 45 C.F.R. § 309.60(b), the Indian tribe is responsible and accountable for the operation of the Indian tribal IV-D program. The Indian tribal IV-D agency need not perform all of the functions of the Indian tribal IV-D program, so long as it ensures that all approved functions are carried out properly, efficiently, and effectively. Under 45 C.F.R. § 309.60(c), if the Indian tribe delegates any of the functions of the Indian tribal IV-D program to another Indian tribe, a state, and/or another agency or entity pursuant to a cooperative arrangement, contract, or tribal resolution, the Indian tribe is responsible for securing compliance with the requirements of the Indian tribal IV-D plan by such Indian tribe, state, agency or entity. The Indian tribe is responsible for submitting copies and appending to the Indian tribal IV-D plan any agreements, contracts, or Indian tribal resolutions between the Indian tribal IV-D agency and an Indian tribe, state, other agency or entity.

support enforcement services are being provided is private and confidential and the Indian tribe shall protect information according to applicable federal, state, and Indian tribal laws. So, assuming the Agreement were amended to establish an agency or contractual relationship between the Colville nation and the State of Washington, then the Agreement's safeguard language would also need to be revised to comport with the specifics of Publication 1075.

CONCLUSION

An Indian tribal CSEA is not an "agency" for purposes of section 6103 because it is neither a federal agency nor a state or political subdivision thereof. In its current form, the Agreement does not represent a contractual arrangement sufficient to authorize disclosure of FTI to an Indian tribal CSEA as an agent or contractor of the state CSEA. Even the ACF and the OCSE did not contemplate Indian tribal CSEAs having such access to FTI, as their proposed regulations and their responses to comments made on the proposed regulations demonstrate. Furthermore, section 6103(l)(10), the regulations thereunder, and 42 U.S.C. § 664 all demonstrate that only states are authorized to request and receive FTI for refund offset purposes. Barring a legislative change, there are two alternative possibilities for an Indian tribal CSEA to be permitted access to any FTI for its IV-D program. First, in order for an Indian tribal CSEA to be permitted access to all of the items of FTI authorized in the Child Support Enforcement Disclosure Provisions, the Indian tribal CSEA would have to turn over IV-D program responsibility to the state CSEA. Second, for an Indian tribal CSEA to receive the three items of FTI (*i.e.*, address, social security number, and amount of any refund offset under section 6402(c)) authorized by section 6103(l)(6)(B), it would have to sign a cooperative agreement with the state CSEA that made clear that the Indian tribal CSEA operates as an agent of the state CSEA in a contractual capacity.

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If you have any further questions, please contact Kimberly Barsa, the attorney assigned to this matter, at 622-7950.