Tax Confidentiality
To Robert, William and Pyret
Örebro Studies in Law 6

Anna-Maria Hambre

Tax Confidentiality
A Comparative Study and Impact Assessment of Global Interest
Cover picture: Mattias Käll/Popill agentur

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Abstract


This thesis deals with legislative rules on tax confidentiality on the possibilities open to the public to obtain information held by tax authorities. Such information contains not only details on how a particular tax administration operates and on its policies and opportunities for public participation in its work, but may furthermore reveal intimate details on an individual taxpayer (such as income, spending and savings, employment status, personal belongings, disability status, associations and club memberships, mortgage costs, child support and alimony).

As the title indicates – Tax Confidentiality: a Comparative Study and Impact Assessment of Global Interest – this thesis comprises both a comparative study and an impact assessment. The comparative study has two components: a country comparison (Sweden and the United States) and an option comparison. This means, first, that there is a comparison with regard to the rules in co-operation and second, that there is a comparison of rules extracted from their context. The evaluation in the country comparison focuses on the outcomes of a balance of rules providing different levels of confidentiality, that is to say, the level of confidentiality the rules in the particular regime provide as a whole. In the option comparison a deeper analysis is provided on individual rules – for example, a rule prescribing confidential tax returns with no consideration as to rules that might compensate high levels of confidentiality. The comparative study results in a proposed preferred option, based on a consideration of the costs and benefits found in the study.

The framework for the impact assessment consists of three selected benchmarks: tax compliance, administrative costs, and taxpayer privacy. This entails the study of how the different rules, providing different levels of confidentiality, stand against the benchmarks, thus identifying the impacts of the rules within the framework of interests encompassed by such benchmarks. The overall research question is: What are the costs and what are the benefits of having a high level of tax transparency versus a high level of tax confidentiality?

Keywords: Tax confidentiality; tax transparency; right to information; tax compliance; administrative costs; taxpayer privacy.

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It is often held that writing a doctoral thesis is a work of solitude. In some ways that is true but in so many other ways it is not so. In the final stages of this work I began to reflect on the years spent reading, writing, rereading and rewriting, and on all those who helped make this thesis the best that it could possibly be. I am filled with gratitude towards these people. Any flaws that remain in this work are all mine.

My first thanks go without hesitation to my supervisor Professor Eleonor Kristoffersson, who in a clear and educative manner assisted me through the (far from simple) process of production, helping me turn ideas into reality. She gave me invaluable advice on navigating difficult terrain together with constant encouragement to maintain the pace, while at times waving me into the pits for a tyre change and for refuelling. I would also like to thank my assistant supervisor Professor Joakim Nergelius for excellent advice and clear guidance.

During the course of working on this thesis I presented drafts of the manuscript at various seminars. I extend my thanks to Associate Professor Jérôme Monsenego, who acted as a discussant at my final seminar, for reviewing the manuscript and for valuable suggestions and remarks. I further extend my thanks to Professor Stefan Olsson, who acted as a discussant at a seminar at an earlier stage of the process and made comments of immense worth on the further progress of this work. I am indebted to those who participated at those seminars for their comments, which enriched those discussions and decidedly improved this thesis.

During my journey, from the first attempt to formulate the aim of this research until the end, I have experienced so many things – fun, challenges, and rewarding moments – for which I am most grateful. First, I offer my heartfelt thanks to Professor Michael Lang for granting me the opportunity of being a visiting scholar at the Institute for International Taxation at WU during the summer of 2012. Second, warm thanks and gratitude are extended to Professor Joshua D Blank for the opportunity of visiting the New York University School of Law for a period of time during the autumn of 2013 and for his ensuring that I did not distort the content of the US tax confidentiality legislation by reading the relevant part of the thesis and for making invaluable remarks.
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<th>Full Form</th>
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<tbody>
<tr>
<td>ADP</td>
<td>Automatic Data Processing</td>
</tr>
<tr>
<td>AICPA</td>
<td>American Institute for Certified Public Accountants</td>
</tr>
<tr>
<td>AEOI</td>
<td>Automatic Exchange of Financial Account Information in Tax Matters</td>
</tr>
<tr>
<td>APA</td>
<td>Advance Pricing Agreements</td>
</tr>
<tr>
<td>BEPS</td>
<td>Base Erosion and Profit Shifting</td>
</tr>
<tr>
<td>CBA</td>
<td>Cost-Benefit Analysis</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>COE</td>
<td>Council of Europe</td>
</tr>
<tr>
<td>Ds</td>
<td>Departementsserien (the Ministry Publication Series)</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>FIAS</td>
<td>Foreign Investment Advisory Service</td>
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<td>FOIA</td>
<td>Freedom of Information Act</td>
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<tr>
<td>FPA</td>
<td>Freedom of the Press Act</td>
</tr>
<tr>
<td>HFD</td>
<td>Högsta förvaltningsdomstolen (Supreme Administrative Court)</td>
</tr>
<tr>
<td>IA</td>
<td>Impact Analysis</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant of Civil and Political Rights</td>
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<tr>
<td>IG</td>
<td>Instrument of Government</td>
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<tr>
<td>IRC</td>
<td>Internal Revenue Code</td>
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<td>IRM</td>
<td>Internal Revenue Manual</td>
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<tr>
<td>IRS</td>
<td>Internal Revenue Service</td>
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<tr>
<td>JO</td>
<td>Justitieombudsmannen (Parliamentary Ombudsmen)</td>
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<tr>
<td>KU</td>
<td>Konstitutionssutskottet (Committee on the Constitution)</td>
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<tr>
<td>MAP</td>
<td>Mutual Agreement Procedure</td>
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<tr>
<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
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<td>PAISA</td>
<td>Public Access to Information and Secrecy Act</td>
</tr>
<tr>
<td>Prop</td>
<td>Proposition (Government bill)</td>
</tr>
<tr>
<td>Reg</td>
<td>Income Tax Regulations</td>
</tr>
<tr>
<td>RIA</td>
<td>Regulatory Impact Analysis</td>
</tr>
<tr>
<td>RÅ</td>
<td>Regeringsrättens Årsbok (case reporter for the Supreme Administrative Court prior to 2010)</td>
</tr>
<tr>
<td>SFS</td>
<td>Svensk författningssamling (Swedish Code of Statutes)</td>
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<tr>
<td>SKV</td>
<td>Skatteverket (Swedish Tax Agency)</td>
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<tr>
<td>SOU</td>
<td>Statens Offentliga Utredningar (Swedish Government Official Reports)</td>
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<tr>
<td>SvD</td>
<td>Svenska Dagbladet (a Swedish newspaper)</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>SvJT</td>
<td>Svensk Juristtidning (a Swedish legal journal)</td>
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<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>US</td>
<td>United States</td>
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<tr>
<td>USC</td>
<td>United States Code</td>
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<td>WU</td>
<td>Wirtschaftsuniversität</td>
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PART I

The basis for the study
1 Introduction

1.1 Background

This thesis concern itself with tax confidentiality legislation, in relation to the possibilities open to the public to obtain information held by tax authorities, and a consideration of its costs and benefits. It treats legislative rules on tax confidentiality from three standpoints: tax compliance, administrative costs, and protection of taxpayer privacy. It examines the consequences of tax confidentiality that might either threaten or serve such interests, or both.

Confidentiality legislation could be said to be the result of a delicate balancing act. The question of when it should prevail over transparency, or the reverse, when transparency should win over confidentiality, often leads to difficult trade-offs because it often involves powerful interests in both camps. The narrower field of confidentiality legislation encapsulated in tax confidentiality, which is the subject of this thesis, is no different in this regard. Subsequently, when evaluating tax confidentiality legislation or proposals for tax confidentiality legislation, it is necessary to consider both the benefits and costs expected from disclosure on the one hand, and confidentiality of tax information on the other hand.

Confidentiality and transparency are key notions in this thesis. How such concepts are defined and applied in this work is described in detail in subsection 1.6, but a brief definition follows here in order to introduce them at an early stage.

The broad definition of transparency holds that it is to do with visibility, or openness, of government activity.1 In a narrower sense, transparency maintains the right to gain access to information held by a public administration. A government is seen to be transparent when information it holds is accessible. When information is confidential there is less transparency. In short, both confidentiality and transparency refer 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 trans-

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Transparency in public administration in relation to information is commonly associated with the right to request and receive information held by public bodies. An essential and basic principle governing the right to information is that of maximum disclosure. The principle of maximum disclosure entails the presumption that all information held by public bodies should be subject to disclosure. One facet is the disclosure of information on 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. This brings us nearer to the issue to be dealt with in this thesis, which is closer to another facet of tax transparency. This aspect involves the issue of disclosure of individual taxpayer information. A rule prescribing transparent tax decisions inevitably affords insight into how a particular tax administration applies tax laws. At the same time it may reveal intimate details on an individual taxpayer. All taxpayers are compelled to file annual returns and in so doing, disclose sensitive information to the tax administration. The scope of such information, that is, what type of data it contains, depends largely on the tax system, since what constitutes taxable objects and which deductions are possible differs between tax systems. Hence, what kind of information is held by the tax administration, and which might be the subject of disclosure, also differs. Nonetheless, tax information generally includes a taxpayer’s income and other details about personal circumstances. Apart from income, the information may reveal facts on 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.

 Disclosure of such information has consequences in different spheres, the most obvious being taxpayer privacy. The presumption under the prin-

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3 Ibid 30.
ciple of maximum disclosure that all information held by public bodies should be subject to divulgence, may be overcome only where there is an overriding risk of harm to a legitimate public or private interest. The interest of a taxpayer’s right to privacy, which concerns the right to confidentiality of personal information held by the tax administration, is generally recognized as outweighing the right to information and thus justifies confidentiality rules protecting privacy.

The conflict between the right to privacy and the right to information, which renders the issue of taxpayer privacy a place in this thesis, is obvious. However, disclosure of tax information has consequences for the core business of any tax administration – the implementation and enforcement of tax legislation and regulation. The collection of taxes is clearly vital for any state financed by taxes and a tax administration’s primary responsibility is to collect the proper amount due to the government at the least possible cost to the public. In achieving it, the promotion of tax compliance is of prime importance. The willingness of taxpayers to comply with the law depends greatly on the trust invested by citizens and businesses in the tax administration in question. Taxpayers should have their expectations confirmed that the tax authority administering the tax laws does so consistently and fairly so that similarly situated taxpayers are treated equally and consistently under that law.5

Another matter of the utmost importance for tax administrations throughout the world is the allocation of resources. Since tax administrations often suffer from restricted funding there is great concern that they operate as efficiently as possible.6 If much of the information that a tax administration holds is disclosed, and undergoes an assessment prior to disclosure, then this inevitably imposes higher financial costs on that tax administration. It is therefore of value to assess the consequences of the administrative costs of rules and policies under which a tax administration operates with regard to tax confidentiality.

The above brief introduction and the following quotation both set the course of this thesis. “Rather than abstract normative claims and rhetoric, what is needed is some realism about transparency’s costs and benefits for

5 See Matthijs Alink and Victor van Kommer, Handbook on Tax Administration (IBFD 2011) 90. See also subsection 2.3 concerning factors influencing tax compliance.
6 Ibid.
the public, for governance, and for the relationship between the public and government.”

1.2 Aim and Research Questions
The aim of this work is to examine national legislative rules on tax confidentiality. The approach of this examination is to study the effects of tax confidentiality rules, in other words, their costs and benefits. This suggests an evaluation of the rules, which is performed on the basis of three selected benchmarks, namely tax compliance, administrative costs, and taxpayer privacy. This entails studying how the different rules, providing different levels of confidentiality, stand against the benchmarks, thus identifying the impacts of the rules within the framework of interests captured by such benchmarks.

While this thesis constitutes a survey of tax confidentiality rules, it goes beyond such a descriptive approach by employing selected benchmarks to explore the implications of such rules. Subsequently, the object of the study is the law, while the benchmarks represent the tools of evaluation. However, these benchmarks, or reference points, do not only constitute evaluation tools, but also serve as adequate delimitations of the topic.

In maintaining that such yardsticks constitute the evaluation tools it is asserted that this thesis, through the setting of the benchmarks (Chapter 2), provides a theoretical framework developed to meet the objective of examining the costs and benefits of tax confidentiality. This framework, however, has been constructed not merely for the accomplishment of the aim of this particular study; it has been designed so that others might use and benefit from it. It is contended that this will not only assist policymakers in their consideration of important factors and competing interests, but also provide them with means of creating or evaluating tax confidentiality legislation, or both.

As indicated, this research is intended to help policymakers think about important factors and competing interests rather than attempt to provide a single correct answer, since legal, institutional, economic, social and cultural differences between countries would militate against the latter. Different individuals, groups, social strata, communities, cultures and nations clearly embrace contrasting values or embrace similar values but in varying ways. One can depict tax confidentiality legislation as that of a balance of

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8 Nils Jareborg, Värderingar (Norstedt 1975) 190.
interests set on a scale, where at one end there is total confidentiality and at the other end complete transparency.

Total tax confidentiality

Total tax transparency

The level of tax confidentiality could well be placed differently on this scale between total tax confidentiality and total tax transparency and still function efficiently in the specific system of a particular country. So, instead of trying to establish one ideal point on the tax confidentiality scale, this thesis centres on identifying the costs and benefits of different levels of tax confidentiality. As earlier mentioned, the boundaries for this exercise are the different benchmarks, identified as important factors when discussing tax confidentiality, comprising a study of what actual and potential costs and benefits they involve.

This thesis is concerned with both national and international levels. At national level it represents a study of tax confidentiality legislation, more specifically, rules providing the public the possibility to access information held by the tax administration, in Sweden and the United States. These two tax confidentiality regimes are evaluated against the benchmarks and then compared. I call this the country comparison. The international level of this study, which includes not only tax confidentiality rules from Sweden and the United States, but rules from other jurisdictions as well, removes the focus from the national perspective and provides an evaluation rule by rule. This part could be said to function as an inventory of existing rules on tax confidentiality (while the country comparison is primarily an evaluation of rules in interaction, that is, the tax confidentiality regime as a whole) governing different issues of tax confidentiality such as confidentiality on tax returns and tax decisions, agreements between a taxpayer and the tax administration, and the level of confidentiality with regard to tax information in court proceedings. These rules are then assessed with the use of the theoretical framework. I call this the option comparison.

These two approaches to tax confidentiality legislation are more thoroughly described later in this chapter, but in short they afford an evaluation to be conducted not only in terms of individual rules on confidentiality, but with regard to rules in co-operation. In other words, the rules are evaluated both outside and inside of their context. These separate approaches afford that conclusions may not only be applicable at national, Swedish, level, but also useful for other jurisdictions contemplating the

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9 The choice of countries is elaborated on in subsection 1.3.4.
delicate matter of deciding what level of confidentiality to apply. The statement that this thesis incorporates an international perspective thus does not imply that it contains an examination of international rules but that its findings might be of global relevance. It could be of interest to other countries beyond those included in the comparative study.

This thesis contains a recommendation for legislation or, in other words, a proposed preferred option. The recommendation is based on a balance of interests between the chosen benchmarks. This might at first appear to contradict the statement of its not being possible to conclude a universally applicable level of confidentiality. However, the recommendation itself constitutes a trade-off rule, thus leaving the final balancing – the trade-off in individual cases – to those practitioners applying the law.

It is held above that this thesis can assist policymakers in their consideration of important factors and competing interests. However, by providing different significant interests (embraced by the benchmarks) and a thorough analysis of the consequences of different rules within the areas of such interests, this research could also contribute to facilitating the final balancing in the application of the recommendation on the part of the practitioner. The recommendation for legislation is founded on an analysis which, in addition to its being used in drafting legislation, could also form the basis for the balance of interest faced by the practitioner. Consequently, not only those engaged in drafting legislation might perhaps benefit from the findings of this thesis, but also the legal experts involved in its application.

The above is concisely expressed by the following overarching research question: What are the costs and what are the benefits of having a high level of tax transparency versus a high level of tax confidentiality? This broad question is then divided into the seven supplementary research questions posed below.

1. What are the impacts of tax confidentiality in relation to
   a. tax compliance,
   b. administrative costs, and
   c. taxpayer privacy?

2. How do different rules on tax confidentiality achieve the objective of
   a. promoting taxpayer compliance,
   b. minimizing administrative costs, and
   c. protecting taxpayer privacy?
3. How did tax confidentiality legislation in Sweden/the United States develop?

4. What is the general legal framework regarding transparency/confidentiality of tax information in Sweden/the United States?

5. What is the reason (or reasons) behind the tax confidentiality regime in Sweden/the United States?

6. What is the main content of the provisions on tax transparency/confidentiality in Sweden/the United States?

7. How does tax confidentiality legislation in Sweden/the United States achieve the interests set forth in the benchmark? That is, how do the two different regimes achieve the objectives of
   a. promoting taxpayer compliance,
   b. minimizing administrative costs, and
   c. protecting taxpayer privacy?

Questions 1a-c relate to the setting of the benchmarks in Chapter 2. In other words, they form the basis for creating the theoretical framework. These questions are essential to this thesis, because it is necessary to answer them in order to draw any conclusions in terms of the research questions 2a-c (option comparison) and 7a-c (country comparison). That is, in order to identify which impacts (or costs and benefits) a specific rule has (for example, on tax compliance) one must first examine those factors related to tax confidentiality which might have a possible impact on tax compliance.

Research questions 3-6 provide a basis for the country comparison, since they help make clear the similarities and differences between the two jurisdictions and thus facilitate making comparative conclusions.

As noted above, this thesis concerns itself with the impacts of rules on tax confidentiality. Other possible ways of approaching tax confidentiality legislation could involve participating in more national issues, for instance, in the actual application of the law in relation to its purposes as expressed in preparatory works. A comparative study might focus on taxpayer privacy issues only, and how such privacy is protected in a greater number of countries than those included in the comparative study in this thesis. At international level, tax confidentiality could be studied in terms of exchange of information.\(^\text{10}\) Though approaches such as these might be of interest and make an important contribution to legal science, the concern

\(^{10}\) For more details on exchange of information and tax confidentiality, see subsection 1.5.
of this study lies in making a comparative study where the effects of the
rules are examined, a study that attempts to contribute at global level.

1.3 Methodology

1.3.1 Introduction

The choice of topic and the purpose of this thesis are explained in the fore-
going subsections, thus setting the framework for the subject of the study.
This part provides the foundation for the methodology used in order to
accomplish the aim. The basis for this procedure is the (perhaps implicit)
approach that the choice of problem to be studied determines the methodo-
logical approach – that is, the formulated research issue governs the choice
of method used in order to address that issue.

For the purpose of setting up the framework for this research with re-
gard to methodology, certain aspects had to be considered. Its title already
implicates the methodological approaches: it is a thesis within the field of
legal science, containing a comparative study and an impact assessment.
The following subsections aim at describing the different approaches in
methodology that form the basis for the methodology employed in this
work.

The form of citations and the bibliography subscribe to the citations sys-
tem Oscola.\(^\text{11}\)

1.3.2 Legal Science

This is essentially a study within the field of legal science in that the basis
for the examination is the law, namely legal rules on tax confidentiality.
However, legal science covers numerous perspectives and approaches,\(^\text{12}\)
and that is the reason why making this statement requires clarification.

The traditional method of writing a thesis in Sweden adheres strictly to
what could be called legal dogmatics (Sw. rättsdogmatik), involving inter-
pretation and systematization of the law as it stands.\(^\text{13}\) This traditional
approach in legal research, however, has lightened and expanded over the
years to include other approaches in methodology.

Traditional legal dogmatics is of great practical significance with regard
to legal education, legislation and legal practice.\(^\text{14}\) The need for traditional

\(^{11}\) Oxford Standard for the Citation of Legal Authorities (4th edition, Hart Pub-
lishers 2012).

\(^{12}\) Such as legal history, legal sociology, law and economics, legal philosophy, etc.

\(^{13}\) Aleksander Peczenik, *The Basis of Legal Justification* (A Peczenik 1983) 118.

\(^{14}\) Ibid.
legal analysis is irrefutable for the maintenance of the rule of law and a benign legal culture in general. Nevertheless, methodological development is a necessary condition for gaining new knowledge. It is held in scholarly (legal) literature that it is therefore important that researchers seek opportunities to treat research problems from new perspectives and through the use of methods other than the traditional legal dogmatic method.

1.3.3 Law and Economics
The traditional approach to legal research (that is, legal dogmatics) takes an internal perspective of the law, in that it looks at the law from the inside, primarily adopting a judicial perspective. A researcher in the field of law who adopts an internal perspective on it focuses on those matters relating to the application of the law.

Another way of looking at the law is from an external perspective. Rather than concentrating on the application of the rules, studies that take an external perspective on the law concentrate more on understanding, describing and analyzing the rules in relation to cause and effect.

This thesis revolves around the consequences that rules may give rise to in society, implying that it takes an external perspective on the law. In accordance with that stated above – that the aim governs the choice of methodology – the methodology should preferably correspond to that approach in taking an external perspective on the rules. Set out below are the components of law and economics – a theory that takes on an external perspective on the law – that make this an apposite starting point in terms of the choice of methodology for this study.

Within the realms of law and economics, the law is not seen as an autonomous entity separated from economic reality (the autonomous idea contending that whenever the law changes, it changes because of its inner nature rather than in response to political and economic pressures) but treats the law as an interactive part of societal economy. As such, law and economics is a theory that offers an external perspective of the law, the external perspective being economy.

16 Minna Gräns, ‘Om interaktiv rättsdogmatik’ in Minna Gräns and Staffan Westerlund (eds), Interaktiv rättsvetenskap: En antologi (Uppsala universitet 2006) 62.
The primary intersection of law and economics has been found in the antitrust field of law. The economic emphasis in antitrust analysis has been generally accepted even among academic lawyers. The reason for this, according to Richard Posner, is that the central focus of antitrust is the control of monopoly, and the study of monopoly has been a major activity of economists for many years.\(^\text{20}\)

The application of an economic analysis of law is not directly controversial when such study concerns itself with economic regulations. However, law and economics has extended, in that it now does not set out a limitation as to the scope of the application of an economic analysis of law.\(^\text{21}\)

Modern law and economics is not merely microeconomics,\(^\text{22}\) but holistic research on individual behaviour. Thus the research is in itself interdisciplinary, in that jurisprudence is related not only to economics and business, but also to behavioural sciences, such as psychology, history, and economic history, as well as various game theoretic models.\(^\text{23}\)

In order to understand law and economics which, as stated, constitutes the point of departure in terms of the chosen methodology, a set of fundamental concepts must be dealt with. The most central assumption in law and economics is that people are rational maximizers of their satisfactions.\(^\text{24}\) A rational maximizer of personal satisfaction adjusts means to ends in the most efficient way possible, including the consideration of the costs and benefits of the different options available to the individual. This is not by necessity restricted to analysis of monetary issues, as the cost and benefits consideration comprises not only pecuniary maximization but also non-pecuniary goals.\(^\text{25}\)

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\(^{21}\) Ibid 759.

\(^{22}\) Microeconomics studies the market behaviour of individuals and firms in making decisions under the premise that resources are limited. Microeconomics focuses on the interaction between these decisions and behaviours and supply and demand, which determines prices, which in turn affects the quantity supplied and demanded, see Christian Dahlman, Marcus Glader and David Reidhav, Rättsekonomi. En introduktion (2:2 edn, Studentlitteratur 2004) ch 1 and 2.

\(^{23}\) Jukka Mähönen, ‘Rättsekonomin i rättsvetenskaplig forskning’ in Minna Gräns and Staffan Westerlund (eds), Interaktiv rättsvetenskap: En antologi (Uppsala universitet 2006) 84; See also Jan Hellner, ‘Lagstiftning och forskning inom den centrala förmögenhetsrätten’ [1988] SvJT 169, 179.

\(^{24}\) Posner, ‘The Economic Approach to Law’ (n 20) 761.

\(^{25}\) Posner, Overcoming law (n 19) 16.
In research conducted on the basis of individuals as rational maximizers, the legal system is treated as a given and the question studied is how individuals involved in the system react to the incentives that it imparts.26 This emphasizes the notion that economics is basically a positive science, but with certain features distinguishing it from traditional legal positivism. In both positive approaches to the law, the object of the study is the law as it stands. While the traditional legal positivist views law as autonomous, taking an internal perspective of the law, a researcher in law and economics considers law to be a social device and attempts to evaluate it functionally, emphasizing its place within the economic structure of society. The economic approach to law as well as legal positivism may increase knowledge of the legal system that it studies. However, by taking on the external rather than the internal perspective, the economic approach to law renders the benefits of providing an understanding of how it works in relation to society.27

Another economic approach to the law (other than the one that assumes that people are rational maximizers) views the law itself as a thing influenced by a concern for promoting economic efficiency – that a legal system is best understood as an attempt to promote an efficient allocation of resources.28

Two standards are applied in law and economics in the definition of economic efficiency. First, there is the Pareto optimality which means, in short, an end of a transaction where at least one person is better off but not at the expense of another. In other words, if there are one or more transactions that may make someone better off without making anyone else worse off, then the original situation does not meet the condition for Pareto optimality. Consequently, there may be different Pareto optimal endpoints, but necessitating no losers. Second, there is the concept of Kaldor-Hicks efficiency. This is achieved when overall economic gains outweigh losses. Hence, unlike Pareto optimality, Kaldor-Hicks efficiency contains both winners and losers. Kaldor-Hicks efficiency is achieved when gains in economic efficiency are sufficiently large so that those better off could, in principle, compensate those worse off in the new allocation of goods and still remain better off.29

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27 Ibid 768–769.
29 Göran Skogh and Jan-Erik Lane, Äganderätten i Sverige: en lärobok i rättseko- nomi (2nd edn, Studieförbundet Näringsliv och samhälle 2000) 53–58; Dahlman, Glader and Reidhav (n 22) 54–56.
Above different fundamentals in law and economics theory have been briefly described. The rest of this subsection concerns the use of law and economics theory in research – that is, law and economics as methodology.

The central assumption in an economic analysis of law described above, presumes that individuals behave rationally in weighting the costs and the benefits of different options in order to maximize their satisfaction. It is depicted in the prominent method within law and economics called Cost-Benefit Analysis (CBA), which has a variety of meanings and uses, ranging from being used normatively to provide guidance for the formation of public or private policy, to the more narrow use of the Kaldor-Hicks concept of efficiency to evaluate government projects. The Kaldor-Hicks criterion is in essence a CBA; if the benefits of a change are larger than the costs, then the criterion is met.

CBA may be put to use when comparing negative and positive impacts when performing an Impact Assessment, or Impact Analysis, (IA). Methods for IA are provided both by the European Commission and the Organization for Economic Co-operation and Development (OECD). The European Commission has produced Impact Assessment Guidelines and the OECD has developed the Regulatory Impact Analysis (RIA). RIA is implemented by many OECD members, as well as non-member countries. It is a systematic policy tool used to examine and measure the likely benefits, costs and effects of new or existing regulation. The procedure of (R)IA ensures that various options are weighed against one another to provide a clear picture of the effects that options might have in different areas. In what follows, the main characteristics of IA are outlined for the purpose of providing a basis for the method employed in this thesis.

Briefly, the process of an IA contains of the following three steps:

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31 Dahlman, Glader and Reidhav (n 22) 56.


33 In Sweden, the impact assessment that RIA involves is found in förordning (2007:1244) om konsekvensutredning vid regelgivning (Eng ordinance on Impact Analysis of Regulation).

1. definition,
2. identification, and
3. assessment.

Step one includes a description of the problem and the desired results pursued which create the context for regulation. The second step involves identifying different options for achieving the objective(s) and likely impacts. The third includes an assessment of the costs and benefits of each option. It involves information about the financial and other impacts of any regulations and a comparison with the impacts of alternative regulations considered.\(^3\)\(^5\) In large part, an IA requires consideration of the following:

- What, in general terms, is the problem to be addressed?
- What is the specific policy objective to be achieved? and
- What are the different ways of achieving it?\(^3\)\(^6\)

Answering those questions provides an identification of as many different options of achieving the objective as possible, which, according to the OECD Handbook on RIA, is necessary in order to identify the best option. Once the possible options are identified, the impact analysis requires them to be compared in terms of costs and benefits. As the effects of different approaches are identified, each option is analyzed to provide information on which is likely to be most effective and efficient – in other words, which one best fulfils the pursued objective(s).\(^3\)\(^7\) As an aid to decision-making the IA includes an evaluation of all possible alternative regulatory and non-regulatory approaches with the overall aim of ensuring that the final selected option provides the greatest benefit.\(^3\)\(^8\)

Two aspects must be considered. First, because this is a thesis basing its analysis on the law, non-regulatory options are not included in the analysis. Second, including all possible options is not feasible. However, the analysis is based on both the findings in the country comparison and certain legislative solutions retrieved from other jurisdictions. The selection is therefore considered to be sufficiently comprehensive to meet adequately.


\(^3\)\(^6\) OECD and FIAS/World Bank Group (n 32) 4.

\(^3\)\(^7\) Ibid.

the requirement of identifying options. Furthermore, since the purpose of this thesis is to examine costs and benefits of different levels of tax confidentiality it should suffice to identify not all possible options (that is, covering every possible level of confidentiality), but to identify rules/options that help point to consequences in both directions, that is, costs and benefits with regard to both a high level of tax confidentiality and a high level of tax transparency.

To achieve the best possible result from an IA it is held to be necessary to consider all of the impacts of the options. The IA as used in this work contains one important feature that deviates from this recommendation. The evaluation of the rules is limited to the three fields of interests (the benchmarks). This means that the interests embraced by such benchmarks are the only fields of impacts that are assessed. In this context the following caveat is required, concerning law and economics in large part, and this requirement in particular: As an economic analysis of law brings with it a set of values or interests which guide the analysis of the law, so does this thesis in that the values/interests are bound by the benchmarks. Depending on the economic theory applied, the set of values may differ. This is important, not only in considering economic theory but particularly for this thesis. This is because the results following on from such an analysis are not necessarily ‘truths’ about the strengths or deficiencies of the law studied. They are only truths insofar as the law is viewed from the perspectives of the underlying values/interests. Narrowing the range of impacts dealt with in this research to three areas has been done based on the assumption that those three areas represent major interests, valid over time, and that a more in-depth analysis that such a delimitation affords, provides a well-founded basis to propose a preferred option.

With regard to the evaluation of the different options set forth, it is based on the criteria of effectiveness, defined in the European Commission Impact Assessment Guidelines as “the extent to which options achieve the objectives of the proposals”. This activity focuses on the performance of

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39 See, for instance, OECD and FIAS/World Bank Group (n 32) 4.

40 Vladimir Bastidas Venegas, Promoting Innovation? A Legal and Economic Analysis of the Application of Article 101 RFEU to Patent Technology Transfer Pricing Agreements (Department of Law, Stockholm University 2011) 29.

41 Although identification of all costs and benefits are encouraged in RIA, making a partial analysis may still be very useful as it narrows the range of issues that must be dealt with, see OECD and FIAS/World Bank Group (n 32) 10.

the options, or in other words, transferred to this thesis, the extent to which the options achieve the interests set forth in the benchmarks.

Furthermore, the use of the terms *costs* and *benefits* and the reference made to law and economics requires further explanation, so that the methodology (and aim) is as clear as possible. A key feature of law and economics is its consideration of the potential economic effects of legal rules. The economic analysis of law is chiefly a model used to measure the economic efficiency of legal rules, thus rendering the terms *costs* and *benefits* monetary terms. However, as already stated, law and economics does not limit itself to a consideration simply of monetary maximization as the only or the most important goals, but non-pecuniary ones may also be included in the weighting of costs and benefits. As already indicated (and further elaborated on in Chapter 2), the benchmarks against which the rules are measured in this thesis embrace not only monetary interests but involve “soft values” to a greater extent than an ordinary economics analysis of the law may provide. However, since this study does not claim to engage in hard-core law and economics, but rather takes its methodological starting point in the theories and methodologies provided by law and economics in which to find an appropriate methodology, this does not become problematic. The involvement of non-monetary features in the evaluation means that costs and benefits not only refer to monetary but to non-monetary costs and benefits. These terms, despite their economic connotation, are employed throughout this work in addressing both monetary and non-monetary impacts.

While there is no imminent problem of involving non-monetary features in the evaluation, there is another aspect that might perhaps raise objection – namely, the quantification of costs. The value of quantification of costs and benefits for the credibility of the results is emphasized in the recommendations for applying an IA, holding that the more quantification provided, the more convincing the analysis. Though preferably required when performing an IA, no quantification of costs and benefits are provided in this thesis. This is mainly because that such quantification is more suitable for economists than legal researchers.

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43 Ibid 32.
A thorough analysis of the fields of potential impacts (that is, the analysis provided in setting the benchmarks) is considered sufficient to facilitate transparent balancing considerations to provide a sound basis for the analysis, resulting in a choice of a preferred legislative option.

Since no quantification is made in this thesis, objections might be made on whether or not there is actual application of a CBA. The European Commission Impact Assessment Guidelines, for instance, holds that a disadvantage of a CBA is that it cannot include impacts for which there exist no quantitative or monetary data. The evaluation model in this research might, owing to lack of quantification, more resemble a multi-criteria analysis, which is another method to apply when evaluating and comparing possible options in an IA. A multi-criteria analysis applies cost benefit thinking to cases where it is necessary to present impacts that are a mixture of qualitative, quantitative and monetary data, and where there are varying degrees of certainty – that is, it allows different types of data to be compared and analyzed within the same framework. Nonetheless, the fact that this work does not contain any quantification of costs and benefits does not mean that quantifications are not possible. The benchmark concerning administrative costs for a tax administration may to a greater extent appear to require quantification of costs than the other benchmarks because it concerns monetary costs. The lack of quantified and monetized costs and benefits may therefore be questioned. But, as previously held, quantification is more suitable for economists than legal researchers. Concerning the benchmark on administrative costs, the intention is to point to where potential monetary costs may arise. Any in-depth quantification is left to the respective jurisdiction. In my view, how to label the activity (CBA or multi-criteria analysis, or none) is of minor importance as long as what is actually done is clear and transparent.

1.3.4 Comparative Study

As previously stated this thesis involves a comparative study. Comparative law, according to Esin Örücü, is a subject full of puzzles that “start with the name of the subject, continue with its definition, aims, objectives, methodology and its use in practice, and culminate in its value and significance for legal science”. There is no intention in this work of solving all of these puzzles. This subsection aims at providing certain features of comparative law that form the basis for the method used in this thesis. It is

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45 European Commission, Impact Assessment Guidelines (n 32) 45–47.
mainly concerned with matters related to what comparative law is, the subject of the comparison, and its contribution to law and legal studies.

Comparative law can be simply described as the comparison of different legal systems of the world. However, this brief description might be misleading because it could imply that comparative law consists of a mere descriptive comparison between different legal systems, while comparative law can afford far more than that. Apart from comparing legal systems on a larger scale (macro-comparison) – for instance by comparing the spirit and style of different legal systems – comparison can also be made on a smaller scale (micro-comparison). It may then be more appropriate to say that comparative law is about comparing legal phenomena (in different legal systems). Such legal phenomena to be compared are for instance certain specific rules and principles, the function of rules/principles, the common goal that the rules/principles are set out to achieve, or a specific problem. Comparative law involves comparing legal systems to ascertain and process the similarities and differences. This processing might involve an explanation of their origin and emergence, a comparative evaluation of the different legal systems’ solutions, the grouping of legal systems into legal families or searching for the common core of legal systems.

On the issue of the subject of comparison, the requirement of tertium comparationis is often addressed. This asserts that the two legal comparanda (that is, the elements to be compared) must share common characteristics to be comparable. Legal comparatists often emphasize that it is the function of a rule that should be compared. Functionality is held to be the basic methodological principle of all comparative law. In law the only things that are comparable are those that fulfil the same function – in other words, rules governing the same type of situation, or problem.

An additional issue in terms of the subject of the comparison is the common element of comparative law of grouping legal systems into legal families. The most well-known classification of legal families is proposed by René David, who suggests four different legal families: 1) common law,

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48 Ibid 4–5.
50 Örücü (n 46) 16–17 and 21.
52 See, for instance, Örücü (n 46) 21; Bogdan (n 51) 57; Michael Bogdan, Concise *Introduction to Comparative Law* (Europa Law Publishing 2013) 46–50.
53 Zweigert and Kötz (n 47) 34; Bogdan (n 51) 57–59.
2) civil law, 3) socialist law, and 4) other conceptions of law. The knowledge on the relationships between legal systems makes it easier to study foreign law and is as such a pedagogical tool for conducting a comparative study.

The contribution of comparative law to law and legal science is manifold. It is acknowledged that its prime function is to “provide access to legal knowledge […] to further the universal knowledge and understanding of the phenomenon of law”. However, it makes more specific contributions. First, comparative law deepens the understanding of one’s native legal system because it enables one to view it from other perspectives and at a certain distance – to see it with new eyes. This makes comparative law a help in the drafting of national legislation. Second, comparative law plays an important part in international harmonization and unification of law. Third, it is of importance in legal education, since it can broaden and deepen one’s view and knowledge of law. This is invaluable both theoretically and in practice, for example in the interpretation of treaties.

With regard to the comparative elements of this research, the comparative study in this thesis has two different functions. It consists of the country comparison first, and second, the option comparison. In other words, the comparative elements of this work are of two different types: a comparison with regard to the rules in co-operation on the one hand and on the other, a comparison of rules extracted from their context.

As previously indicated, the country comparison consists of a comparison between the tax confidentiality legislation in Sweden and the United States. This comparison provides examples on the combination and interaction of different rules – different systems holding different results on a balance of interests.

In the option comparison on the other hand, individual rules are studied in and of themselves and their consequences for the benchmarks. That is to say, it does not consider other rules that might compensate different consequences of the particular rule studied, or considerations that are included in the country comparison when the interaction of rules is taken into account. In the option comparison the options are grouped into different categories, such as those governing the scope of accessible information and those determining the scope of accessibility. Within these categories the

55 Bogdan (n 51) 76–79.
56 Örücü (n 46) 12.
57 Zweigert and Kötz (n 42) ch 2. 

34 | ANNA-MARIA HAMBRE Tax Confidentiality
rules are divided into subcategories under different headings depending on the issue that they have been identified to govern. The category of rules on the scope of accessible information consists, for example, of rules on confidentiality of tax returns, the public nature of decisions, advance rulings and agreements between a taxpayer and the tax administration. The category on the scope of accessibility consists, for example, of rules providing different ways as to how public information may be obtained. Subsequently, the option comparison comprises a comparison of different legislative solutions extracted from their contexts and legal systems. The comparison then results in a recommendation for legislation.

The common basis of the two comparisons is the identification phase. A comparative study in law of necessity involves identification of the law as it stands. The rules that are to be compared need to be presented in a comparative study. Thus identification and description of the law that is to be compared is an integral part of the comparative study. On the country comparison, the identification phase involves studying tax confidentiality legislation in Sweden and the United States. The identification phase concerning the option comparison builds on the country study, but supplements it by options found in other jurisdictions illuminating other aspects not covered by those found in the country study, or merely to give further examples of possible variations of options, in order to arrive at a preferred option. The identification phase is therefore a means of exploring the range of different solutions – that is, to inventory existing legislative solutions.58 This is useful not only for realizing the aim of this thesis, but in perhaps assisting actors in national jurisdictions by providing a spectrum of different legislative solutions.59

This is illustrated in the following figure.

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59 Filippo Valguarnera, ‘Den komparativa metoden’ in Frederic Korling and Mauro Zamboni (eds), *Juridikens metodlära* (Studentlitteratur AB 2013) 143.
The choice of Sweden and the United States in the country comparison is based on what general approach the particular country has on transparency and how this is reflected in tax confidentiality legislation, to what extent the benchmarks and their costs and benefits are shown, and interesting legislative solutions to trade-offs. So though the two chosen jurisdictions belong to different legal families, the choice does not rest on the classification of legal families.

From a purely national perspective, studying the Swedish tax confidentiality legislation is stimulated by the fact that the rules created in the late 1970s have remained mostly the same since the creation of the Secrecy Act of 1980\(^{60}\) through to the new Public Access to Information and Secrecy Act of 2009\(^{61}\) (PAISA). The development in different areas of society motivates a critical analysis of these dated rules. There might be other factors to consider when deciding on the level of tax confidentiality than those considered at that time, leading perhaps to a different result in trade-offs.

On the choice of including Sweden in a comparative study (thus turning away from the purely national perspective) consideration was given to the

\(^{60}\) Sekretesslag (1980:100)

fact that 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 to 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, has shaped a deeply grounded culture of openness that to this day remains a *differentia specifica* of Sweden.  

During the course of the work I have observed that the Swedish tax secrecy is perceived as very different and startling outside of Sweden. Because of this, I believe there is good reason to include Sweden in the comparative study.

Returning to the figure depicting the tax confidentiality scale, Sweden could be said to be placed close to the transparency end of the scale.

![Diagram](image)

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.  

![Diagram](image)

It could be held that a comparison including Sweden, which is noted in international transparency discussions due to its two hundred-year tradition of transparent government, would be of greater interest if it involved a country placed more at the opposite end of the confidentiality scale than the United States. Countries that afford a typically high level of tax confidentiality, and could therefore be placed further to the total confidentiality

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64 The scale here presented is only illustrative and does not claim to show any exact placing on the scale.
end of the scale are, for instance, Lichtenstein and Switzerland. In Lichtenstein, tax confidentiality provisions deny third party access to information including all documents, tax returns, tax assessments and the whole correspondence between the taxpayer with the tax authority. As for court decisions, those of the first and second instances in tax court are not made public and only some decisions of the third instance (administrative court) are made public and in such cases they are made public in anonymized form.\textsuperscript{65} In Switzerland the proceedings and decisions of the tax administration are not publicly accessible. Court decisions may be published for reasons of transparency, but in anonymized form.\textsuperscript{66}

Nevertheless, tax confidentiality legislation in the United States provides solutions, justifications, and considerations that enrich the discussion and thus make a comparison between these two jurisdictions interesting and contributory. For example, in the United States the level of tax confidentiality has fluctuated widely over the years, compared with the somewhat static level of tax confidentiality in Sweden since its first appearance.

Given this, both jurisdictions offer themselves as interesting regimes to examine and use in a comparative study. They illuminate different views on the costs and benefits embraced by the benchmarks and what impacts legislative solutions may lead to. Together they contribute to this thesis in constituting excellent examples of the results of different trade-offs made.

In the United States taxes are collected at federal, state and municipal level. Each state has its own separate tax system. State autonomy provides that rules may vary, not only on taxes, but also with regard to rules on tax confidentiality. While it may be interesting to study tax confidentiality at state level, since this can afford solutions other than at federal level, the decision has been made to focus on federal rules. This is because the rules at federal level correspond to the “level” of Swedish rules to a greater extent than those at state level.

As to the selection of legislative options to include in the option comparison the evaluation of options, as implied, is not narrowed down to merely the rules found in the country study. Since the recommendation when applying IA is to identify as many possible options as possible, the methodology makes room for other options as well. Though Swedish and US tax confidentiality rules constitute the larger amount of rules forming the basis


for the evaluation in Chapter 6, since to a great extent they illuminate the issues addressed in the different subsections in that chapter, rules from other jurisdictions are also provided.

Regarding the selection of these other legislative solutions, a conference was held in the summer 2012 in Rust, Austria, within the framework of the tax secrecy research project in co-operation between Örebro University and the Institute for Austrian and International Tax Law at WU Wien. Approximately 80 people, representing some 40 countries, attended. The conference, apart from nurturing interesting discussions, resulted in the production of an anthology containing national reports from the represented countries.67 This and the fact that all reports were written in English, made it possible to survey the tax confidentiality legislation of many countries in order to make the selection of solutions to include in the option comparison. The reports were written by national experts, discussed during the conference, and reviewed by international experts prior to publication. The content of the reports are thus considered to be of high quality.

The choice of the jurisdictions from which additional rules were taken has no other basis than that of an illuminating provision. The selection of jurisdictions to include is thus not intended to provide an exhaustive list of options on the topic at hand or to show best practices. The national reports from the conference in Rust have served as a means of surveying legislative solutions to enable a thorough analysis of the costs and benefits of tax confidentiality within the framework of the chosen benchmarks. However, during the course of writing this thesis certain exemplifying rules were also found in country jurisdictions not represented in the anthology.

Apart from rules of Sweden and the United States those of Norway, Finland and Hungary will also be found in Chapter 6. Norway, not included in the anthology, shows another example of rules providing a high level of transparency, though slightly different from those of Sweden in that the Norwegian rules afford a narrower scope of accessible information yet a wider scope of accessibility. The Finnish and Hungarian rules are merely clear examples illuminating the different topics in those subsections where these rules are cited.

Extracting a rule from its context may deprive the rule of some of its content. For example, parts of a provision may refer to other provisions that may neither be provided in Chapter 6, nor necessary for the issue at hand. Furthermore, not every detail in a provision is needed in order to

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illuminate a particular matter. In some cases, too many details might get in the way. I have therefore taken the liberty of adjusting some of the rules (for example, in deleting certain fragments) for the sake of clarity.

One must proceed with caution in drawing conclusions from analyzing rules separately. This is because one rule, extracted from its context, might be offensive from, for instance, a privacy perspective, but in aggregation with other rules would provide a satisfactory regime. A tax confidentiality regime, for example, might have one rule stating disclosure of tax returns, which may raise certain privacy considerations. But another rule might provide explicit or implicit exceptions from this rule, limiting the privacy concerns raised by the first rule. This thesis may in that regard function as a smorgasbord of rules, of which different constellations are possible to satisfy the aims of a particular jurisdiction. (Examples and evaluation of provisions in co-operation are provided by the country study in Chapters 3-5.)

As far as possible the reports have been cross-checked with primary sources and other sources referred to, in order to verify what is stated in the reports. In this context, though, the following needs to be noted. The fulfillment of the aim of this thesis (to study the impacts of tax confidentiality legislation) is not dependent on providing rules cited by their exact wording. Using only a hypothetical list of legislative solutions could very well have accomplished the aim (though applied solutions entail a sort of “reality check” that the rules work in practice). Subsequently, the cross-checking of the sources has had a limited effect on the objective of this work. This has the advantage of not limiting the selection of solutions presented and analyzed owing to lack of language skills.

Traditionally, the principal aim of comparative studies in law as a theoretical-descriptive discipline is to identify differences and similarities between certain legal systems and the reasons behind them. As an applied discipline, comparative law suggests how a specific problem can most appropriately be solved under given social and economic circumstances. A study consisting merely of reports on different jurisdictions’ solutions to the problem in question does not constitute a real comparison. Such a study could at most be called descriptive comparative law. The author of a comparative study, according to Zweigert & Kötz, should first lay out the essentials of the relevant foreign law, country by country, and then use this material as the foundation for a critical comparison, ending with conclusions on the proper policy for the law to adopt. The methodology in this

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68 Zweigert and Kötz (n 47) 11.

69 Ibid 6.
thesis is a mixture of both the theoretical-descriptive and the applied comparative disciplines and is applied to identify similarities and differences between the jurisdictions chosen so that the findings form the basis for a critical comparison, which together with the option comparison ends in a preferred option.

As held above, functionality is considered to be the basic methodological principle of all comparative law. In the subsection on law and economics, the issue of functionality as representing one of the core elements of an economic approach to the law is touched upon in the sense in that the law is not autonomous but interacts with society – that is, its function within society. In this comparative context, referring to the functionality of rules in different jurisdictions requires the following distinction. Functionality, on the one hand, might refer to the purpose of a particular rule or system. On the other, it could be looked upon as the function of a rule within a certain field, such as economics. With regard to the first aspect of functionality, the rules on tax confidentiality can be said to fulfil the same function in providing a certain level of confidentiality protection. While the function of the rules on tax confidentiality could be said to be the same – to provide confidentiality to some extent – they in fact serve different purposes. For example, one regime with a high level of tax confidentiality could base its confidentiality rules mostly on preventing taxpayers from being exposed to criminal actions, while another might justify its rules based primarily on reasons for higher tax revenue. Nevertheless, the view has been taken that such difference with regard to the purpose of rules does not hinder the performance of a comparative study, since the intention of this thesis is not to study whether or not a specific rule achieves its intended purpose. This research instead centres on the function of the rules within the different fields of interest governed by the benchmarks. For instance, the intention is to consider the function of a rule within a tax compliance context in order to extract the consequences of that rule within the limited spheres of interests.

1.3.5 Summarizing the Method used in this Thesis

The subsections above deal with several different methodological approaches. This subsection boils down the different approaches to a short description of the specific method used to meet the aim of this thesis, namely to identify costs and benefits of tax confidentiality.

The method used in this thesis is that of a comparative study within the framework of an impact analysis. It has three elements: definition, identification, and evaluation. The definition of the policy problem lays down the context underpinning rules on tax confidentiality (Chapter 1). The identifi-
cation element consists of inventorying existing rules on tax confidentiality, extracted by wording or adjusted (Chapters 3, 4 and 6). The evaluation of the rules in the identification phase is conducted on the basis of the theoretical framework set forth in Chapter 2. The evaluation involves examining the degree to which the different rules satisfy the interests embraced by the benchmarks. This evaluation takes two different forms. The first form is that of a country comparison, comparing the Swedish and US tax confidentiality regimes – that is, rules in co-operation – in relation to the benchmarks (Chapters 3-5). The second is the option comparison, whereby different rules extracted out of their legal system is analysed in relation to the benchmarks (Chapter 6).

The identification and evaluation of costs and benefits are used in order to draw conclusions that might help policymakers think about important factors and competing interests when forming tax confidentiality rules. The methodology described here provides a foundation for a preferred option – that is, a recommendation for legislation (Chapter 7) in this particular field of law. If the activity of finding a preferred option is to be named, it could be to refer to it as the Kaldor-Hicks criterion. This is because the Kaldor-Hicks criterion allows both gainers and losers and efficiency is considered to be achieved when gains outweigh losses, and while the preferred option does hold costs its benefits are considered to outweigh costs.

1.4 Material
As earlier stated, the choice of research topic and questions govern the choice of method. Correspondingly, the choice of method governs the material to be considered, or rather, how the material is addressed. This is because despite legal science covering many different perspectives and approaches the common denominator is the sources used in conducting the study. The sources that an analysis in legal science is to be based on are the traditional ones: legislation, case law, legislative history, and legal doctrine. The external perspective on the law taken in this thesis does not alter which legal sources are used, but rather the approach to them. Thus the sources upon which the argumentation in this thesis is based are found among the traditional legal sources. Nonetheless, the characteristics of the different steps in the methodology determine how the sources are used, which means that the weight placed on them differs.

The basis for Chapter 2, where the benchmarks are analyzed and set, is that of secondary rather than primary sources because Chapter 2 rests on the empirical studies of others. No empirical studies have been conducted

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70 See subsection 1.3.1.
within the fields embraced by the benchmarks because this is not the task of a legal researcher. To achieve a high level of credibility in the argumentation and conclusions, a survey of these secondary sources has been conducted in order to compare approaches of different researchers in the specific fields.

On secondary sources, the following should be noted. Standards, principles, guiding information, and so on, set down by the European Commission, the OECD, and the United Nations (UN), are frequently referred to in the process of setting the benchmarks. The reputation and authority of these institutions means that their research and reports in areas covering the interests embraced by the benchmarks can be accepted with confidence and are thus considered to constitute useful sources of information for a thesis such as this. Studying reports from these organizations, together with other comprehensive studies carried out within the fields of the benchmarks, helps determine the major research contributions to be studied in more detail in order to form a sound basis for conclusions.

This thesis involves an assessment of the law as it stands. An analysis evaluating the law demands an operation in which the law as it stands is laid down. A problem encountered in this context, when using a comparative method, is the treatment of the legal sources used in order to lay down the law as it stands. There is a risk of misinterpretation when comparatists address foreign law as if it were their own native law. A comparatist must find the sources of law in the foreign country concerned and treat them in the same way as it is done in that country. A comparatist must in accordance with native lawyers and scholars attend to statutory and customary law, to case law and legal doctrine, to trade usage and custom, and accord those sources the same relative weight and value as they do.71 This is as important a task as it is challenging. The aim is of necessity to treat the law and apply the legal sources of foreign countries included in a comparative study, in this thesis the United States, in the same manner as is required by practitioners and scholars within this country, while being aware of the shortcomings that a foreign scholar (such as myself) possesses in terms of these requirements, thus not claiming any full mastery of every part of the foreign jurisdiction. Bearing in mind the hierarchy of legal sources (see the following paragraphs) in the United States while reading its literature on tax confidentiality has, it is to be hoped, helped me treat these foreign legal sources in an adequate manner.

The rest of this subsection contains a description first on the sources of law in the United States and then the sources of law in Sweden. The pur-

71 Zweigert and Kötz (n 47) 35–36.
pose of this is not to make any comparison between the two, but merely to serve as a presentation to explain the use of the legal sources when presenting the law as it stands (mainly in Chapters 3 and 4, where each country’s tax confidentiality legislation is laid down).

As for the law of the United States, it originally consisted mainly of case law, but statutory law has gained more importance over the years. Sources of law are found both at federal and state level. For instance, constitutional law and statutory law are both found at federal and state level. Article VI(2) of the US Constitution, called the “supremacy clause”, meaning that federal law overrides state law if there is a conflict between the two, reads:

This Constitution, and the laws of the United States which shall be made in pursuance thereof [...] shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The hierarchy of sources of law, in accordance with the supremacy clause, is as follows:

1. The federal Constitution
2. Federal statutes, treaties and court rules
3. Federal administrative agency rules
4. Federal common law
5. State constitutions
6. State statutes and court rules
7. State agency rules
8. State common law
9. Secondary sources

Accordingly, federal law consists of the constitution, federal statutes, federal treaties, and regulations issued by federal administrative agencies. State law consists of the constitution of the particular state, its statutes, and the regulations issued by state administrative agencies.

Federal statutes are found in the United States Code (USC). The USC is divided into 50 titles by subject, such as Title 8 Aliens and Nationality, and Title 22 Foreign and Intercourse. Collections of state statutes are called compiled laws or statutes.

Concerning interpretation of statutes, there is no official approved list of approaches or maxims, but a mixture of the same. First, there is the plain

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meaning rule, according to which a court should construe a statute so as to give its words their ordinary meaning, unless the result would be absurd. Within this approach, there is no resort to legislative history. Second, the plain meaning rule is supplemented with legislative history. Of greatest value when legislative history is used are legislative committee reports, the result of *inter alia* a hearing providing the strengths and weaknesses of a proposal followed by a majority vote to report the bill to the chamber. Another important legislative history source is that of conference committee reports. A conference committee is composed of members of both the House of Representatives and the Senate. A conference report is an agreement on legislation negotiated between the House of Representatives and the Senate, when different versions of bills are passed by the House and Senate.73 Other approaches in statute interpretation are the social purpose rule, the context of statutory language, and presumptions about the use of language.74

Two kinds of case law occupy different places in the hierarchy of sources in the United States. The first is *case law* that interprets enacted law. Case law is at the same level of hierarchy as the enacted law that it interprets. If two sources of law on the same level of the hierarchy are in conflict, then the later in time prevails. This means that case law interpreting the constitution overrides a conflicting statute. The second is *common law*, which is a body of law developed solely through judicial opinions. It is at the lowest level in hierarchy of sources of law, which means that it can be displaced by enactment.75

Secondary sources include treatises, hornbooks, restatements of the law, law reviews, and other legal periodicals, which summarize, restate, review, analyze, and interpret the law.76 These secondary sources are used as an aid by lawyers or judges when seeking citations to primary sources of law. Works by legal scholars in the United States can have an effect on the law because they may influence a court to the extent that it is persuaded by

74 For more on these and additional interpretational approaches, see Burnham (n 72) 58–64.
75 Ibid 40–41.
76 For details on these sources, see ibid 75–77.
their reasoning. Legal scholarship is mostly found in law reviews published at the different law schools and other institutions of scholarship. 77

On sources of law in the United States on tax confidentiality, references are made in this thesis to Income Tax Regulations (Regulations or Reg) and the Internal Revenue Manual (IRM). The Regulations provide the official interpretation of the Internal Revenue Code (IRC), containing provisions on tax confidentiality, by the US Department of the Treasury. The Regulations are issued by the Internal Revenue Service (IRS) and Treasury Department to provide guidance on new legislation or to address issues that arise with respect to existing IRC sections. Regulations interpret and give directions on complying with the law. Generally, regulations are first published in proposed form in a Notice of Proposed Rulemaking. After public input is fully considered through written comments and even a public hearing, a final regulation or a temporary regulation is published as a Treasury Decision in the Federal Register. 78 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. 79

With regard to the study of Swedish tax secrecy legislation, frequent references to preparatory works can be found. This is because the legislative preparatory works enjoy a high degree of authority in the Swedish legal system and thus form important sources of law. In order to explain to those unfamiliar with Swedish sources of law and how they work, a brief presentation will be made of them, especially the preparatory works, since these are of particular importance for the study of Swedish tax secrecy.

The concept of a hierarchy of norms has never been clearly developed in Swedish constitutional law. Such a concept may only indirectly be deduced from the Instrument of Government (IG) Chapter 11 § 14, stating that if a court finds that a provision conflicts with a rule of fundamental law or other superior statute, then such provision shall not be applied. 80

79 IRM Performance Management §1.4.1.7 (01-20-2012).
Nonetheless, the order of precedence according to the Swedish doctrine of the hierarchy of legal sources (Sw. rättskälleläran) is traditionally as follows, though there are differences of opinions on the ranking:81

1. Legislation: the four distinct constitutional acts, parliamentary acts, government regulations (also called ordinances) and agency regulations
2. Legislative preparatory works
3. Case law
4. Legal scholarship

Aleksander Peczenik divides the sources of law into sources that shall be referred to (the laws), sources that should be referred to (precedents and preparatory works), and sources that may be referred to (legal scholarship and agency recommendations).82 Claes Sandgren points out that there is a tendency to talk about legal source material or legal source factors rather than sources of law. He further states that the trend is to emphasize interpretation as a weighing of the relevant material instead of looking at the material as hierarchical sources.83

On legislation, which is the highest ranked legal source, 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.

On 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 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

81 See, for instance, Strömholm (n 18) 32; Nergelius (n 80) 21–3; Aleksander Peczenik, Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation, vol 156 (Norstedts Juridik 1995) 213–218.
82 Peczenik (n 81) 213–216.
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. When the committee has completed its deliberations, it presents a report (Sw. utskottsbetänkande) which is submitted to Parliament for debate and approval. If passed, the bill then becomes law, published in the Swedish Code of Statutes (SFS).\footnote{84 ‘What does the Riksdag do? - Legislation’ (Sveriges Riksdag, 8 May 2013) <http://www.riksdagen.se/en/How-the-Riksdag-works/What-does-the-Riksdag-do/Legislation/> accessed 8 May 2013.}

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.\footnote{85 Strömholm (n 18) 358–374; See also Börje Leidhammar, Bevisprövning i taxeringsmål (Fritze 1995) 33 as an example where preparatory works are given high value as a complement to the legislative text.}

The Swedish PAISA rests on government bill 2008/09:150 and KU\footnote{86 KU is the abbreviation for the Committee on the Constitution (Sw. konstitutionssutskottet).} 2008/09:24. However, with regard to comments on the vast majority of individual provisions the bill refers to the preparatory works preceding the Secrecy Act of 1980. These are mainly in government bill 1979/80:2 or in KU 1979/80:37. Thus, to seek the motives behind Swedish tax secrecy legislation it is these latter sources that are of most importance.

Most of the documents generated in the legislative process have been published and made easily accessible in many public libraries since the mid-1800s. Many of the documents are now freely accessible at the websites of Parliament and Government.\footnote{87 \url{http://riksdagen.se/} and \url{http://regeringen.se/}}

Something needs to be said concerning the use of Swedish case law in this research. Since the primary purpose of this thesis is not to determine the exact content and application of the law as it stands – de lege lata – but pursues the more progressive aim of making an evaluation of the law and making suggestions for the future – de lege ferenda – references to Swedish case law will be found mainly in descriptions of and discussions on the legal concepts embraced by this thesis. Therefore, this thesis does not claim to cover every case related to tax secrecy.

At times the reader will find references to decisions of the JO, the Swedish Parliamentary Ombudsmen (Sw. justitieombudsmannen). JO is there to supervise the application of the laws to ensure that public authorities...
and their staff comply with the laws and other statutes governing their actions. JO can direct criticism against actions taken by a court or other national or local authority. Matters can be brought to its attention by complaints filed by individuals or the ombudsmen themselves can initiate audits of governmental authorities. JO’s decisions are not legally binding, which means that the criticized public authority does not formally have to act on such criticism. Since a JO decision has no precedence, its value as legal source might be questioned. However, as held by Wiweka Warnling-Nerep, even though its decisions cannot enjoy the same legal significance as cases from the Supreme Administrative Court, such decisions in many cases function as primary guidance for public authorities. This, she argues, should not be underestimated. Nor, she continues, should the legal professionalism within JO be ignored. Certain reference to JO decisions may therefore be considered legitimate. No systematic review of JO’s decisions has, however, been made, but the (scarce) references are intended to exemplify the interpretation of the law.

Regarding legal scholarship, as held above, Aleksander Peczenik divides the sources of law into sources that shall be referred to (the laws), sources that should be referred to (precedents and preparatory works), and sources that may be referred to (legal scholarship and agency recommendations). Under this division, agency recommendations such as Tax Agency recommendations thus may be referred to. The Tax Agency has authorization to decide on regulations (Sw. föreskrifter) and recommendations (sw. allmänna råd, previously rekommendationer). Regulations are binding, while recommendations are only of a guiding nature. Thus regulations are a legal source that should be taken into account, while recommendations constitute a legal source that may be taken into account. The Tax Agency

88 For more information on the JO, see their website www.jo.se.
90 Peczenik (n 81) 213–216.
91 Stefan Olsson, Redovisningsrätt: en introduktion (Norstedts juridik 2012) 16.
92 Peczenik (n 81) 215; Robert Pålsson, Riksskatteverkets rekommendationer. Allmänna råd och andra uttalanden på skatteområdet (Iustus 1995) 390.
makes statements in ways other than regulations and recommendations, such as guides (Sw. *handledningar*) and brochures. Through these different measures, the Tax Agency exerts active legal control. These sources represent what Robert Påhlsson calls “administrative practice”. Despite the absence of formal rules of precedent, these sources could be held to be a part of tax law.

### 1.5 Delimitations

Many issues touch the topic of this thesis. For this reason, as with most studies, this requires certain delimitations, which are presented in this subsection.

As held, the aim of this thesis is to examine national legislative rules on tax confidentiality. Tax confidentiality may also be studied within an international context. There are certain matters in such a context that are of great interest in a tax confidentiality setting and therefore, while not included in this study, need to be mentioned. Examples of such issues are provided in the following.

Over the past two decades government transparency has gained increased recognition throughout the world. Transparency in public administration is internationally recognized as the foundation for a properly functioning democracy. The UN and several other international, intergovernmental organizations have acknowledged transparency as an essential part of democracy.

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94 Ibid 175 and 205; See also Påhlsson, *Riksskatteverkets rekommendationer* (n 92).

95 Påhlsson, *Riksskatteverkets rekommendationer* (n 92) 154; Olsson (n 91) 16–17.

96 See subsection 1.2.

97 Mendel and Unesco (n 2) 1.

EU law and politics with declaration No. 17 on the right of access to information (containing a recommendation that the Commission should draft a report on measures designed to improve public access to the information available to the institutions), an attachment to the Treaty of Maastricht of 1992, to Article 11(1) and (2) the Treaty on European Union (TEU) and Article 295 the Treaty on the Functioning of the European Union (TFEU) and the interinstitutional Agreement between the European Parliament and the European Commission on the establishment of a transparency register,99 which forms the basis for the Transparency Register100.

Nevertheless, this thesis neither includes discussions on the importance of transparency for a well-functioning democracy nor the spreading and strengthening of transparency in different areas of the law and of the world. Consequently, the reasons for having a transparent government are not brought under any close analysis and are merely referred to as required. Furthermore, the general “right to know” is not a right analysed in this thesis. It is only used as a descriptive basis for concepts (such as tax transparency) embraced by this work. While not including such topics in this research, it is recognized that the demand for greater transparency in national and international contexts may reflect on matters on limited fields of law, such as tax confidentiality. Overarching transparency trends and its effects on smaller sections of the law may (though this thesis does not deal with these trends and effects per se) defend a closer study of tax confidentiality, in order to set the context of such confidentiality at national, even global, level.

The worldwide recognition of cross-border tax evasion and tax avoidance has raised discussions on how to solve these problems at both national and international level because large amounts of money are kept offshore and cause countries to lose tax revenues. Action to combat tax fraud and tax evasion includes for instance the OECD/G20 project Base Erosion and Profit Shifting (BEPS101). The BEPS Action Plan will allow countries to

101 BEPS primarily relates to instances where the interaction of different tax rules leads to double non-taxation or less than single taxation. It also relates to arrange-
draw up the coordinated, comprehensive, and transparent standards that will ensure that multinationals pay their fair share of taxes, for instance, by addressing gaps between different countries’ tax systems (see Action 1) and revise existing rules on tax treaties (see Action 6) and transfer pricing (see Actions 8–10). Improving transparency is considered to be an important step in countering more effectively harmful tax practices (see Action 5).

Co-operation between tax administrations is held by the OECD to be critical in the fight against tax evasion and protecting the integrity of tax systems. The exchange of information is a key aspect of such co-operation.102 Exchange of information can be based on bilateral treaties such as those founded on Article 26 of the OECD and UN Model Tax Convention or on the multilateral Convention on Mutual Administrative Assistance in Tax Matters. The latter provides for all forms of administrative co-operation and permits the automatic exchange of information.103 Such automatic exchange is considered a measure that effectively tackles tax evasion. The OECD and G20 have developed a single global standard for financial account information, the Standard for Automatic Exchange of Financial Account Information in Tax Matters (AEOI). The full version of the standard was released by the OECD on 21 July 2014 and approved by the OECD Council on 15 July 2014. The Standard calls on governments to obtain detailed account information from their financial institutions and exchange such information automatically and annually with other jurisdictions.

The protection of taxpayers’ confidentiality is held to be of fundamental value to the success of exchange of information.104 This is why treaties and

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103 See ibid 13.


<http://www.oecd.org/tax/transparency/global_forum_background%20brief.pdf> accessed 17 November 2014; See also Pasquale Pistone, ‘Exchange of Information and Rubik Agreements: The Perspective of an EU Academic’ (2013) 67 Bulletin for International Taxation 217 and 225, where the author asserts that the protection of taxpayer rights, of which the right to confidentiality in tax matters is essential, is possibly the most important aspect of global tax law and that the issue of global fiscal transparency need to include considerations as to these rights, .

52 I ANNA-MARIA HAMBRE Tax Confidentiality
exchange of information instruments contain strict rules on confidentiality and proper use of information.\textsuperscript{105} The OECD has released a Guide on Confidentiality, \textit{Keeping it Safe},\textsuperscript{106} which sets out best practices related to confidentiality and provides practical guidance on how to ensure an adequate level of protection while recognizing that different tax administrations might have different approaches for ensuring that in practice they achieve the level required for the effective protection of confidentiality.\textsuperscript{107}

Large scale cross-border tax avoidance has been revealed, for instance, through the so-called Lux leaks scandal, the leakage of documents (mainly Advance Tax Agreements) reviewed by the International Consortium of Investigative Journalists, showing that more than 340 companies from around the world have avoided tax with complicated deals negotiated through the Luxembourg tax administration.\textsuperscript{108} This revelation, besides stressing the urgent issue of how to combat cross-border tax evasion and tax avoidance, raises questions of taxpayer privacy protection and the taxpayer’s claims on illegal information leakage.

Another issue at an international level concerns the resolution of international tax treaty disputes. A classic means of resolving disputes on the application of double taxation treaties is the so-called mutual agreement procedure (MAP). This allows designated representatives from the governments of contracting states to interact with the intention of resolving international tax disputes. On occasion competent authorities are unable to agree. A means of resolving unresolved international tax disputes is through arbitration. Arbitration clauses oblige the tax administrations of the treaty states to enter into an arbitration procedure if they are unable to reach an agreement by way of the MAP within two years. Arbitration is thus mandatory for the competent authorities and the result would be binding on treaty states.\textsuperscript{109} MAP and arbitration procedures might well be

\begin{flushleft}
\textsuperscript{107} Ibid 5.
\textsuperscript{109} See Article 25 of the OECD Model Tax Convention regarding MAP and arbitration procedures.
\end{flushleft}
the topic of a tax confidentiality discussion. In the commentary on Article 25 of the OECD Model Tax Convention, it is held that “[d]ecisions on individual cases reached under the mutual agreement procedure are generally not made public. In the case of reasoned arbitral decisions, however, publishing the decisions would lend additional transparency to the process. Also, whilst the decision would not be in any sense a formal precedent, having the material in the public domain could influence the course of other cases so as to avoid subsequent disputes and lead to a more uniform approach to the same issue. [...] Also, in order to maintain the confidentiality of information communicated to the competent authorities, publication should be made in a form that would not disclose the names of the parties nor any element that would help to identify them.”110 This opens the way for further discussions on confidentiality.

A means of preventing disputes from arising is in advance rulings (dealt with in subsection 6.4). This enables a taxpayer to obtain some degree of certainty regarding how the tax laws will be applied in given circumstances. A specific kind of advance rulings is Advance Pricing Agreements (APAs), which help companies with subsidiaries and divisions in different countries to voluntarily resolve transfer pricing issues. An APA is an agreement between a taxpayer and one or more tax administrations specifying the pricing method that the taxpayer will apply to transactions between related entities. An APA provides a multinational company with greater certainty on the transfer pricing method adopted, preventing later costly disputes, and reduces the risk of double taxation.111 Confidentiality protection concerning APAs is of importance for such companies, since they might reveal detailed information on business.112 However, in this thesis advance rulings are dealt with more generally and not particularly with APAs in mind.

On the matter of APAs the issue of State Aid could be raised in a study of tax confidentiality legislation (an issue that connects to that of the Lux leaks scandal mentioned above). In June 2014 the European Commission announced in a press release that it was undertaking an investigation on potential breaches of State Aid rules in Article 107(1) of the TFEU, since Ireland, Luxembourg and the Netherlands had entered into APAs with

112 See ibid 177.
companies which favoured the companies unfairly and resulted in less tax being paid than should have been the case. According to Article 107(1) state aid that affects trade between Member States and threatens to distort competition by favouring certain undertakings is in principle incompatible with the EU Single Market. In its opening decision on an investigation on whether the Netherlands’ APA with Starbucks constituted state aid the Commission took the preliminary view that the APA was state aid and may not be compatible with the internal market.

As indicated, numerous issues on tax confidentiality arise in an international context. This is particularly so on exchange of information for tackling cross-border tax evasion and avoidance, privacy protection in terms of illegal information leakage, confidentiality of MAPs and arbitrary tax treaty dispute resolutions, and confidentiality on APAs on a general level but also more specifically, for example, in relation to State Aid. However, tax confidentiality relating to these matters is not further dealt with in this thesis. Though what applies in the domestic context on protecting tax confidentiality equally applies internationally (that is, domestic rules may have impacts on the possibilities of effective and efficient exchange of information\(^\text{113}\)) this thesis does not deal with exchange of tax information and tax confidentiality related to issues at international level such as those mentioned above, but rather deals with rules at the domestic level.

After the above discussion and delimitation in terms of certain issues at international level, the rest of this subsection deals with delimitations of other topics relating to tax confidentiality.

Confidentiality prohibits disclosure of information. Information might, however, be made known in different ways, for instance by disclosing documents (public or non-public) or by divulging information orally. Confidentiality rules might therefore explicitly prohibit disclosure of documents while other rules might contain professional secrecy (Sw. *tystnadsplikt*). A rule may furthermore govern both at the same time, that is to say, a rule may govern confidentiality of documents as well as professional secrecy. In this study, no further discussion specifically related to issues on oral disclosure, such as freedom of expression and the right to communicate and publish information (Sw. *meddelarfrihet*), and restrictions thereof (for example professional secrecy mentioned above) is provided.

Tax confidentiality rules apply at different levels in tax administration. This research deals with confidentiality rules regarding tax information leaving the tax administration. It does not deal with confidentiality rules.

\(^{113}\) Information exchange partners may suspend the exchange of information if appropriate safeguards are not in place, OECD, *Keeping It Safe* (n 106) 7.
on information coming to the tax administration. Thus confidentiality rules that apply to the collection of tax information are excluded from this work.

A tax confidentiality regime may provide a high level of confidentiality protection with regard to information held by the tax administration, but at the same time provide a weaker protection in court proceedings. For instance, when deciding on the level of tax confidentiality the Swedish preparatory works often defend the high level of confidentiality by arguing that there is more transparency in subsequent proceedings in courts (than at the level of actual tax administration) and that consequently the transparency interest is satisfactorily met. Tax confidentiality in court, based on the principle of the open public hearing, is not an issue considered for any deep analysis in this thesis and is only referred to when necessary. Nonetheless, it is interesting to study this connection – the occurrence and consequences of tax confidentiality at the tax administration level in relation to that of tax confidentiality in court. Consequently, the delimitation in the foregoing paragraph, stating that this thesis deals only with tax information leaving the tax administration, regards the verb leaving and is not first and foremost an absolute delimitation regarding the disclosing authority. That is, this research considers tax confidentiality not only at the tax administration but also in the courts.

One issue relating to disclosure of tax information regards the keeping of information by the tax administration. One of the biggest obstacles on access to information faced by many countries is the poor state of record keeping. Sometimes officials do not know what information is kept by their respective authorities or cannot locate it when requested. A properly functioning management of official documents is crucial for the effective implementation of the right to information. How a tax administration stores its information and the policies and rules governing the record keeping and the handling of such information are closely linked to the topic of this thesis. Nevertheless, this issue does not fit within the scope of this study.

Countries have differing views on what constitutes taxable events. One event can be taxed in one country but not in another. This raises additional issues. Some tax regimes might, for instance, be based more on income tax, while others might collect more on VAT or similar consumption taxes.

114 Proposition 1979/80:2 med förslag till sekretesslag mm Del A 256–257; See also Konstitutionsutskottet betänkande 1979/80:37 med anledning av propositionen 1979/80:2 med förslag till sekretesslag mm jämte motioner 34.
115 Mendel and Unesco (n 2) 34.
This could, of course, matter in the consideration of the level of tax confidentiality. This thesis does not take this into account, but rather presumes that most countries tax both private individuals and companies and would thus take into consideration the types of questions discussed. More detailed differences in taxable events, such as whether or not capital gains are taxed, are thus excluded. The latter type of differences is considered to be of minor importance for the aim of this work.

Furthermore, when addressing some of the issues dealt with in this thesis, complexities in tax systems are often highlighted. For example, complexity in the tax system is said to be an important factor influencing levels of tax compliance. Complex tax rules can cause a failure in taxpayers to comply with the rules, either knowingly or otherwise. As this thesis deals with tax confidentiality rules rather than tax rules, any discussions on the impact of having a complex tax system are delineated. On the basis that this study deals with tax confidentiality rules and not tax rules, any other discussion relating to the tax system is also delineated.

To delineate the topic further, it must be made clear that in writing about access to tax information, I refer to tax information actually held by tax administrations. This connects with the issue of different countries taxing different events and why it is hard to make any detailed recommendations as to what precise information should be publicly available or kept confidential.

Other than when presenting the Swedish rules on tax confidentiality, there are no further discussions on the definition of which documents are to be regarded as official. The research work does not include a close study of the circumstances under which information can be disclosed in general, but solely presents different possibilities open to the disclosure of tax information.

Information held by tax administrations is not always accurate. An administration might also introduce errors when processing information – for example, when transcribing tax information from paper returns. Issues concerning what effects this might have and how heavy such effects should weigh in finding an adequate level of tax confidentiality are also excluded from this work.

With regard to trust, which is embraced by the benchmark on tax compliance, this thesis does not contain discussions on what creates it. The

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116 For those interested in this topic, the following could be of interest (especially Chapter 5 on how social capital is produced): Bo Rothstein, *Social Traps and the Problem of Trust* (Cambridge University Press 2005).
focus is rather on how the quality trust affects actions – more particularly, how trust affects tax compliance.

1.6 Basic Concepts

1.6.1 Introduction

This section aims at presenting the basic concepts of tax transparency and tax confidentiality as embraced by this thesis. It serves as a means of bringing the reader a step closer to the essence of this work.

1.6.2 Tax Transparency and Disclosure

The broad definition of transparency holds that transparency is about visibility, or openness, of government activities. In a narrower sense, transparency assumes the right of access to information held by public administration. A government is held to be transparent when information it holds is accessible. Correspondingly, when information is confidential there is less transparency. In that sense, transparency is essentially about availability and accessibility.

To start by defining the concept of transparency for the topic of this thesis, a key underlying principle governing the right to information is the principle of maximum disclosure. This principle establishes a presumption that all information held by public bodies should be subject to disclosure. Such presumption may be overcome only where there is an overriding risk of harm to a legitimate public or private interest.117

Most right to information laws place an obligation on public bodies to publish information on a proactive or routine basis. The scope usually extends to key information on how they operate, their policies, opportunities for public participation in their work and how to make a request for information.118 While not diminishing the importance of the public knowing how the authorities operate or what rules are applicable in the tax administration, etc., there is another dimension of transparency. This is where transparency is not viewed merely as means of gaining insight into public administration activities through such information. Tax administrations normally hold a great deal more information that could benefit the public by disclosure. This involves information concerning the tax administration and its relationship with the public rather than such things as how

118 Mendel and Unesco (n 2) 5.
the tax administration operates. This information contains information about someone else, namely taxpayers’ personal tax information received by the tax administration through, for instance, tax returns. In this thesis the concept of transparency regards disclosure of this latter kind of information. Thus the terms “transparency” and “disclosure” both refer to tax information concerning individuals being revealed to third parties.

Transparency in some cases is primarily referred to as publicizing tax information, being the information publicized by the tax administration itself or through the media.\(^{119}\) This work contends that there is another perspective to this discussion – that of availability, or accessibility. Transparency does not of necessity have to indicate the publicizing of information, but also its availability. In other words, transparency can be about accessibility, as in making information available upon request. Hence, a distinction is to be noted between transparency in its implying publicity on the one hand and availability on the other.

### 1.6.3 Tax Confidentiality and Tax Secrecy

In this thesis, both the terms (tax) confidentiality and (tax) secrecy will be found. Different interpretations of these terms have been made. For instance, tax secrecy has been defined as concerning the limits to the gathering of tax information, while tax confidentiality relates to restricting access to such information.\(^{120}\) The OECD Glossary defines tax secrecy as an “[o]bligation usually imposed on tax officials not to reveal particulars about the identity and personal circumstances of taxpayers, or about any of the various aspects governing their tax liability, except in certain strictly limited circumstances”.\(^{121}\)

In this thesis the terms secrecy and confidentiality are used synonymously, both referring to the concept of tax administrations not revealing individual tax information to the public. They are the opposite of the term (tax) transparency as apprehending the foregoing subsection. In other

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words, tax confidentiality represents a certain degree of limitation to the availability or accessibility of information.122

The term tax secrecy is more frequently used than tax confidentiality with reference to Swedish legislation. This is because secrecy is closer to the Swedish sekretess, which is the term used in Swedish legislation. Konfidential on the other hand, the Swedish word that resembles the word confidential, is not used in the Swedish legislation subject for this research.

Furthermore, in the United States, privacy is used as a synonym for confidentiality. This requires a brief clarification, as privacy might be used as implicating the right to privacy (Sw. rätt till skydd för den personliga integriteten), that is, every person’s right to a protected personal sphere, which constitutes a justification for having tax confidentiality.123 The context where the term “privacy” is used often reveals its definition, whether in the meaning of a right to privacy or in the meaning of confidentiality. Nonetheless, in order to avoid misinterpretation, the word privacy is used with reference to the right to privacy.

1.7 Outline
This thesis is made up of four parts. The first part, The Basis for the Study, consists of two chapters. In Chapter 1 the context and frameworks are set out including, inter alia, the topic, aim and methodology. After this introductory chapter, the different benchmarks selected for this study are presented, analyzed and set down in Chapter 2. This is where the theoretical framework for the evaluation is laid down.

The second part, the country comparison,124 includes Chapters 3-5. Chapter 3 consists of a close study of the Swedish tax secrecy legislation, while Chapter 4 contains a study of the US tax confidentiality legislation. The structure of these two chapters is similar, starting with a brief presentation of the tax administration and of the historical development of tax confidentiality. Thereafter a more in-depth description regarding the current rules on tax confidentiality is provided. This begins with the basis for tax confidentiality and continues with the details of the substantive content of the rules governing tax confidentiality, more particularly, the rules governing the public’s access to tax information held by the tax administration. Each country section ends with a concluding part, where the coun-


123 The concept of privacy as in the right to privacy is dealt with in subsection 2.5.

124 The country comparison is described in subsection 1.3.4.
try’s tax confidentiality legislation is put in the light of the benchmarks, thus providing a national analysis in respect of the benchmarks. Since a more in-depth analysis of the individual rules is provided in Chapter 6, the evaluation of each jurisdiction is kept somewhat short and focuses more on the system as a whole and the combination and interaction of rules rather than on each individual rule. Chapters 3 and 4 are then followed by a comparative chapter, Chapter 5, in which an analysis of the similarities and differences between the two jurisdictions’ tax confidentiality legislation is provided. This chapter is divided into seven subsections, in which (apart from the first introductory subsection and the final concluding one) research questions 3-7 are treated in separate subsections.

The third part of the thesis contains the option comparison. This comprises two chapters, Chapters 6-7. Chapter 6 brings together the applied solutions extracted in Chapters 3 and 4 with other legislative solutions retrieved from jurisdictions other than the two included in the country study. It concludes their costs and benefits on the basis of the theoretical framework provided in Chapter 2, thus answering research questions 2(a)-c): How do different rules on tax confidentiality achieve the objective of promoting taxpayer compliance, minimizing administrative costs, and protecting taxpayer privacy? This is where the evaluation based on the criteria of effectiveness takes place – that is to say, where the performance of the different options in achieving the benchmarks is analyzed.

By identification and analysis of the benchmarks (Chapter 2), the evaluation by country (Chapters 3-5), and by legislative solution (Chapter 6), a thorough and comprehensive analysis is provided. This serves as grounds for Chapter 7, which provides a preferred option, or in other words, a recommendation for tax confidentiality legislation. This chapter contains an analysis of the balance of positive and negative impacts (that is, the costs and benefits) associated with the preferred option in order to provide in a transparent manner the basis for the choice of option.

The fourth and last part, containing Chapter 8, forms the conclusion. It connects to the overall research question – What are the costs and what are the benefits of having a high level of tax transparency versus a high level of tax confidentiality? – by answering the research questions set forth in subsection 1.2 and drawing overall conclusions in terms of the findings of this study.

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125 The option comparison is described in subsection 1.3.4.
2 Theoretical Framework

2.1 Introduction

This chapter contains the theoretical framework, entailing the benchmarks tax compliance, administrative costs, and taxpayer privacy, used in order to evaluate rules on tax confidentiality. The evaluation is based on the criteria of effectiveness, defined in the European Commission Impact Assessment Guidelines as “the extent to which options achieve the objectives of the proposals”\textsuperscript{126} \textsuperscript{127} The development of this theoretical framework was done because when speaking of efficiency\textsuperscript{128} in these terms it requires a determination. Things are not efficient in general; they are efficient depending on what they are supposed to achieve. Determining whether or not something is efficient requires an assessment: one must assess what in a given situation is efficient and what is not. In order to conduct such an assessment, one needs certain standards of efficiency.\textsuperscript{129} In this thesis, for this evaluation of effectiveness, the criteria are tax compliance, administrative costs, and taxpayer privacy.

The analysis and setting of the three benchmarks is based on existing research within the different areas they embrace. They provide a foundation for conducting an assessment in order to determine the degree of effectiveness of rules on tax confidentiality – in other words, the determination of the degree to which the different rules fulfil the interests embraced by the benchmarks. This in turn provides a basis for a choice of option/options, since it makes possible the comparison of the costs and benefits of different options to enable a decision to be made on which option(s) is preferable.


\textsuperscript{127} See subsection 1.3.3.

\textsuperscript{128} The terms effectiveness and efficiency are here used as if they are interchangeable. However, if one is to be finical, effectiveness and efficiency have different meanings. In short, effectiveness refers to best outcome and efficiency refers to low costs. Effectiveness measures the outcomes, how the goals have been achieved by the tax administration. Efficiency measures the costs for achieving the outcomes and relates to reducing or minimizing the use of resources in achieving the outcomes. Nonetheless, while noting that there is a difference, the terms are here both used in the meaning of effectiveness.

In the following, first, the procedure of selecting the benchmarks is described (subsection 2.2). Thereafter follows the analysis and the setting of the three selected benchmarks tax compliance (subsection 2.3), administrative costs (subsection 2.4), and taxpayer privacy (subsection 2.5).

### 2.2 Selecting the Benchmarks

When applying an IA in analyzing the law, the recommendation is to consider all of the possible impacts of the different rules. The list of interesting aspects to be considered when studying the impacts of rules on tax confidentiality could be extensive. Such a list might include scrutiny of government activities, compliance, equal treatment of taxpayers, combating corruption, combating tax avoidance and tax evasion, taxpayer trust in the tax administration, risk of being the target of criminal actions, the rapid development of Information Technology, protection of privacy, equal pay for equal work, effects on corporations, tax administration expenses, efficiency, and easily applicable legislation.

On the subject of scrutiny of government activities and corruption, it is widely recognized that the need for access to information held by public bodies is a key tool in combating the very serious and difficult problem of corruption. In 2003, Transparency International’s annual publication, the Global Corruption Report, included a special focus on access to information, highlighting its importance in fighting corruption. In the introduction to the report, it is noted that access to information is “perhaps the most important weapon against corruption”. While being a strong argument for transparency and thus a strong case for tax transparency, the

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130 See subsection 1.3.3.


132 Transparency International is a Berlin-based nongovernmental organization established 1993 to combat corruption around the world.

issue of transparency and corruption is a large issue and has already been well examined.\footnote{134} This is why the contribution to this topic by choosing corruption as a benchmark is somewhat limited. There might be countries with a high level of tax confidentiality yet not recognized as corrupt. It could be interesting to study what measures are taken in such countries to maintain a high level of tax confidentiality, while at the same time ensuring a non-corrupt tax administration.

On Information Technology, this is raised especially in the context of protection of privacy. The rapid development of technology opens up new possibilities for access to information that jeopardizes taxpayers’ right to privacy.

Small details that were once captured in dim memories or fading scraps of paper are now preserved forever in the digital minds of computers, in vast databases with fertile fields of personal data. [...] Digital technology enables the preservation of the minutia of our everyday comings and goings, of our likes and dislikes, of who we are and what we own. It is ever more possible to create an electronic collage that covers much of a person’s life – a life captured in records, a digital person composed in the collective computer networks of the world.\footnote{135}

In this thesis the issue of Information Technology and its rapid development is only touched upon in relation to taxpayer privacy.\footnote{136}

Yet another subject on the list above is that of equal pay for equal work. This matter is often referred to in gender discussions, comparing the pay of men and women in the same occupation or type of job in the same establishment.\footnote{137} Promoting equality between women and men is an important

\footnote{134} See note 96.


objective of the European Union (EU). The principle of equal pay for men and women has been a fundamental principle of law since the Treaty of Rome where it was laid down in Article 119, now Article 157 of the TFEU. It was further specified by secondary legislation in Council Directive 75/117/EEC and is today a key element of Directive 2006/54/EC on the implementation of the principle of equal treatment of men and women in matters of employment and occupation.\(^{138}\)

A question arising in a tax confidentiality context is whether such confidentiality hinders the progress of equal pay for equal work, since the potential possibilities decrease for workers to know what their colleagues earn. This issue has been addressed by the European Commission, concluding that the lack of pay transparency is the key problem driver behind insufficient implementation of the principle of equal pay.\(^{139}\) It is stated that:

The lack of wage transparency explains to a large extent the lack of awareness concerning gender bias and discrimination in pay structures of an undertaking or an industry and it also poses a significant difficulty for victims who want to claim equal pay.\(^{140}\)

This recommendation is based on a detailed IA of measures that have a direct bearing on the transparency of pay. The European Commission has adopted the following recommendation:

Member States should encourage public and private employers and social partners to adopt transparency policies on wage composition and structures. They should put in place specific measures to promote wage transparency.\(^{141}\)

On the issue of combating tax avoidance and evasion, extensive work is being conducted, especially at international level with regard to tax shelters and the exchange of information agreements in tax matters. For instance (as mentioned previously), in recognizing that offshore tax evasion remains a serious problem the OECD, together with G20 countries and in close co-

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\(^{139}\) Ibid 29.

\(^{140}\) Ibid 20.

operation with the EU, has produced a document containing the global standard for automatic exchange of financial account information.\textsuperscript{142}

Another issue on the list above is that of effects on corporations. The Swedish ordinance on Impact Analysis of Regulation\textsuperscript{143} states that a regulation can have important effects for a company, for instance, regarding its working conditions and competitiveness. An impact analysis should therefore, according to § 7, contain a description, \textit{inter alia}, of the number of companies affected by the regulation, the time required for the regulation to be implemented by corporations, how the regulation would affect their administrative and other costs, any changes in their activities they might need to make as a result of the proposed regulation, and the extent to which it could affect competitive conditions and other matters. These questions might be considered from a tax confidentiality perspective. Joshua D Blank has taken on a corporate perspective on tax confidentiality in his article \textit{Reconsidering Corporate Tax Privacy}, in which he concludes that corporate tax confidentiality might, \textit{inter alia}, limit the pressure to engage in more aggressive tax planning.\textsuperscript{144} This conclusion (among others) results in the first of three suggested guiding principles that policymakers should consider when evaluating proposals concerning corporate tax confidentiality: strategic defences of confidentiality.\textsuperscript{145} The other two are exposure of proprietary information of corporate taxpayers and public awareness and debate of corporate tax issues.\textsuperscript{146}

As indicated above, there are several interesting perspectives to take on in a thesis that studies tax confidentiality. After careful consideration what remains of the list of interests mentioned above has been boiled down to the following three, which I consider being the most interesting to explore: \textit{tax compliance}, \textit{administrative costs}, and \textit{taxpayer privacy}. Their detailed content is presented in designated subsections of this chapter but a brief introduction is provided in the following, in way of an introduction as to the reasons why they were chosen. This will show that the benchmark on tax compliance embraces equal treatment of taxpayers and taxpayer trust in the tax administration; that the risk of becoming the target of criminal actions falls under the benchmark on protection of taxpayer privacy; and

\begin{itemize}
  \item \textsuperscript{142} OECD, \textit{Standard for Automatic Exchange of Financial Account Information in Tax Matters} (n 102).
  \item \textsuperscript{143} See subsection 1.3.3.
  \item \textsuperscript{144} Joshua D Blank, ‘\textit{Reconsidering Corporate Tax Privacy}’ (2014) 11 New York University Journal of Law and Economics 120.
  \item \textsuperscript{145} Ibid.
  \item \textsuperscript{146} Ibid.
\end{itemize}
that easily applicable legislation is sorted under administrative costs. Efficiency is connected both to tax compliance and administrative costs.

The selected benchmarks represent continuing issues, that is, the interests embraced by the benchmarks are of interest and importance not only now but in the future. Since it is always of great importance for any tax administration to achieve a high revenue collection, it follows that the promotion of tax compliance will always be of interest. That the activities undertaken by tax administrations are conducted in an efficient and effective manner should also be of continuing concern, both for the tax administration and the individual. This is why it is of particular interest to study the impacts on the costs incurred on a tax administration by rules on tax confidentiality. The issue of the right to privacy has been on the agenda for many years and the end of that discourse does not appear to be imminent.

Five principles of sound tax policy have been identified by the OECD: tax revenue, efficiency, equity, simplicity, and tax compliance. The importance of tax revenue needs no deeper clarification. To finance the economic and social objectives of states, the main point of a tax system is to raise revenue. The core business of tax administrations is thus levying and collecting taxes in accordance with the law. The achievement of this basic obligation is dependent on different factors, such as the four remaining principles, or responsibilities, for sound tax policy – efficiency, equity, simplicity, and tax compliance. An analysis made of the Mission Statements of the tax administrations of 35 countries’ confirms the importance of those responsibilities. The analysis revealed a variety of strategic goals for tax administrations, inter alia, optimizing compliance and revenue yield, warranting confidence of the public in the tax administration’s integrity and honesty, and ensuring fairness, equity and equality in levying and collecting taxes.

The prime responsibility of tax administrations is connected to its core business of collecting the proper amount of tax at the least possible cost to the public. This involves on the one hand an obligation to work as effec-

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149 Alink and van Kommer (n 5) 87.

150 Ibid 110–111.

151 Ibid 90.
tively as possible in collecting taxes (that is, achieving the best results) and on the other, an obligation to work as efficiently as possible in keeping costs down.\textsuperscript{152} To effectiveness and efficiency one could add simplicity, one of the principles for sound tax policy set out by the OECD. Simplicity relates to minimizing the complexity of the tax system. Issues concerning complexity in tax systems are delineated in section 1.4. Nevertheless, as is further developed in this chapter, a need for simplicity in tax confidentiality rules can be identified. Simple tax confidentiality legislation can have a positive effect on a tax administration’s work, aiming at working as effectively and efficiently as possible, since complex rules are more time-consuming and requires more administrative resources. Furthermore, efficiency in a tax confidentiality context relates, \textit{inter alia}, to costs for disclosing documents on request.

A modern tax system must have high levels of voluntary compliance in order to function effectively.\textsuperscript{153} Clearly, such high levels of voluntary tax compliance decreases tax administration costs and where the system suffers from high rates of non-compliance then administrative costs are higher due, for instance, to an increased need of enforcement activities. Promoting voluntary tax compliance is therefore an important task for tax administrations in order to meet their primary responsibilities.

In the collection of taxes it is essential that tax administrations meet the expectations of taxpayers of consistent and fair administration under the laws.\textsuperscript{154} Fair treatment is also important with regard to voluntary tax compliance. Taxpayers are more likely to comply with tax rules if they perceive that the system and its administration are fair and just.\textsuperscript{155} Fairness (or equity) is thus linked to voluntary tax compliance. Equity is not one-dimensional. It requires that taxpayers in similar circumstances pay similar amounts of tax and that the burden is appropriately shared. The two main types of equity to be identified are horizontal and vertical. Horizontal equity suggests equal treatment of similarly situated taxpayers – that is, that taxpayers in equal situations should carry similar tax burdens. Vertical

\textsuperscript{152} As regards efficiency and effectiveness, in short, efficiency refers to costs and effectiveness refers to outcomes.


\textsuperscript{154} Alink and van Kommer (n 5) 90.

\textsuperscript{155} AICPA, \textit{Guiding Principles for Tax Equity and Fairness} (American Institute of Certified Public Accountants, Inc 2010) 9.
equity implies that taxpayers with a greater ability to pay should be taxed more heavily.\textsuperscript{156} As voluntary compliance includes the public’s notion of the tax administration in its treating taxpayers fairly, this thesis focuses on horizontal equity and what effect different levels of tax confidentiality have with regard to this.

Another aspect of tax compliance which also, as will be shown, has important considerations in a tax confidentiality context is the issue of taxpayer trust in the tax administration. People who trust the tax administration are less likely to cheat on their taxes than people who do not.\textsuperscript{157}

Certain aspects already pointed out correlate in some ways. Simply put, significant non-compliance weakens perceptions of equity, increases tax administration costs, and enlarges the tax gap.\textsuperscript{158} The ways in which tax administration interacts with taxpayers and employees impact on the public’s perception of the tax system and the degree of voluntary compliance. Taxpayers who are aware of their rights and expect and receive fair and efficient treatment are more willing to comply.\textsuperscript{159} The quality of relationship between citizen and government thus shapes high tax morale. Trust in government and the perception of justice and fairness in the tax system is therefore required.\textsuperscript{160} As these issues interact it is necessary to include all of them to achieve reliable conclusions. Delineating one or other enhances the risk of rendering the analysis too narrow or one-sided.

Since discussion on voluntary compliance includes considerations as to taxpayer trust in the tax administration and equal treatment of taxpayers, fairness and trust are treated under the same heading, Tax Compliance.

In dealing with tax confidentiality the clash between the interests of gaining access to information and that of protecting taxpayer privacy is, as held, obvious. Confidentiality of taxpayer information and protection of taxpayer privacy has always been a cornerstone of tax systems.\textsuperscript{161}

To summarize, tax compliance, administrative costs on the tax administration, and taxpayer privacy are the benchmarks that create the theoreti-\textsuperscript{156} OECD, \textit{OECD Tax Policy Studies Fundamental Reform of Personal Income Tax} (n 147) 40–41.
\textsuperscript{158} AICPA (n 155) 9.
\textsuperscript{160} Alink and van Kommer (n 5) 164.
\textsuperscript{161} OECD, \textit{Keeping It Safe} (n 106) 5.
cal framework for this study, which is used in order to evaluate legislative solutions on tax confidentiality, so that costs and benefits of different levels of tax confidentiality can be identified.

The subsection on tax compliance is wider in scope than the other two benchmarks, which could be open to question. However, tax compliance is a complex issue involving different factors that in and of themselves are complex. The intention (as with all parts of the thesis) is not to provide excessive information, but at the same time to furnish the reader with a comprehensive understanding of the different aspects of tax compliance and their relationship to tax confidentiality.

In the introduction to this thesis the following quotation appears:

Rather than abstract normative claims and rhetoric, what is needed is some realism about transparency’s costs and benefits for the public, for governance, and for the relationship between the public and government.\(^{162}\)

The benchmarks chosen for this study embrace all these different stakeholders that have an interest in transparency, that is, they take into account both public and government (more particularly, tax administration) interests. Moreover, they consider not only public interests, but also individual (taxpayer) interests, in other words, interests linked not only to the public as a whole, but to those individuals forming part of the public.

It could be held that the benchmark on tax compliance only involve tax administration interests, since it is in the interests of a tax administration to collect the highest possible revenue at the lowest financial cost. A high level of voluntary tax compliance, as will be further elaborated later in this chapter, promotes such an outcome. However, tax compliance also involves public interests, since society benefits from a high level of compliance in that the funding of functions in a society based on taxes might increase when tax revenues increase. This is an example of why it is not possible – or even necessary for the aim of this thesis – to delimit the stakeholders in this quotation in relation to the interests encompassed by the benchmarks. It is sufficient to recognize that there are different stakeholders that have an interest in the balancing of transparency and confidentiality in tax matters and that these are intertwined to a greater or lesser extent.\(^{163}\)

\(^{162}\) Fenster (n 7) 893.

\(^{163}\) See Christina Moëll, Proportionalitetsprincipen i skatterätten (Juristförlaget 2003) 38–42 for a discussion on the definition of ‘public interest’ (which in Swedish renders discussion on the term ‘det allmänna’, which relates to public governance, in relation to that of ‘allmänheten’, which rather refer to the public/society)
As a summary of the above and as a starting point for what follows, the question to be posed, summarizing research question 1a-c, is this: What costs and benefits of tax confidentiality can be identified within the boundaries set by the benchmarks?

2.3 Tax Compliance

2.3.1 Introduction

The aim of this part of the thesis is to set the benchmark on tax compliance against which different rules on tax confidentiality are measured. This is to fulfil the aim of identifying the costs and benefits of tax confidentiality. In particular, this subsection provides answers to the research question 1a) what are the impacts of tax confidentiality in relation to tax compliance?

After a brief introduction, including a definition of tax compliance, the subsection continues with identifying different aspects that have an impact on tax compliance, extracting those factors for which tax confidentiality is of importance. It concludes by drawing conclusions on the costs and benefits of tax confidentiality in terms of tax compliance.

The process of setting this benchmark is based on existing research concerning tax compliance, extracting factors that can be considered important from a tax confidentiality perspective. The study of research on which factors influence compliance in large part in order to identify the dominant view on which subsequent conclusions with regard to tax compliance and tax confidentiality are base, shows that the factors underpinning taxpayer behaviour are diverse and answers to questions on tax compliance are therefore complicated. Differences therefore exist on what factors and to what extent they impact on taxpayer compliance. For instance, there have been objections to the idea that norms should have decisive importance for tax compliance, asserting that social norms do not have such an influence on people to the extent that they can counteract the opportunities and incentives for cheating and where economic self-interest takes over.\(^{164}\) However, as is illustrated in the following subsections there are persuasive arguments in favour of the effects of norms on tax compliance.

Tax compliance is the “degree to which a taxpayer complies (or fails to comply) with the tax rules of his country, for example by declaring income,

and on separating public and individual interestst for the purpose of a balance of interests.

filing a return, and paying the tax due in a timely manner”. A tax system would be placed under a severe compliance strain if most taxpayers did not pay most of their taxes most of the time. Consequently, governments would be unable to finance their economic and social objectives. To further define the concept of tax compliance one could add the notion of willingness to comply, defining it as voluntary tax compliance. This is significant because there is a difference between enforcing compliance and fostering a state of voluntary compliance. As previously stated, one of the modern tax administration’s responsibilities is to promote voluntary tax compliance. Such compliance is the most cost-effective means of collecting taxes. Influencing taxpayer behaviour should therefore be concerned with increasing the willingness to comply and about enforcing the law if necessary.

2.3.2 Factors Behind Tax Compliance

2.3.2.1 Introduction

As indicated earlier, the collection of taxes is clearly vital for any state financed by taxes. Because of this numerous studies exist that are concerned with the analysis of the factors that influence tax compliance behaviour. By studying tax compliance determinants, governments may address different measure to increase levels of compliance.

Factors affecting tax compliance concern, inter alia, attitudes, norms, perceptions of fairness, tax law complexity, audit probabilities, fines, and tax rates. There are different ways to categorise these factors. For instance, the determinants may be categorized into those of an economic nature and those of a non-economic type, the former comprising, inter alia, tax rate, fines, audit probabilities, tax benefits, while the latter consists of attitudes towards taxes, norms, and perceptions of fairness. The determinants

165 ‘Glossary of Tax Terms’ (n 121).
166 OECD, Taxpayers’ Rights and Obligations (n 153) 5.
168 Alink and van Kommer (n 5) 90.
may furthermore be divided into three categories: 1) social psychological determinants comprising attitudes, norms, and fairness perceptions, 2) political determinants such as complexity of the tax law and the tax system, and 3) economic determinants, such as rational decision-making processes, audit effects, fines, and tax rates.\textsuperscript{171}

It has been decided to submit to a classification of determinants resulting in the grouping of the five main categories below\textsuperscript{172} because this best serves the aim of this part of the thesis, which is to set a benchmark on tax compliance against which tax confidentiality rules are evaluated. The five main categories are:

- Deterrence
- Norms
- Opportunity
- Fairness and trust
- Economic factors

The categories that are the subject for analysis in this thesis are deterrence, norms, and trust and fairness. The opportunity and economic categories are not dealt with here, since both relate to the tax system and its design, an issue delineated in section 1.4. Opportunity is about limiting opportunities for evasion and increasing opportunities for compliance.\textsuperscript{173} In large part the opportunity category refers to complexity in tax legislation. Complex tax rules, for instance, inevitably put compliance at risk as some proportion of taxpayers will not fully understand their obligations and make errors while others will simply ignore what is expected of them.\textsuperscript{174} Economic factors mainly regard the amount of taxes to be paid or the tax rate.\textsuperscript{175} Additionally, economic factors include allocation of tax revenue, that is to say, compliance is affected by what taxpayers perceive


\textsuperscript{172} OECD, \textit{Understanding and Influencing Taxpayers’ Compliance Behaviour} (n 169) 12.

\textsuperscript{173} Ibid 26.

\textsuperscript{174} OECD, \textit{Tax Policy Conclusions} (n 147) 6.

\textsuperscript{175} OECD, \textit{Understanding and Influencing Taxpayers’ Compliance Behaviour} (n 169) 32.
they receive directly in return for their tax payments. The remaining categories, deterrence, norms, and trust and fairness, are further analyzed in subsections 2.3.2.2-2.3.2.4 below.

Apart from the different categorizations of tax compliance determinants an additional caveat is needed. While a number of empirical studies exist devoted to the different driving factors behind tax compliance, little is known of tax compliance behaviour in developing countries. Thus there might be other factors impacting tax compliance in developing countries, or the factors may be the same but of varying importance. For instance, a study of tax compliance in local authorities in Tanzania shows that severity of sanctions, which according to standard theory help increase tax compliance actually seem to fuel tax resistance.\footnote{Odd-Helge Fjeldstad and Joseph Semboja, ‘Why people pay taxes: The case of the development levy in Tanzania’ (2001) 29 World Development 2059, 2070; See also Odd-Helge Fjeldstad, Ingrid Hoem SJursen and Merima Ali, ‘Factors affecting tax compliant attitude in Africa: Evidence from Kenya, Tanzania, Uganda and South Africa’ (2013) <http://www.cmi.no/publications/publication/?4727=factors-affecting-tax-compliant-attitude-in-africa> accessed 19 November 2014.}

2.3.2.2 Deterrence

Scientific research on tax compliance and taxpayer behaviour mostly began in the 1970s with simple economic models, which in simplified terms suggest that tax evasion is a product of the risk of detection and punishment if cheating is detected – in other words, deterrence.\footnote{Michael G Allingham and Agnar Sandmo, ‘Income Tax Evasion: A Theoretical Analysis’ [1972] Journal of Public Economics 1 323.} The deterrence model is a rational choice model based on the concept that the risk of detection and punishment will improve compliance behaviour. In its extreme form, this approach regards tax compliance as a purely economic decision founded on an assumption that taxpayers behave in an economically rational way and act to maximize self-interest. It suggests that the behaviour of people with respect to the law is shaped by their calculations of expected gains and losses.\footnote{OECD, \textit{Understanding and Influencing Taxpayers’ Compliance Behaviour} (n 169) 14.} The rational choice model of deterrence advocates that taxpayers carefully assess opportunities and risks and disobey the law when the risk of detection and punishment is small in relation to the profits to be made by not complying.\footnote{Kristina Murphy, ‘Trust Me, I’m the Taxman: The Role of Trust in Nurturing Compliance’ [2002] Centre for Tax System Integrity 3–4} Advocates of this view believe that severe
sanctions and penalties should be applied when dealing with non-compliant taxpayers. Thus in order to increase compliance economic models counsel increasing audit rates or sanctions, or both.\textsuperscript{180}

If people were simply rational actors motivated purely by self-interest, one would expect compliance to be low, since most taxpayers would frequently try to avoid paying their taxes because the probability of detection and punishment is fairly low.\textsuperscript{181} In reality, however, taxpayers cheat much less than these purely economic models on probability of detection and punishment predict.\textsuperscript{182} Research has shown that taxpayers are generally compliant even when the chance of detection and punishment is slim.\textsuperscript{183} Studies have shown that some people never cheat even if the risk of detection is non-existent.\textsuperscript{184} The rational choice model thus does not satisfactorily explain the high level of voluntary compliance.

As indicated, deterrence as a rational choice model refers to detection and punishment based on deterrent activities such as large audit adjustments and monetary penalties. Research suggests there is a connection between risk of detection, formal sanctions and compliance. Nevertheless, it is advocated that deterrence is not the most important factor behind compliance behaviour.\textsuperscript{185} Studies show that deterrence models used to increase tax compliance largely based on detection risk and punishment, are not always effective and only have a modest influence on behaviour.\textsuperscript{186} Thus the direct effect of deterrence should not be overestimated. However, deterrence can also have an indirect effect on tax compliance. It is shown to have a positive effect on tax compliance as it is said to have a norm-
reinforcing function, since deterrence can create or support social norms by signalling which behaviour is disliked or liked.\textsuperscript{187}

For the purpose of this thesis it is important to note the difference between deterrence as a rational choice model and as a norm-reinforcing function. Deterrence seen purely as a rational choice model is based on deterrent activities such as audits and monetary punishment, issues that are not dealt with in this thesis. Rather it is deterrence as a norm-reinforcement function (that is, deterrence linked to social norms) that is of interest here. This is further examined in the following subsection.

Nonetheless, some taxpayers respond with increased compliance to appeals suggesting that tax compliance is the norm. Yet there are some taxpayers for whom even the strongest social norm of compliance has little or no influence. Some taxpayers thus respond more positively to deterrent activities such as high audit rates and severe punishment on detection, than to social norms that counsel tax compliance.\textsuperscript{188} As this thesis centres on situations where tax confidentiality might have an impact on tax compliance and does not aim to discuss matters such as audit frequencies and the formal level of punishment, such issues are not further analyzed but merely noted.

\textbf{2.3.2.3 Norms}

Though deterrence as in detection risk and punishment could have a positive impact on tax compliance, research suggests (as implicated above) that norms have a greater influence on it.\textsuperscript{189} Revenue bodies consider that norms are the most important drivers of compliance.\textsuperscript{190}

They can be divided into social and personal norms. Personal norms are the individual’s own ethical values and moral convictions, while social norms are the values of a certain social group. For social norms to have any effect the individual’s environment must know of the specific act, which provides a rather obvious link to rules on confidentiality. Personal norms have an effect irrespective of whether or not anyone else knows of

\textsuperscript{187} OECD, \textit{Understanding and Influencing Taxpayers’ Compliance Behaviour} (n 169) 15.

\textsuperscript{188} See Stephen Coleman, \textit{The Minnesota Income Tax Compliance Experiment} (Minnesota Department of Revenue 1995).

\textsuperscript{189} Skatteverket, ‘Right from the Start’ (n 157) 36.

\textsuperscript{190} OECD, \textit{Understanding and Influencing Taxpayers’ Compliance Behaviour} (n 169) 5.
the act, since the individual always knows what he or she has done.\textsuperscript{191} Consequently, the focus is on social rather than personal norms.

Social norms are non-legal rules or obligations that certain individuals feel compelled to follow despite any lack of formal legal sanctions.\textsuperscript{192} Such norms are often a result of spontaneous interaction between individuals in small groups that arise through a form of evolution where individuals rationally imitate the behaviour of others.\textsuperscript{193}

People follow norms because they gain from doing so, either through increased inner satisfaction from doing the right thing or through external approval. The individual engages in a cost-benefit analysis. That is to say, a balancing occurs between the benefit of complying with a social norm and the discomfort of deviating from it.\textsuperscript{194}

Several studies show that people are inclined to follow the behaviour of others and tend to behave as others for fear of social exclusion.\textsuperscript{195} In failing to follow the norms the non-compliant would be subject to sanctions from others, typically in the form of disapproval, low esteem, or even ostracism.\textsuperscript{196} Informal sanctions from family, friends and colleagues have a greater preventive effect than formal punishment.\textsuperscript{197} Formal sanctions work better if a social cost is associated with them. For instance, measures that impact on a firm’s profitability and reputation are frequently more effective than punishment.\textsuperscript{198}

In general people behave as others and avoid doing things that can lead to social disapproval. Social norms are thus about reciprocity, which is held to be one of the most basic norms governing human behaviour.\textsuperscript{199} Reciprocity means that people ‘repay’ a certain kind of behaviour, meaning

\textsuperscript{191} Skatteverket, ‘Right from the Start’ (n 157) 16.
\textsuperscript{192} Lederman (n 180) 1459.
\textsuperscript{193} Assar Lindbeck, ‘Hushållen beteende - incitament och sociala normer’ (1997) 25 Ekonomisk Debatt 265, 266.
\textsuperscript{194} Lindbeck (n 193).
\textsuperscript{196} Lederman (n 180) 1459.
\textsuperscript{197} Skatteverket, ‘Right from the Start’ (n 157) 117.
\textsuperscript{198} Ibid 118.
that an individual will choose to cooperate and contribute to the common good if others are seen to be doing so.\textsuperscript{200}

Individuals tend to co-operate with others even under circumstances where self-interest suggests they should not. In other words, people are inclined to contribute to the public good if they perceive that others are doing so, even if they were to benefit personally by not doing so.\textsuperscript{201}

People are more inclined to meet their tax obligations when they trust that others also are paying their fair share.\textsuperscript{202} The Swedish political scientist Bo Rothstein concluded that the largest problem for countries in economic crisis is their inability to collect taxes. That in turn depends on mutual trust, or the lack of it. Citizens refrain from paying their taxes not for specific moral reasons or low morality in general, but because they do not trust “the others”. They ask themselves: “If everybody else cheats on their taxes, there is no great use in me paying my taxes, is there?”\textsuperscript{203}

Furthermore, individuals generally co-operate if other individuals do so, irrespective of whom they co-operate with. For instance, if you hold the door open for others, I will too.\textsuperscript{204}

In short, social norms are significant because most people tend to follow the mainstream – to think and act as others do. Thus a prerequisite for compliance is that other people are seen to be complying with the rules, since most people are prepared to follow norms so long as there is an expectation that others are doing so. Hence, if an individual does not consider others to be honest then that person’s expectation would be that those others are not complying. Consequently, the individual will choose not to comply.\textsuperscript{205} The opportunity to observe properly a pattern of behaviour is decisive to the way a social group adapts to prevailing norms.\textsuperscript{206}

Studies illustrate empirical evidence that norms play a role in compliance. It shows the impact of the perceived behaviour of others (or ones

\textsuperscript{200} Skatteverket, ‘Right from the Start’ (n 157) 6.
\textsuperscript{201} Lederman (n 180) 1461.
\textsuperscript{204} Skatteverket, ‘Right from the Start’ (n 157) 27.
\textsuperscript{205} Ibid 36.
\textsuperscript{206} Ibid 66.
idea of the behaviour of others) on tax compliance. In Minnesota a group of taxpayers were sent a letter that stated, in part:\(^{207}\)

According to a recent public opinion survey, many Minnesotans believe other people routinely cheat on their taxes. This is not true, however. Audits by the Internal Revenue Service show that people who file tax returns report correctly and pay voluntary 93 percent of the income taxes they owe. Most taxpayers file their returns accurately on time. Although some taxpayers owe money because of minor errors, a small number of taxpayers who deliberately cheat owe the bulk of unpaid taxes.

The letter had a positive effect on compliance. Another group of taxpayers were sent another letter that contained rational arguments describing what the taxes would be used for, explaining that society would suffer if people did not pay their taxes. This letter had no effect.

Yet another study showing the impact of the perceived behaviour of others on tax compliance was conducted by the Australian Centre for Tax System Integrity.\(^{208}\) This found an apparent increase in compliance after taxpayers were informed that others reported more honesty in tax compliance than people tended to think. People who were given the information that the honesty of others was higher than they had thought indicated significantly more compliance than those individuals participating in the experiment who had not received any such information on the honesty of others.

The Australian study furthermore highlights the distinction between prescriptive (or intrinsic) norms and descriptive norms. Prescriptive norms prescribe what people should or should not do. Descriptive norms indicate what is actually done, how others usually act in certain situations. Descriptive norms influence behaviour, since they set a standard by generating group behaviour – that is, if everyone pays their taxes then it must be reasonable to do so. Prescriptive norms work by promising social reward or punishment.\(^{209}\)

The Australian experiment shows first that taxpayers perceived other taxpayers to hold the belief that one should comply to a lesser degree than they themselves did, and second that taxpayers thought others were less compliant than they themselves were. Thus there is a prescriptive norm suggesting that one should comply, but taxpayers did not think that others

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\(^{207}\) Coleman (n 188).


\(^{209}\) Skatteverket, ‘Right from the Start’ (n 157) 20–21.
adhered to this norm, the perceived descriptive norm being that others cheated. However, the descriptive social norm is in fact that people comply.

These studies show the importance of how people perceive the compliance behaviour of others. In summary, both the Minnesotan and the Australian studies found that a norm-based appeal had a positive effect on tax compliance. They show that the opinions and behaviour of others, or even one’s ideas about the opinions of others’ and their behaviour, are of great importance for taxpayer compliance. Information about what others do thus has a profound impact on behaviour. This is emphasized in a survey performed by the Swedish Tax Agency (Sw. Skatteverket) in 2012. According to this survey those who reported that they themselves cheated to a greater extent than those who did not cheat, knew someone who evaded tax.210

As most people comply with rules not because they are afraid of being found out and punished for not doing so, but because they regard it as being right and proper and because others do so, the deterrent effect of compliance enforcement is slim. Research shows that compliance ceases when deterrence does. Behaviour changes when enforcement decreases.211 Then again, as indicated previously, the threat of detection and punishment can work hand in hand with the fostering of compliance norms; the risk of detection and punishment can help in maintaining existing norms. Deterrence can create or support social norms by signalling which behaviour is disliked or liked.212 Though the deterrent effect of compliance enforcement is regarded as slim, its norm-reinforcing effect is all the greater. This norm-reinforcing effect of deterrence and its link to tax confidentiality is examined in the following.

Sanctions for non-compliance increase co-operation in that enforcement might strengthen the individual’s perception that compliance is the right thing.213 People must be able to trust to the notion that others cannot break the rules and go unpunished. A system of risk of detection and punishment enables people to trust that others are complying with the rules, so that they too will comply.214 If compliant taxpayers notice that the non-

210 ‘SKV Rapport 2012:1 Medborgarnas synpunkter på skattesystemet, skattefusket och Skatteverkets kontroll’ 75.
211 Skatteverket, ‘Right from the Start’ (n 157) 36.
212 OECD, Understanding and Influencing Taxpayers’ Compliance Behaviour (n 169) 15.
213 Ibid 17.
214 Skatteverket, ‘Right from the Start’ (n 157) 6.
compliant are being caught and punished, then compliance may be bolstered.215 Consequently, deterrence increases tax compliance. But deterrence in this way does not correspond to deterrence as a rational choice model. This instead shows the norm-reinforcing function of deterrence; that deterrence can influence norms.

As a norm-reinforcing factor deterrence is perhaps a double edged sword, since it can have positive or negative effects on compliance. On the one hand it can create or support social norms, or both, by signalling which behaviour is disapproved or liked.216 It can strengthen the moral obligation to pay tax because it points out the right thing to do.217 Behaviour of others signals so-called social proof that such behaviour is correct in the given circumstances.218 When individuals believe that others are contributing to the public good by paying their taxes, they tend to respond by complying as well. On the other hand, social norms can encourage cheating. If individuals perceive that everybody else cheats, if cheating is perceived as “normal”, then this becomes the norm and it is accepted and encouraged. A belief that others are evading taxes tends to weaken the norm of compliance and may cause others to repeat such evasive tax behaviour.219 Thus a person who encounters non-compliant taxpayers is more likely to consider evasion. Hence, non-compliance can lead to feelings of shame and guilt or to feelings of pride and justification, depending on which norms apply.220

Because compliance ceases when deterrence does (behaviour will change immediately enforcement decreases in scope) deterrence in its simple form can increase compliance, but should have a short-term effect.221 Supporting or creating social norms appears to be a more long-lasting way of using deterrence in order to increase tax compliance. The latter furthermore enhances voluntary tax compliance, which should be the ultimate goal. Deterrence should thus be used to support social norms. Enforcement should

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215 OECD, *Understanding and Influencing Taxpayers’ Compliance Behaviour* (n 169) 17.
217 Skatteverket, ‘Right from the Start’ (n 157) 16.
218 Cialdini (n 199) ch 4 Social Proof: Truths Are Us.
220 Skatteverket, ‘Right from the Start’ (n 157) 16.
221 Ibid 36.
be used to strengthen desirable signals, thereby enhancing those stigma associated with tax non-compliance – that is, using it in its norm-reinforcing function.\footnote{222Eric A Posner, ‘Law and Social Norms: The Case of Tax Compliance’ (2000) 86 Virginia Law Review 1781, 1792–1798.}

In short, social norms are important because most people tend to follow the mainstream in thinking and acting as others, or what they think others do.\footnote{223Which is in accordance with cognitive game theory Rothstein (n 116) 14–17.} On the one hand, to choose not to co-operate can be a rational decision if one has reason to believe that others choose non-co-operation. On the other hand, it can be rational to choose to co-operate if one has reason to believe that others choose co-operation. The decision to co-operate, or not, is thus not so much based on one’s individual preferences but rather on the social context.\footnote{224Ibid 13.} Accordingly, a prerequisite for compliance is the sense that other people are complying with the rules, since most people are prepared to follow norms as long as there is an expectation that others will do so. Hence, if an individual does not consider that others are honest, that person’s expectation would be that others are not complying. In consequence, that individual will choose not to comply. The opportunity to observe behaviour in action, in other words its visibility, is a decisive factor in influencing a social group in its adapting to prevailing norms.\footnote{225Skatteverket, ‘Right from the Start’ (n 157) 66.} Thus a core question to be considered is precisely how the images and beliefs about others enter into consciousness.\footnote{226Rothstein (n 116) 14.} Hence, tax confidentiality may take its place in the tax compliance discourse. In the rest of this subsection those factors hitherto identified as influencing taxpayer compliance are considered in the light of tax confidentiality.

There is, on the one hand, the publication of the amount of evasion that occurs in the form of statistics, and on the other, the publication of convictions of tax evaders. Publicizing information on the tax gap or using convictions of tax evaders as an example to others can cause taxpayers to believe that evasion is higher than it actually is.\footnote{227Skatteverket, ‘Right from the Start’ (n 157) 15.} Publicizing information on the tax gap increases the degree to which a taxpayer views other taxpayers as being dishonest. Moreover, publicizing information about evaders and successful (large scale) audits may create an impression that evasion is wide
That in turn promotes a strong non-compliant norm and when non-compliance becomes the norm, the notion that cheating is acceptable increases. Taxpayers who perceive that tax evasion is widespread and acceptable are more likely to cheat themselves because it makes them feel that they do not need to feel shame by doing what everyone else is doing – “Why should I pay taxes while others do not?”

The perception that others are non-compliant is thus an intrinsic factor, tending to have a negative impact on a taxpayer’s attitude toward compliance, as an individual who encounters non-compliant taxpayers is more likely to consider evasion. Experimental results support the view that publicizing estimations of the prevailing tax gap indicates that tax evasion is widespread and undetected and might reduce taxpayers’ subjective perceptions of risk and punishment, thereby negatively affecting compliance levels. Consequently, publicity about the existing degree of non-compliance changes taxpayers’ perception of social norms and may thus result in increased non-compliance.

In accordance with the suggestion that publicizing information on the tax gap increases non-compliant behaviour, publicizing the names of taxpayers who cheat could cause individuals to overestimate the extent of tax evasion, thereby generating a reciprocal motivation to evade rather than comply. However, research points to evidence to the contrary, namely that publicizing the imposition of criminal penalties in specific cases triggers a sense of reassurance among those who comply that they are doing the right thing, thereby bolstering, or at least maintaining, positive reciprocal tendencies. This is in line with the conclusion above, that enforcement might strengthen the individual’s perception that compliance is the

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228 OECD, *Understanding and Influencing Taxpayers’ Compliance Behaviour* (n 169) 17.


231 Kahan (n 219) 381.

right thing and that people must be able to trust to the fact that other people cannot break the rules and go unpunished. If compliant taxpayers notice that non-compliant taxpayers are being caught and punished, compliance may be reinforced.²³³

However, to simply deliver a message that non-compliant taxpayers are being detected is not sufficient. The public must also be reassured (truthfully) that most taxpayers are honest, since this promotes a strong social norm to remain compliant. Otherwise, deterrence communication can give the impression that non-compliance is the norm and thus run the risk of promoting further non-compliance.²³⁴ Subsequently, it is important that intelligence on tax non-compliance includes information that the non-compliant taxpayer is not only caught but punished.

Consequently, compliance may be strengthened if compliant taxpayers notice that the non-compliant are being caught and punished. Publicity on specific individuals does not seem to have the same negative effects as publicizing the tax gap, which may imply to taxpayers that cheating is widespread creating a norm of tax non-compliance, thus increasing reciprocal behaviour of non-compliance. Specific and detailed accounts on non-compliant taxpayers are less likely to have damaging effects on overall perceptions.²³⁵ The external incentive of detection risk and punishment can therefore be a factor that creates a rational value by following the rules, thus increasing tax compliance. However, far too strong an external pressure can displace the reason for compliance so that rules are followed only in order to avoid punishment, not because it is the right thing to do. Compliance is then not voluntary.²³⁶ The focus should therefore be on how to use an external incentive in the form of detection risk and punishment to increase a willingness to comply with rules instead of decreasing it.²³⁷

A number of studies from various countries show that people tend to believe that tax evasion is more widespread than it is. However, in most countries evaders are actually in the minority. The media is providing an “unrealistic dim view”²³⁸ on tax compliance in publishing information

²³³ Skatteverket, ‘Right from the Start’ (n 157) 6; OECD, Understanding and Influencing Taxpayers’ Compliance Behaviour (n 169) 17.
²³⁴ OECD, Understanding and Influencing Taxpayers’ Compliance Behaviour (n 169) 5.
²³⁵ Sheffrin and Triest (n 230) 211.
²³⁶ Skatteverket, ‘Right from the Start’ (n 157) 33.
²³⁷ Ibid 35.
²³⁸ OECD, Understanding and Influencing Taxpayers’ Compliance Behaviour (n 169) 24.
received by tax administrations. Communication should predominantly contain information about honest taxpayers, putting the message across that this is the norm.\textsuperscript{239} Otherwise people with a set of personal norms providing a high moral standard will more probably engage in and continue disloyal behaviour because they believe that others are disloyal. This is not because most people are disloyal but because they have an expectation that others will cheat.\textsuperscript{240} The challenge is therefore to explain to the public that most taxpayers are honest and that the few exceptions are caught.\textsuperscript{241} More information should be published to show that most taxpayers do the right thing and pay their taxes.\textsuperscript{242} Portraying tax evasion as normal, ordinary behaviour will simply increase it. It should instead be emphasized that most taxpayers are honest and that cheating is the exception rather than the rule. Pointing to the honest majority can help reduce cheating. The true picture must be given; the extent of cheating must not be kept secret and the true proportionate picture described.\textsuperscript{243} The overall message should not be that many people cheat but rather that the tax administration is successful at catching the few deliberate cheats.\textsuperscript{244}

The opinions in the literature on whether or not tax confidentiality increases or decreases voluntary tax compliance differ significantly. Some argue that the knowledge of tax information being disclosed from the tax administration and not kept confidential makes people think twice about providing their complete tax information to the tax administration.\textsuperscript{245} Others assert that taxpayers knowing that there is a possibility of their neighbours, friends and colleagues obtaining their tax information makes them comply with tax laws to a greater extent. Proponents of tax transparency claim that taxpayers will not file fraudulent returns or engage in the more tenuous legal tax avoidance schemes if others have knowledge of such be-

\begin{itemize}
\item \textsuperscript{239} Ibid.
\item \textsuperscript{240} Rothstein (n 116) 7.
\item \textsuperscript{241} OECD, \textit{Understanding and Influencing Taxpayers’ Compliance Behaviour} (n 169) 17.
\item \textsuperscript{242} Cialdini (n 219) 215.
\item \textsuperscript{243} Skatteverket, ‘Right from the Start’ (n 157) 22.
\item \textsuperscript{244} Lederman (n 180) 1502.
\end{itemize}
haviour. Defenders of tax confidentiality suggest that taxpayers might feel vulnerable to embarrassment or harassment if others were able to view the facts. Taxpayers will think twice about filing a tax return or properly reporting all of their income if they know that the information might be used by another agency besides the tax administration in ways they believe would put them at a disadvantage. This is held to be a negative effect of tax transparency.

The above shows, in my opinion, that there is great support for the view that tax transparency might considerably improve tax compliance. It shows that visibility – or transparency – is of importance in terms of norms and their impact on compliance, but that it should be carefully considered how transparency is applied in order to increase and not decrease tax compliance when it comes to social norms.

2.3.2.4 Trust and Fairness

It is held in the above that reciprocity is important with regard to tax compliance. However, reciprocity does not always work. Co-operation is not realized if citizens feel they cannot trust the institutions that exercise authority. Consequently, taxpayer trust in the tax administration can be a factor impacting the degree of tax compliance. This section presents research on the significance of trust for tax compliance. Moreover, taxpayer trust in the tax administration is dependent on how taxpayers perceive the fairness of the tax administration’s procedures. Since trust and fairness are closely linked, both are dealt with in this subsection.

With regard to trust there is, on the one hand, trust between citizen and state (vertical trust) and on the other, trust between citizens (horizontal trust). Trust between citizens has been dealt with in regard to norms and reciprocity in the foregoing subsection, in that taxpayers need to trust that others are complying with tax laws so that they will do likewise. This subsection deals with the other aspect of trust, namely trust in government. It focuses on vertical trust, identifying the position that there is on the one hand the tax administration’s trust in taxpayers and on the other, taxpayer trust in the tax administration. This thesis deals with the latter, namely

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248 United States Government Accountability Office (n 245) 22.

249 Skatteverket, ‘Right from the Start’ (n 157) 42.
taxpayer trust in the tax administration and what impact tax confidentiality has on such trust.250

Public trust and confidence in government has a direct effect on the willingness to comply with rules. Empirical studies have explored the relationship between trust and compliance, indicating that trust plays an important role in determining acceptance and compliance with an organization’s rules and regulations.251 The public’s trust in an authority is extremely important because people who trust the tax administration, for instance, are less likely to cheat on their taxes than people who do not.252 Additionally, increased compliance and increased trust are mutually reinforcing. At the same time, resistance or hostility from taxpayers because of poor behaviour on the part of the tax administration leads to reduced compliance and reduced trust. The reduction is thus congruently mutually reinforcing.253 Furthermore, in the long run trust can only be built by consistent truth.254

Impartiality makes administrative institutions trustworthy. It imposes, *inter alia*, fairness in procedures.255 The key to creating trust accordingly lies in the authority acting in such a way that the general public perceives it as just and fair. Public trust in authorities is encouraged when such authorities reach their decisions through procedures that members of the public view as fair.256 This is termed *procedural justice*, which concerns the perceived fairness of the procedures involved in decision-making and the perceived treatment one receives from the decision-maker.257

Procedural justice has been shown in research to be of the utmost importance in gaining citizens’ trust.258 Research suggests that people’s compliance behaviour is strongly linked to their views on justice and injustice.

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250 As noted, in this thesis horizontal and vertical trust is dealt with separately. However, research proposes a connection between trust in public institutions and interpersonal trust, in that if a state’s political institutions are perceived as corrupt the lower is the level of interpersonal trust, Bo Rothstein and Staffan Kumlin, *Demokrati, socialt kapital och förtroende* (2001) Notwithstanding, this issue is not dealt with in this thesis.

251 Murphy (n 179) 4–5; Scholz and Lubell (n 202) 412.

252 Ibid.

253 Ibid.


255 Rothstein (n 116) 109.

256 Tyler (n 186) 6.

257 Murphy (n 179) 7.

258 Rothstein (n 116) 132.
and that procedural justice plays an important part in individual decisions to comply with rules and regulations.\textsuperscript{259} Studies conclude that the perception of procedural fairness is linked both to the acceptance of a specific decision and to the inclination to comply with laws and rules more generally. Willing acceptance comes about because people trust legal authorities to make decisions justly, and therefore tend to place their own trust in them.\textsuperscript{260}

People care not only about the final result of personal interaction with public authorities, but are often equally interested in whether the procedure that eventually led to the final result might be considered fair.\textsuperscript{261} Taxpayer trust in tax administrations thus relies on the perceived fairness of the tax administration’s procedures and the perceived treatment that the taxpayer receives from tax officials. The latter concerns individuals in their feeling that they are treated with respect and dignity in their dealings with those officials, while the former covers the fair application of the tax system between taxpayers. Though the latter is of importance for trust, as regards trust and fairness for the purposes of this thesis the focus is on the former aspect of perceived fairness in its taking a more general perspective on the tax administration.

Empirical evidence shows that people who feel they have been treated in a procedurally fair manner by an organization are more likely to trust that organization and are more inclined to accept its decisions and follow its directions.\textsuperscript{262} This is because if the procedures are perceived to be just and fair, the authority will be perceived accordingly. This in turn leads to the perception of the decisions of the authority being just and fair. If the authority acts fairly when dealing with cases, it will be perceived as being just and fair even if the decision goes against the individual. Thus an individual will more readily accept a negative decision if the authority is perceived to be fair in its dealings.\textsuperscript{263} Studies performed by the Swedish Tax Agency

\textsuperscript{259} Tom R Tyler, \textit{Why People Obey the Law} (Princeton University Press 2006).
\textsuperscript{260} Tyler (n 186) 44.
\textsuperscript{261} Rothstein (n 116) 122 and 132; Tyler (n 259).
\textsuperscript{263} Murphy (n 179) 7–8.
support the view that trust is influenced very much by how an authority does its job, that is to say, whether fairness is inherent in its procedures and outcomes.\textsuperscript{264} 

Research thus concludes that the individual’s perception of procedural fairness in dealings with decision-makers has a positive impact on compliance with legal obligations.\textsuperscript{265} Taxpayers are more likely to increase voluntary compliance when they believe that the tax administration acts fairly and reasonably.\textsuperscript{266} Conversely, if the tax system and the tax administration are perceived as unfair or unjust, voluntary compliance will not be enhanced. If taxpayers feel poorly treated by a tax administration, this can lead to a decrease in taxpayer trust. This decrease can then go on to affect voluntary tax compliance. Research suggests that in order to create and maintain trust the importance of procedural justice must be acknowledged.\textsuperscript{267}

Another aspect of procedural justice commonly noted is concerned with whether people have been treated equally under the law. In other words, equal treatment is another aspect to consider.\textsuperscript{268} According to the OECD Glossary of Tax Terms \textit{equal treatment} is a “general principle of taxation that requires that taxpayers pay an equal amount of tax if their circumstances are equal”.\textsuperscript{269} This corresponds to horizontal equity,\textsuperscript{270} which implies fairness among similarly situated taxpayers; that taxpayers in equal situations should be taxed in equally, as they have the same ability to bear the tax burden.\textsuperscript{271} Horizontal equity has a range of interpretations, since the ‘similar situation’ can be ambiguous. For example, some tax systems consider the number of children that people have, or their marital status, as a relevant difference for tax purposes while others do not – for example,  

\begin{itemize}
\item \textsuperscript{264} Skatteverket, ‘Right from the Start’ (n 157) 48–49.
\item \textsuperscript{265} Mazza (n 232) 1071–1072.
\item \textsuperscript{267} Murphy (n 179) 21.
\item \textsuperscript{268} Rothstein (n 116) 122 and 132; Tyler (n 259).
\item \textsuperscript{269} ‘Glossary of Tax Terms’ (n 121).
\item \textsuperscript{270} Compared to vertical equity, which requires that people on higher incomes should pay a higher proportion of their income tax.
\item \textsuperscript{271} OECD, \textit{OECD Tax Policy Studies Fundamental Reform of Personal Income Tax} (n 147) 40–41.
\end{itemize}
where married people file separate tax returns akin to single persons.\textsuperscript{272} The issue in this context is how a regime with a high level of tax confidentiality safeguards the perception among its taxpayers that those in equal situations are taxed equally so that the perception of procedural justice is increased, thus increasing taxpayer trust in the tax administration.

Proponents of tax transparency claim that it can prevent not only taxpayer fraud and evasion but also prevent maladministration of tax laws. It is held that open returns help to keep the system honest because the public can discover schemes not caught by tax officials (a proposal implying that tax transparency should have a deterrent function in increasing the detection probability) and can ensure that officials are administering the system honestly. By keeping the system honest, transparency increases taxpayer confidence in its fairness, which in turn has the beneficial effects of increasing voluntary compliance and revenues.\textsuperscript{273}

While trust is difficult to earn it is easy to shatter. Taxpayers who have experienced grave corruption in their tax administration are not likely to forget it the next time their tax bill arrives. People do not forget treacherous and deceitful behaviour.\textsuperscript{274}

\subsection*{2.3.3 Conclusions}

There are several reasons for tax compliance. It has been shown that both deterrence and norms are important as to whether or not a person chooses to comply. Rules might be followed to avoid informal or formal punishment. Furthermore, a person may choose to comply with rules on account of social norms. Rules are then complied with quite voluntarily since they are regarded as being right. Research clearly shows that the risk of detection and punishment is less important than the influence of norms and moral values. Most people comply with rules not because they are afraid of being caught and punished for not doing so, but because they regard it as being right and because others are doing so.

Though it is of importance for compliance methods of deterrence such as audits and punishment cannot alone achieve voluntary compliance, since norms and moral values have a great impact on behaviour. Nonetheless, such approaches are important not because of their deterrent function but owing to the fact that they can be applied to strengthen and support existing norms – that is, deterrence models have a norm-reinforcing factor.


\textsuperscript{273} Kornhauser (n 246) 99.

\textsuperscript{274} Rothstein (n 116) 13 and 18 and 131.
Deterrence is shown to have a positive effect on tax compliance in its norm-reinforcing function in that it can create or support social norms by signalling which behaviour is disliked or liked. However, the norm-reinforcing function of deterrence can also have a negative effect on compliance. Besides strengthening the moral obligation to pay taxes in its pointing out what is the right thing to do it can also create non-compliance if the perceived norm is that of non-compliance. Thus while deterrence is shown in research to be an important factor for behaviour, the predominant conclusion seems to be that it is most effective as a device for supporting existing social norms in favour of compliance. Deterrence should be used to make clear that society does not approve of non-compliant behaviour rather than by threatening people into compliance by the risk of detection and punishment. In the long run, high levels of compliance are achieved preferably by establishing and reinforcing norms in favour of compliance.

With regard to deterrence and norms and their impact on voluntary tax compliance from a tax confidentiality perspective, publicizing statistics showing estimations on the tax gap does not have a positive impact on tax compliance. Instead, publicizing information on the gap appears to increase tax non-compliance, since it portrays non-compliance as the norm and in turn convince people that cheating is acceptable. However, it appears that even though publicizing facts on non-compliance can increase people’s perception of tax evasion being widespread, making known information on individual cases diminishes that effect. This latter type of publicity appears to reinforce the norm of compliance as being the right thing to do. Though questions can be raised with regard to increasing public perception on how widespread evasion is when publicizing information on non-compliance, empirical evidence shows that spreading information on individual cases on non-compliant taxpayers being caught and punished has a positive impact on tax compliance. This is because it shows that non-compliant taxpayers are detected and punished, further increasing the perception of compliance being right and proper behaviour. The fact that the taxpayer is caught and punished appears to diminish the negative impact that publication on non-compliant behaviour has on tax compliance. The deterrent effect of tax transparency is thus obvious, though in its norm-reinforcing function. Consequently, tax compliance should improve with the perception that most comply and those who do not undergo penalties. Furthermore, publicity about specific individuals does not seem to have the same negative effects as publicizing the tax gap. Specific and detailed stories about non-compliant taxpayers are less likely to have damaging effects on overall perceptions.
Apart from deterrence and norms, trust in the tax administration and the perception of fairness in the tax administration’s procedures have been shown to have an impact on tax compliance. If people feel unfairly treated by a tax administration this can lead to a decrease in taxpayer trust. This fall in trust can then go on to negatively affect voluntary tax compliance. Tax transparency could help nurture taxpayer trust in the tax administration, because if people are able to take part in the tax administration’s procedures they can decide for themselves whether or not the tax administration treats taxpayers fairly and equally. Conversely, this suggests that a tax administration that does not treat taxpayers equally could lose the trust of taxpayers if implementing a higher level of tax transparency, since taxpayers can then discover this unequal treatment thus losing trust in the administration, which in turn increases the risk of non-compliance.

In conclusion, people are more likely to pay taxes if they believe that their friends and other citizens pay taxes. Furthermore, social sanctions have an impact on the degree of compliance. In this context it could be argued that having tax transparency, making it possible for everyone to gain access to another’s tax information, has a deterrent function because the mere idea that all are able to gain access to such information deters taxpayer compliance. In addition, people are more likely to pay taxes if the tax administration seems fair and implement fair procedures. People are more likely to cheat on their own taxes if they perceive a weakening in the social norm against cheating. This will occur if they learn – or even if they simply believe – that more people are cheating. People are more willing to comply with laws they think are fairly administered. If taxpayers perceive that tax evasion is widespread or that the revenue body is unjust, such notions may lead people to justify tax evasion. Since norms are more decisive than deterrence on the level of tax compliance, the focus should be on reinforcing norms instead of using tax confidentiality rules as ways of deterring taxpayers and trying to make them compliant. Rules on tax confidentiality (or tax transparency) should be used in ways that do not (only) evoke deterrence, but rather create trust and promote strong social norms. A high level of tax transparency enhances the demands on the tax administration in its dealings with taxpayers’ affairs, which in turn should enhance the quality of its work, thus increasing taxpayer trust in the administration, and as a further consequence increasing tax compliance.
2.4 Administrative Costs

2.4.1 Introduction

The work of government relies on the collection of taxes from citizens and businesses. Tax administrations perform the important functions of collecting taxes in order to fund government activities. Close attention now centres on increasing the efficiency of tax administrations in order to reduce costs while providing better services to citizens and businesses. All revenue bodies are confronted with the demands of deciding how their (limited) resources should be allocated to meet organizational goals and objectives and to satisfy external expectations of good service and a reduced compliance burden.\footnote{OECD, Forum on Tax Administration, \textit{Executive Overview: Working Smarter} (2012) 2 <http://www.oecd.org/site/ctpfta/49428156.pdf> accessed 12 February 2014.} Tax administrations, particularly if operating in times of economic difficulty, are confronted with cost-reduction challenges and seek ways of improving efficiency and cost-effectiveness. It is therefore interesting to look at tax confidentiality rules from the perspective of incurred costs related to the enforcement of those rules.

\textit{Administrative costs} is the collective term used in this benchmark, representing the expenses incurred on the tax administration in applying the rules on tax confidentiality.

This part answers research question 1b) \textit{What are the impacts of tax confidentiality in relation to administrative costs?} This entails identifying different costs imposed on the tax administration due to rules on tax confidentiality and also possible impacts such costs in turn might have. However, identifying or evaluating the costs does not include any actual calculations of the costs.\footnote{See subsection 1.3.3 concerning a discussion on calculations.}

The view that setting this benchmark involves identifying costs and their impacts requires some clarification in relation to the overall aim of the thesis. The overall point of this work (as held earlier) is to identify the costs (and benefits) of tax confidentiality rules – that is, to identify the different effects of tax confidentiality legislation. With that said, since it concerns itself with identifying not only administrative costs of the enforcement of tax confidentiality rules, but also considers the costs – the impacts – associated with such costs, the aim of this subsection could be said to be to identify the costs of the costs. The issue revolves around the fact that the term \textit{costs} involves different definitions. As held in subsection 1.3.3, the term \textit{costs} as used in the overall aim of this research, implies that \textit{costs} is
the equivalent to *negative impacts*. *Costs* as referred to in this specific benchmark relates to expenditure. Those latter costs might in consequence have different impacts. To maintain that low costs improve efficiency is not a remarkable statement, but costs might have other impacts as well. For instance, high costs with regard to disclosure rules might have negative impacts in that they might distort the right to information. The different effects are further developed in the following subsections.

### 2.4.2 Identifying the Costs

Laws on tax information disclosure are likely to place more responsibilities on the tax administration or otherwise increase its workload. Disclosure requirements undoubtedly raise the fiscal costs of government. Costs on the tax administration will inevitably follow when providing information, but how high the costs are will differ depending on the rules on disclosure. This section identifies areas where costs to the tax administration arise due to tax confidentiality rules. Any explicit calculations are not conducted in this thesis. Again, costs are only referred to as estimation, for instance resulting in an increased work-load.

Generally, four steps can be identified when the tax administration receives a request on disclosure. All of these steps are connected with costs in some way. First, the tax administration needs to search for the requested information. Second, it needs to review the information to determine whether any of the information falls under any rule exempting its disclosure. If so, the administration might need to make redactions to make the information ready for disclosure, or if the information is confidential in its entirety, give the requester some sort of notification with regard to why such information may not be disclosed. Third, if the information may be disclosed the tax administration must reproduce the information. Finally, there is the fourth step of sending the information to the requester. Thus the four steps are 1) search, 2) review, 3) reproduce, and 4) disclose.\(^{277}\)

While the first step is important when considering the administrative costs in tax confidentiality, this first step is delineated from the scope of this thesis since it relates to the tax administration’s record-keeping, which in turn is delineated from this thesis.\(^{278}\)

Calculating the costs of the second step includes estimating the hours of work put into making the review of the requested information. This thesis

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\(^{277}\) See Antonin Scalia, ‘The Freedom of Information Act Has No Clothes’ (1982) 6 Regulation 14, 16 suggesting three steps (search, review, and duplicate); Mendel and Unesco (n 2) 146 adding a fourth step (sending the information).

\(^{278}\) See subsection 1.5.
does not contain any calculation on the actual working hours but rather recognizes that it is often the second step that is the most costly part of the process since it often requires the lengthy personal attention of high grade personnel. The costs associated with the third and fourth steps are perhaps more easily calculated costs than those of the second step, even though calculating the costs of, for example, transmitting information from one medium to another could be less simple than the calculation of duplicating a paper copy to a paper copy, or calculating the costs for sending the information by mail.

Within the second step related to administrative costs in tax administration in a tax confidentiality context is the aspect of easily accessible and easily understandable confidentiality legislation. Too complicated rules will inevitably require more resources, as it is more time or staff consuming, or both. Complicated rules on tax confidentiality furthermore risk lengthening the procedures, hence increasing costs. If the tax administration needs to take special steps to extract the information in question, verify it or correct errors before its transmission then the costs will be greater than if no special steps were needed. Simple and less formal procedures facilitate the efficiency and speed of the procedures. Making sure that tax confidentiality legislation is clear and easily applicable is thus important when designing rules on tax confidentiality.

In cases where a public authority denies access to information, it has, according to the UN Special Rapporteur on Freedom of Opinion and Expression, a responsibility of justifying such refusal. That is to say, the authority must show that the withholding of information falls under an exception from access to information.

As shown, access to information laws imposes costs on the tax administration. Especially large requests might well become a financial burden for it. Besides taking more time to handle and thus increase the costs, large requests increase the costs in the third and fourth steps to a greater degree than small requests, for example, because a large request involves more copies to be made.

### 2.4.3 Recouping Costs

The fact that rules on public access impose costs on the tax administration has been established above. The tax administration should be able to recoup costs related to the four steps mentioned in this subsection.

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279 Scalia (n 277) 16.

280 UN Special Rapporteur on Freedom of Opinion and Expression (n 117) 57.

281 Mendel and Unesco (n 2) 38.
The UN Standards note that the cost of access should not be so high as to deter potential applicants and negate the intent of the law itself, which is to promote open access to information. The UN Standards hold that the long-term benefits of the charging of fees for gaining access to information far exceed the costs. Principle VIII of the 2002 Recommendation of the Committee of Ministers of the Council of Europe (COE Recommendations) is more specific in stating that any fees charged for a copy of an official document should be reasonable and not exceed the actual costs incurred by the public authority. In the explanatory memorandum to the COE Recommendations the principle is further explained. It is stated that access to original documents on the spot should in principle be free of charge in order to facilitate access to public information. However, the public authority concerned might charge the applicant for the cost of finding the actual documents, especially with regard to large requests or when a request creates a great deal of work for the public authority concerned. Yet the fee should not exceed the actual costs incurred by the public authority. Regarding costs for copies fees may be charged to the applicant, but authorities should not make any profit. Subsequently, the fees should be reasonable and kept to a minimum and should not exceed the actual costs incurred by the public authority.

2.4.4 Costs and Compliance

This subsection connects the interest of reducing costs within the tax administration with the first benchmark, which concerns tax compliance. It would be most efficient and effective for any tax administration if everyone’s tax was correct from the start, if compliance were to be fully and genuinely voluntary. It is maintained by both researchers and revenue bodies that apart from being the most effective way of influencing behaviour, norms are also the least costly.

As indicated, there is a link between tax confidentiality rules and tax compliance suggesting that tax transparency might increase tax compli-
If the conclusion is that tax transparency increases compliance, then transparency can enhance efficiency in the tax administration, since compliance with tax laws makes the administration more likely to reach its overall goal of raising revenue. Furthermore, enhancing voluntary compliance reduces enforcement costs; the higher the level of tax compliance, the less is the need for obtrusive and expensive monitoring and punishment mechanisms. If voluntary compliance is high, tax administrations spend less on enforcement. Tax transparency might thus both enhance the possibility of keeping revenues high and costs low as the need for enforcement decreases.

Consequently, a dual effect of voluntary compliance occurs in that tax law is better observed, which means greater effectiveness. The tax administration can then work with greater efficiency. The result is that the total tax collected increases in the long run, while collection costs decrease.

2.4.5 Administrative Costs and the Right to Information

It is asserted above that high costs might distort the right to gain access to information. This subsection further develops certain aspects of this topic.

As previously stated the tax administration should have some means of recouping the costs imposed on it by rules on tax confidentiality. Fees should be reasonable and kept to a minimum and not exceed the actual costs incurred by the particular public authority. Additionally, it is important to keep fee levels low so as not to deter people from submitting requests for information. High fees may pose a barrier to access because people might refrain from submitting requests for information through lack of money. On the other hand, the charging of fees might decrease the tax administration’s workload in that fees could decrease the amount of requests in a positive way preventing frivolous requests. Price can thus be a device for restricting the service in the absence of any “need to know” requirement. Nevertheless, excessive fees should not be employed because of the high risk of their becoming an obstacle for individuals requesting (and obtaining) information. They could undermine the principle of public access to information.

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287 See subsection 2.3.
288 Scholz and Lubell (n 202) 399.
289 Alink and van Kommer (n 5) 113.
290 See subsection 2.4.5
291 Mendel and Unesco (n 2) 146.
292 Scalia (n 277) 17.
Accordingly, economic factors might have negative effects on the fulfilment of the right to gain access to information. High costs could distort this right to information.

Another aspect considered above is the fact that rules on tax confidentiality might (depending on their design) involve lengthy procedures that incur costs on the tax administration. Besides imposing higher costs on tax administration, lengthy procedures could completely annul the meaning of the right of access to information. This is a kind of right that is current at the time the applicant exercises the right. Information obtained after a certain period might not have the same value as current information.293

2.4.6 Conclusions

Rules on tax confidentiality give rise to certain costs in their enforcement. Four steps have been identified (though only three are further elaborated) in what I term “the disclosure chain”, where costs are incurred for (1) search, (2) review, (3) reproduction, and (4) disclosure. It is concluded that it is the second step that is the most costly part in the chain, as this could require the personal attention of highly skilled staff for long periods. The design of confidentiality rules is in this regard crucial, since complicated rules are time or staff consuming, or both – that is, they incur higher costs than simpler rules.

The tax administration may recoup some of the costs due to the enforcement of confidentiality rules by setting up fees for disclosure. However, if fees are set too high they risk distorting the right to information because they can prevent enjoyment of the right to gain access to information. On the other hand, the charging of fees could have the benefit of preventing trivial requests for information based on curiosity.

Another issue dealt with in this part is the connection made with tax compliance: as compliance increases, tax collection increases, while collection costs decrease. Hence, tax compliance benefits greatly the expense levels of the tax administration.

293 Bugaric (n 62) 499.
2.5 Taxpayer Privacy

2.5.1 Introduction

2.5.1.1 Aim and Structure

The taxpayer’s right to privacy including the right to confidentiality of personal tax information\(^{294}\) held by the tax administration is frequently highlighted as an interest that to a greater or lesser extent overrides the right of access to information. This section aims at setting a benchmark with regard to taxpayer privacy against which rules on tax confidentiality are measured for the purpose of identifying what costs and benefits different rules hold regarding the protection of taxpayer privacy. It aims at answering research question 1c) *What are the impacts of tax confidentiality in relation to taxpayer privacy?*

In order to meet the aim of answering this research question, the following subsections concern the issue of privacy in a tax confidentiality context. This is done in order to understand what it is that different national rules on tax confidentiality protect, to be able to extract the costs and benefits connected with the different levels of protection provided by these rules.

The intention is not to define how privacy is protected under international rules and regulations governing the protection of privacy, or whether or not national legislation conflicts with them. Any reference made to such sources is only made with the intention of narrowing the concept of privacy into *taxpayer* privacy. Furthermore, there is thus no intention of providing any comprehensive analysis on case law from the European Court of Human Rights (ECtHR) or the Court of Justice of the European Union (CJEU) as to interpretation of the right enshrined in international treaties. Such case law is merely used as points of reference and departure for the contextual approach to privacy.

The analysis of privacy in the following subsections takes its starting point in a recognized common denominator, according to which privacy is seen as a personal, private sphere including the person’s right to freedom of infringements of that personal sphere, resulting in a contextual concept of privacy, containing the specific characteristics of privacy in a tax context. It specifies the kind of information that is at hand and possible contraventions of privacy that could occur on disclosure of such information, and consequences of such violations. It answers the questions of what could be

\(^{294}\) Pasquale Pistone asserts that taxpayer right to confidentiality in tax matters is an expression of a more general human right to confidentiality in general, Pistone (n 104) 217.
said to be included in the personal sphere in tax confidentiality matters and what the potential consequences of infringements could be. It thus entails both positive and negative definitions of privacy.

2.5.1.2 The Context-Based Approach in terms of Conceptualizing Privacy

When discussing privacy issues there is a need in some way to demarcate the concept of privacy. However, defining the concept of privacy is no easy matter. It has been concluded, *inter alia* by the ECtHR that it is not possible or necessary to attempt an exhaustive definition of the notion of private life.\(^{295}\) Swedish preparatory works state that it is difficult, if not impossible, effectively and adequately to define the notion of privacy so as to make it applicable to all areas of society and the law.\(^{296}\) This is supported by research which establishes that privacy has no universal value that is the same across all contexts, and that its value in a particular context depends on the social importance of the practice of which it is a part.\(^{297}\) I agree that it might be difficult to define privacy at a universal level and still retain a concept worthy of an analysis on a limited area of the law.

Subsequently, there is a limit to any aim of finding a general definition of individual privacy and its protection. However, the fact that it is hardly possible to make such a definition with sufficient precision does not prevent the *discerning of some elements* of privacy, which are essential when considering reductive measures. Rather than attempting a universal definition of privacy one could address the issue of how individual privacy is to be comprehended as a question of clarification of what is meant by the term in the particular context in which the rules are applied.\(^{298}\) Addressing the issue of the concept of privacy in this latter way (studying what it means for something to be private in a contextual sense) has the advantage of viewing it with a context-based approach which simplifies the dissemination of what is at stake when it is threatened, and what precisely the law must do to resolve such difficulties. A context-based approach therefore seems the most suitable path instead of trying to find a universally applicable concept when addressing privacy issues in a specific field of the law.

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\(^{295}\) See, for example, *Niemietz v Germany* App no 13710/88 (16 December 1992) para 29; *Peck v the United Kingdom* App no 44647/98 (28 January 2003) para 57.


\(^{298}\) Ingrid Helmius, *Polisens rättsliga befogenheter vid spaning* (Iustus 2000) 123.
such as tax confidentiality. It facilitates a discussion on a more detailed level both in terms of what privacy is, that is, what needs to be protected and how, in that particular field of law. I have therefore chosen to subscribe to such an approach, that is to say, to mark out privacy contextually. The concept of privacy is for that reason to be demarcated based on the question of what it is in a tax confidentiality context.

2.5.2 A Common Denominator

Privacy is a fundamental human right recognized in most constitutions of democratic societies and international human rights treaties, such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Human Rights (ECHR). It is a broad concept relating to the protection of individual autonomy and the relationship between an individual and society, including governments, companies, and other individuals. It is often summarized as “the right to be let alone”. However, it encompasses a wide range of rights, inter alia freedom of thought, protection from intrusions into family and home life, control over personal information, freedom from surveillance, and protection of one’s reputation.

The concept of privacy is often divided into different parts. One such separation divides privacy into information privacy, bodily privacy, privacy of communications and territorial privacy. Such a division provides some distinction of privacy and if privacy (as understood for the aim of this thesis) were to be placed within one of these facets it would be that of information privacy, which concerns the establishment of rules governing

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300 Numerous scholars refer to privacy as ‘the right to be let alone’, most referring to the following article: Samuel D Warren and Louis D Brandeis, ‘Right to Privacy’ (1890) 4 Harvard Law Review 193, which has been characterized as the most influential law review article published.

301 Solove, ‘Conceptualizing Privacy’ (n 297) 1088.

the collection and handling of personal data. It also involves an individual’s claim to control the terms under which personal information is acquired, disclosed, and used.\textsuperscript{303}

The difficulty in finding a general definition of privacy applicable to all areas of society and law has already been addressed. However, a common denominator can be identified which describes it as every person’s right to a protected personal sphere. The ECtHR states that the right to privacy secures “to the individual a sphere within which he or she can freely pursue the development and fulfilment of his personality.”\textsuperscript{304} Reference to privacy as a personal sphere is also made in Swedish preparatory works\textsuperscript{305} and by scholars\textsuperscript{306}. In general it may further be said that a transgression of privacy constitutes an infringement in some way of this individual protective sphere – for example, through legislation.\textsuperscript{307}

Reasons for the difficulty of defining privacy, already touched upon, lies in the fact that the scope of the personal sphere, and what is considered an infringement of it, varies over the course of time and with societies because of cultural, ethnic, religious and social differences. Differences of opinions do not only appear between countries, but between generations and communities within a particular country.

This common denominator of privacy, where privacy is seen as a right to a personal sphere protected from infringements, demands a demarcation of the personal sphere that is to be protected. It is in the making of this demarcation that I move to a contextual conceptualization of privacy,

\textsuperscript{303} Ibid; Privacy Working Group, Information Policy Committee and Information Infrastructure Task Force, ‘Privacy and the National Information Infrastructure: Principles for Providing and Using Personal Information’ \texttt{<http://aspe.hhs.gov/datacncl/niippivp.htm>}. Note, however, the delimitations for this thesis in subsection 1.4, according to which only the disclosure, and not the acquiring and use of information is studied.

\textsuperscript{304} Brüggemann and Scheuten v Germany App no 6959/75 (19 May 1977) para 55; Shtukaturov v Russia App no 44009/05 (27 March 2008) para 83.


\textsuperscript{306} Solove, ‘Conceptualizing Privacy’ (n 297).

\textsuperscript{307} SOU 2002:18 (n 305) 53 in which national and international literature were studied in order to find the answer to the question of what privacy is; Stig Strömholt, \textit{Right of Privacy and Rights of the Personality: A Comparative Survey} (Norstedt 1967) 237.
turning the general concept of privacy into the more specific concept of taxpayer privacy.

2.5.3 Violation and Restrictions of Privacy

Thus far it has been stated that the right to privacy is a human right. Furthermore, it has been concluded that this right consists of a personal sphere, entailing a right to be free from violations of this realm. It has additionally been stated that privacy is transgressed when an intrusion into a person’s private life takes place, encroachment on this private sphere. The following subsection deals with the concept of violation of the right to privacy.

It could be asserted that a breach of privacy exists when information that most people in a society would not want to be spread, is made public.\(^{308}\) In other words, an invasion of privacy occurs upon disclosure of information that individuals would normally wish to conceal. It is suggested in research that the disclosure of private information must be a public act and not private – that is, there must be publicity.\(^{309}\) This is in accordance with Black’s Law Dictionary’s definition of invasion of privacy in its fifth edition: “[t]he unwarranted appropriation or expropriation of one’s personality, publicizing [emphasis added] one’s private affairs with which public has no legitimate concern, or wrongful intrusion into one’s private activities, in such a manner as to cause mental suffering, shame or humiliation to person of ordinary sensibilities.”\(^{310}\) This issue relates to the distinction between publicity and accessibility (or availability) touched upon previously.\(^{311}\) This suggests that one may discuss an actual violation of privacy only when information is de facto publicized. However, the CJEU has concluded that that it would suffice to find that information has been disclosed to a third party.\(^{312}\) Thus a contravention does not necessarily involve publication of information, but could occasion only a limited disclosure.

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\(^{309}\) Prosser (n 119) 393.

\(^{310}\) ‘Black’s Law Dictionary’.

\(^{311}\) See subsection 1.6.2.

\(^{312}\) Joined cases Rechnungshof (C-465/00) v Österreichischer Rundfunk and Others, Christa Neukomm (C-138/01) and Joseph Lauermann (C-139/01) v Österreichischer Rundfunk [2003] ECLI:EU:C:2003:294 paras 74–75; See also Case C-73/07 Tietosuojavaltuutettu v Satakunnan Makkipäörssi Oy and Satamedia Oy [2008] ECLI:EU:C:2008:266, Opinion of AG Kokott para 40.
In the eighth edition of Black’s invasion of privacy is first defined as “[a]n unjustified exploitation of one’s personality or intrusion into one’s personal activities, actionable under tort law and sometimes under constitutional law”. It is then divided into several categories, among them the “invasion of privacy by public disclosure of private facts: the public revelation of private information about another in an objectionable manner. Even if the information is true and non-defamatory, a cause of action may arise”. Thus the reference to actual publication of information is not as strong as that in the fifth edition. Nevertheless, the definition in the fifth edition serves as an illuminating example of how a violation of privacy might be understood.

Furthermore, the fifth edition of Black’s definition entails (apart from the existence of publication of information) a specification as to the consequences of such disclosure; it includes a specification of harm due to disclosure. According to this definition a violation of privacy includes harm. The eighth edition does not, as seen in the previous paragraph, prescribe harm as a determinative part of a transgression. This correlates to the CJEU, which states that in order to determine whether or not there has been a violation of privacy, it does not matter whether the information communicated is of a sensitive nature or the persons concerned have been inconvenienced in any way.\textsuperscript{313} Though not part of the determination on whether or not a violation of privacy has occurred the Court, however, noted that it could not be excluded that disclosure in the form of publicity of information on income might cause harm to individuals.\textsuperscript{314}

The view of the CJEU, which does not include considerations on possible harm when determining whether or not there has been a breach of privacy, could be said to be supported by the scholarly view that privacy is not about avoiding disclosure in order to hinder the public from adopting a certain attitude or opinion (whether true or false, hostile or friendly) about others based on the information disclosed. The essence rather is that some aspects of life would have been held up to public scrutiny – that is to say, the act of publicity\textsuperscript{315} itself constitutes a form of intrusion. Inherent to

\textsuperscript{313} Joined cases Rechnungshof (C-465/00) v Österreichischer Rundfunk and Others, Christa Neukomm (C-138/01) and Joseph Lauermann (C-139/01) v Österreichischer Rundfunk [2003] ECLI:EU:C:2003:294 (n 312) paras 74–75.

\textsuperscript{314} Ibid 89.

\textsuperscript{315} Note the use of \textit{publicity}, as opposed to \textit{availability/accessibility}. The choice of words is because the author refers to cases that concern actual publication of certain information.
violation of privacy is the notion of loss of individuality when information is publicly disclosed.\textsuperscript{316}

To some extent opposition to the view of the CJEU (according to which the mere disclosure of information constitutes an invasion of privacy) is the academic standpoint that no violation of privacy occurs, for instance, when inspecting public records, which by law or custom are kept open to the public.\textsuperscript{317} The decisive question in deciding whether or not there has been an interference with privacy is what use is made of the information disclosed and what interest are served.\textsuperscript{318}

To hold that a transgression of privacy occurs only upon publication of private information is in my opinion too narrow a view. If a violation of privacy were to be at hand only when the information in question is publicized, there should only be a need to protect tax information from disclosure in the sense of publicity. However, tax information could be misused for other purposes that do not imply any publicizing of information. Criminals might for instance request information without the intention of publicizing it. The conclusion drawn by the CJEU whereby a violation of privacy is at hand upon disclosure of information to a third party seems to be more appropriate. Thus the academic view that proposes that the use of disclosed information decides whether or not a violation of privacy has occurred is rejected. Consequently, the mere availability of information should not constitute a violation of privacy. The fact that tax information is available at the tax administration does not in itself constitute a violation of privacy, only when such information is actually disclosed to a requesting party.

It was previously concluded that there is a right to privacy, something considered to be a human right. However, the right to privacy and protection from infringements of it is not absolute. Such right must be balanced with other values that could lead to violations of privacy to a greater or lesser extent. The right to privacy could be said to be a \textit{prima facie} right, meaning that it is valid and legitimate but which could be overturned when in conflict with an overriding right.\textsuperscript{319} The individual must therefore tolerate certain intrusions into the personal realm.

The nature of the right to privacy as a non-absolute right is, \textit{inter alia}, shown in Article 8 ECHR. The first paragraph states the right, while the

\begin{footnotesize}
\begin{enumerate}
\item Edward J Bloustein, ‘Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser’ (1964) 39 New York University Law Review 962, 979 and 981.
\item Prosser (n 119) 395–396; Strömholm (n 307) 66.
\item Strömholm (n 307) 68.
\item Collste (n 308) 801 referring to the English philosopher W D Ross.
\end{enumerate}
\end{footnotesize}
second paragraph states the circumstances under which the right may be restricted. Restrictions on the right to privacy may be made to the extent that they are in accordance with the law and are necessary in a democratic society with respect to national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, the protection of health or morals, or for the protection of the rights and freedoms of others. Such restriction must be proportionate to its aims. If interference with the right to privacy is deemed proportionate, then limitation on the right is legitimate. The court may set aside a rule on disclosure if the rule is considered to be a disproportionate violation of privacy.

Both the CJEU and ECtHR recognize the legitimacy of disclosure of information relating to matters of public interest and to current public debate.\(^{320}\) The Advocate General held the view that the public might have a legitimate interest in obtaining a comprehensive overview of taxation and public revenue involving individuals’ income and wealth. There is also reason to believe that interest in this information is generally of a private nature.\(^{321}\) The Advocate General mentions personal curiosity regarding neighbours and acquaintances as an example of a situation where disclosure does not relate to a current public debate.\(^{322}\)

Where to draw the line of public interest relates to whether the person concerned has a legitimate expectation of respect for private life. If information according to domestic law and social values is of its nature public, individuals cannot be considered to have a legitimate expectation with regard to confidential treatment of personal information.\(^{323}\) Hence while it is for national courts to make the final weighing of opposing interests,\(^{324}\) national legislation could provide a legitimate violation of privacy if the

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\(^{322}\) Ibid 74 and 93.

\(^{323}\) Ibid 74 and 89; Fressoz and Roire v France App no 29183/95 (21 January 1999) (n 320) para 50; von Hannover v Germany App no 59320/00 (24 June 2004) (n 320) para 51.

\(^{324}\) Case C-73/07 Tietosuojavaltuutettu v Satakunnan Makkinapörssi Oy and Satamedia Oy [2008] ECLI:EU:C:2008:266, Opinion of AG Kokott (n 312) para 46; Case C-275/06 Productores de Música de España (Promusicae) v Telefónica de España SAU [2006] ECLI:EU:C:2008:54 para 68; von Hannover v Germany App no 59320/00 (24 June 2004) (n 320) para 57.
information concerned, according to state law, is of a public nature. This issue is not further dealt with, since this thesis concerns consequences of tax confidentiality and not whether the studied jurisdictions’ legislation is legitimate in this sense.

Based on the view of the CJEU outlined above, the manner and extent of disclosure are not the defining factors with regard to the determination of whether or not a violation of privacy has occurred.

The delicacy of balancing the two opposing interests of transparency and privacy is apparent. On the one hand, privacy is not an absolute right in that to a certain extent people will have to put up with breaches of privacy while on the other hand, the violations must not be too extensive. The question is where to draw the line. It has been concluded in this subsection that the determination of whether or not a violation of privacy is at hand is based on the existence of mere disclosure; the nature of the interference does not matter in that regard. However, to determine whether the interference (which constitutes a violation of the right to privacy) is legitimate one must consider the nature of such interference. The scope of the violation needs to be set in order to determine if the violation of privacy is proportionate to the aims of the disclosure. In doing this, it is inevitable to address the information, the disclosure of which constitutes a contravention of privacy, the way in which the information is disclosed, and the consequences of disclosure. These factors demarcate the scope of the interference and as stated, only the scope of the violation of privacy can determine whether or not the interference is legitimate.325

In the above it is concluded that a violation of privacy occurs on disclosure of certain information. The rest of this subsection deals with the types of information at hand in tax matters. Another issue in what follows is concerned with the importance of considering how information is disclosed and its possible consequences. The effects of disclosure might constitute reasons for justifying high levels of taxpayer privacy protection. Addressing these aspects facilitates the narrowing down of the right to privacy into that of taxpayer privacy – the context-based approach of defining privacy based on the question of what privacy is in a tax confidentiality context.

325 Jointed cases Rechnungshof (C-465/00) v Österreichischer Rundfunk and Others, Christa Neukomm (C-138/01) and Joseph Lauermann (C-139/01) v Österreichischer Rundfunk [2003] ECLI:EU:C:2003:294 (n 312) paras 84 and 90; Joined cases C-293/12 Digital Rights Ireland and C-594/12 Kärntner Landesregierung [2014] ECLI:EU:C:2014:238 para 33; Joined cases C-293/12 Digital Rights Ireland and C-594/12 Kärntner Landesregierung [2013] ECLI:EU:C:2013:845, Opinion of AG Cruz Villalón para 121.
Tax information includes facts that are regarded as a particularly sensitive form of personal details. The material the tax administration collects might (depending on the tax system) reveal, *inter alia*, information on income and its source, spending habits, employment status, personal belongings, disability status, associations and club memberships, donations to charities, mortgage costs, marital status, child support and alimony, and the amount and size of gifts to family members and others. Furthermore, in order to obtain certain deductions the taxpayer might be forced to reveal intimate details such as religious affiliation and medical state.326

Though tax information is considered to be of a particularly sensitive nature, the CJEU has noted that information on income and taxation, though personal, is not as sensitive as that on a person’s health, family life or sexuality.327 However, as already indicated a tax return could contain information on an individual’s health, family life, or sexuality. Take, for instance, a tax regime that permits deductions with regard to medical costs. The basis for such deduction might reveal a specific disease, the type and amount of medication, sexual orientation, and so on. Thus while an individual’s tax information might consist of mere figures on income and taxes owed it could reveal sensitive facts.

It has been concluded that an infraction of taxpayer privacy occurs upon the disclosure of a taxpayer’s personal tax information. Furthermore, publication of information does not need to take place for privacy to be considered violated. However, the way the information is disclosed could be of importance to a certain extent. For instance, a limited disclosure made only to one person might be deemed to cause less harm than if the information in question were to be publicized in a newspaper and read by many people. A single person knowing one’s personal information might seem less harmful than many people knowing it. So in evaluating the rules on tax confidentiality consideration must be given to the different methods of disclosure that the rules permit.

One person in the limited disclosure case might, however, cause greater harm than all of the people reading the newspaper if that person turns out


327 Joined cases Rechnungshof (C-465/00) v Österreichischer Rundfunk and Others, Christa Neukomm (C-138/01) and Joseph Lauermann (C-139/01) v Österreichischer Rundfunk [2003] ECLI:EU:C:2003:294 (n 312) para 52.
to be a criminal and takes action based on the information disclosed. The risk of being a crime victim is one reason why a taxpayer might wish to avoid disclosure of personal tax information. What follows deals with this aspect and other reasons as to why protection of taxpayer information might be justified.

The view that a violation of privacy exists on the mere disclosure of information, regardless of whether such disclosure causes any harm, could be compared to defamation. Defamation causes loss of reputation while public disclosure of information is said to constitute a loss of individuality. However, disclosure could lead to a loss of reputation, to harassment or embarrassment and thus create not only a loss of individuality but also damage or harm to the individual. This is one of the many reasons why a taxpayer might wish to avoid disclosure of personal tax information. Some might fear that political or other enemies would make public their personal financial information to humiliate or embarrass. For instance, it has been asserted in research that the most important reason for protecting privacy is to prevent stifling exercises of power employed to destroy or injure individuals. On the other hand, it could be held that it is wrong to treat the idea of reputation as a ‘right’ because it is a subject relating to what people think about others and the individual does not the right to control another’s thoughts.

One might be hasty in thinking that only those with high incomes have a desire to conceal their earnings. However, people with low incomes might wish to conceal such information for fear that embarrassment or humiliation would result if friends or neighbours were to gain access to their personal information.

Furthermore, some might wish to avoid revealing facts about their finances to avoid blatant comparisons (favourable or unfavourable) with others. Others might be opposed to revealing financial facts to avoid scrutiny or interference with their decisions so as to protect their creativity and autonomy. However, it has been questioned whether such a privacy

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328 Bloustein (n 316) 981.
329 Solove, ‘Conceptualizing Privacy’ (n 297) 1151.
claim would be legitimate, since it concerns financial information. Some people are concerned that their wealth would make them susceptible to requests for donations, or gifts to friends or family. Another example is that of corporate interests exploiting personal information in direct advertising. Citizens might seek to avoid commercial solicitation by suppliers of luxury goods or investment management. Knowledge of an individual’s income and wealth could not only be used for commercial purposes but to estimate customers’ solvency. While most purchase and credit reporting is inoffensive or even desirable, abuse inevitably occurs. Everyone is bombarded by targeted telephone solicitations. In extreme cases, identities are stolen and incorrect information gets into data banks.

Additionally, disclosure of tax information could put wealthy citizens at risk of becoming targets. People might fear that information on their wealth could make them the objects of criminals, including kidnappers seeking a ransom. Confidentiality of tax information to conceal it from lawbreakers is considered legitimate self-protection. Such societal justification for high levels of tax confidentiality is common in countries where criminal actions are frequent.

Another aspect that could justify high levels of privacy protection is the increased ability, enhanced by modern technology, to gather and review large amounts of information. Even relatively innocuous information can if aggregated with other facts provide a complete picture of a person’s circumstances resulting in an unwarranted invasion of privacy. Consolidated bits of information, each bit relatively unrevealing, can on aggregated paint

334 Blum (n 326) 604–605.
335 SOU 1997:39 (n 136) 544.
336 Blum (n 326) 605.
a portrait of a person’s life. The potential to quickly compile such details about a person is deemed to be a threat to personal privacy.  

Set against the view of the individual’s right to privacy protection is the argument that privacy should not be a barrier to publicity because the right of privacy is not invaded, or if it is, such invasion is either minimal or necessary (or both) for a properly functioning democracy. There should be no right to privacy on a tax return, since paying taxes is a duty and the information contained on returns belongs to members of the public, who have a right to know whether others are paying their fair share.

As far as taxation is concerned, there ought to be nothing ‘private’ about the amount of any man’s income, or the aggregate of all forms of his property, inasmuch as every man has a right to know, that all his neighbors are contributing pro rata with himself to support that Government, which is common to him and them ... [L]east of all should there be anything private in the matter of public taxes, since in bearing up the burdens of Government all the citizens are like copartners, and [...] for this purpose each has a right to demand a look into the books of all the others.

2.5.4 Conclusions
In order to evaluate rules on tax confidentiality in relation to taxpayer privacy there is a need in some way to demarcate the concept of privacy. For this activity, a context-based approach has been chosen based on the question of what privacy is in a tax confidentiality setting. The starting point is taken in what is recognized as a common denominator in privacy discussions. This is then narrowed down through the type of information at hand in tax matters and the different ways that such information may be disclosed and the possible consequences of disclosure that could justify a high level of privacy protection. This is in order to demarcate what privacy is in a tax confidentiality context.

A common denominator when discussing privacy appears to be that the right to privacy is a right to a personal sphere and a right of protection from its unwarranted infringements. The lack of a unified definition of privacy has led to the use of a negative definition, that is, what constitutes violations of privacy. A violation of privacy is the intrusion into this per-

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342 Kornhauser (n 246) 99.

sonal realm. Such invasion of privacy occurs upon disclosure of personal information to a third party without considerations of the possible harm resulting from such disclosure.

The right to privacy, including the right to protection from its infringements, is not an absolute right because the individual must tolerate certain violations of it. The extent of such invasion depends on balancing on the one hand, those interests that disclosure is meant to protect and on the other, those interests that confidentiality is supposed to protect. With regard to privacy in a tax context the information held by the tax administration might reveal detailed personal information about an individual, the disclosure of which could cause harm. It is not necessary to consider the nature of the information disclosed or the consequences of disclosure when determining whether there has been a violation of the right to privacy. However, only the scope of the breach of privacy can determine whether or not such interference is legitimate. The possible harm suffered by taxpayers due to the disclosure of their tax information thus needs to be considered when determining if the violation of privacy is legitimate. The scope of intrusion (the type of information, the way it is disclosed, and its consequences) might well justify high levels of privacy protection.

The facts mentioned above suggest that the evaluation of different tax confidentiality rules against the benchmark of taxpayer privacy is to be made by starting with a consideration of whether the rules provide disclosure of personal tax information. If they do, privacy is violated. In the second step of the evaluation lies the assessment of the scope of such breach, which in turn decides whether it is legitimate. However, this thesis stops with the assessment of the scope of violation. Its legitimacy is left to each jurisdiction to make, since to a great extent this determination depends on cultural and societal considerations. Within the assessment of the range of violation consideration is to be given to the type of information that the rules permit to be disclosed, the method of disclosure, and its possible consequences. Regarding the type of information, some information is deemed less sensitive than others, and may therefore be disclosed to a greater extent. The way in which the information is disclosed involves an assessment of whether the aim of the restriction on the right to privacy could be met through less extensive measures. Assessing the consequences implies the assessment of the existence of harm, which may defend a high level of privacy protection because harm strengthens the reason for protecting privacy.

Adopting this view creates more consistency in the argumentation than if one were to adhere to the view that the use of such information is decisive to the question of whether or not a violation has occurred. The line
between the two views might seem indifferent, because based on either the first or the second standpoint the conclusion might be the same – namely that disclosure of information is allowed. Nonetheless, there is a point in regarding mere disclosure as a violation, while providing for restrictions on the right to privacy through legitimate breaches of privacy. In this way disclosure always constitutes a violation of privacy, but in certain circumstances it could be considered legitimate. The difference between the two standpoints lies in the use of the information. According to the latter view it decides whether or not there has been a violation of privacy. According the view proposed above the use of such information decides, inter alia, whether or not such invasion is legitimate. The scope or the seriousness of the breach balanced against the interests for disclosure decides whether or not such violation is legitimate – not whether there has been a violation in fact.

2.6 Summary Conclusions

In this subsection a summary of the conclusions drawn in this chapter regarding the benchmarks – tax compliance, administrative costs, and taxpayer privacy – is provided.

The selected benchmarks represent continuing issues in that they are of interest for both today and tomorrow. The promotion of taxpayer compliance should always be in the interests of the tax administration because high levels of compliance increase revenue. Keeping expenses at low is clearly of interest not only for the tax administration but for society as a whole. Value for money in administering the gathering of taxes is an essential consideration for any society that functions on the basis of its effective collection of taxes. The issue of the right to privacy has been on the agenda for many years and an end to this discourse does not appear imminent.

This chapter has shown that there are several reasons for tax compliance. Among the circumstances affecting whether or not a person chooses to comply with rules are deterrence, social norms, trust and fairness. These factors imply that while deterrence is of some importance for compliance, deterrent methods such as auditing and punishment cannot alone achieve voluntary compliance. This is because social norms are held to have more influence on compliance. Most people comply with rules because they believe it is right and because others do so, not through reasons of fear of being caught and punished.

A strong social norm in favour of compliance increases compliance. People are generally more likely to pay taxes if they believe their friends and other citizens are paying theirs. People are more likely to cheat if they
perceive a weakening in the social norm against cheating. In other words, compliance is about reciprocity.

Moreover, even though deterrence is shown in research to be an important factor for behaviour, the predominant conclusion seems to be that deterrence is most effective as a tool for supporting existing social norms in favour of compliance. This norm-reinforcing function of deterrence is shown to have a positive effect on tax compliance. Nevertheless, if the perceived norm is non-compliance the norm-reinforcing function of deterrence might have a negative effect on compliance – that is, a perceived non-compliant norm risks increasing non-compliant behaviour.

Publicizing statistics showing the estimations on the tax gap appears to increase tax non-compliance, since it may portray non-compliance as being widespread with non-compliers getting away with cheating, which convinces people that cheating is acceptable. Publicizing information on individual cases, on the other hand, diminishes that effect. Empirical evidence shows that publicizing information on individual cases showing non-compliant taxpayers being caught and punished has a positive impact on tax compliance, since it illustrates that non-compliant taxpayers are being detected and punished. This in turn increases the perception of compliance being the accepted norm. Consequently, deterrence should be used to signal that society does not approve of non-compliant behaviour rather than threatening people into compliance by the risk of detection and punishment. In the long run, high levels of compliance are achieved preferably by establishing and reinforcing strong norms in favour of compliance.

Taxpayer trust in the tax administration and the perception of fairness in its procedures are other factors that have an impact on tax compliance. People are more likely to pay their taxes if they perceive that the tax administration operates fairly, that is to say, procedural justice affects whether or not taxpayers comply with the rules. If they feel unfairly treated by a tax administration this can lead to decreased taxpayer trust, which can negatively affect voluntary tax compliance. Tax transparency could help nurture taxpayer trust in tax administrations because if taxpayers are able to take part in an administration’s procedures they can decide for themselves whether or not it treats taxpayers fairly and equally.

The conclusion drawn from this is that tax compliance increases with the perception that most taxpayers comply and that those who do not are caught and suffer consequences. If taxpayers notice that tax evasion is widespread and that the tax administration operates unfairly, such perceptions could cause people to justify tax evasion. Rules on tax confidentiality (or tax transparency) should be applied in ways that do not (only) evoke deterrence, but rather create trust and promote strong social norms. More-
However, high levels of tax transparency increase demands on the tax administration in its dealings with the taxpayer, which in turn should enhance the quality of its work. Taxpayers would thus gain trust in the administration, further increasing tax compliance.

The second benchmark concerns costs incurred on the tax administration due to the application of the confidentiality rules. Four steps, each involving costs for the tax administration have been identified in what I term “the disclosure chain”. Costs are incurred for (1) search, (2) review, (3) reproduction, and (4) disclosure. It is concluded that it is the second step that is the most costly part of the chain, as this may require the personal attention of highly skilled officers for long periods. The design of the confidentiality rules is in this regard crucial because complicated rules are time or staff consuming, or both. They incur higher costs than less complicated rules.

The tax administration might recoup some of its costs due to the enforcement of the confidentiality rules by setting up fees for disclosure. But if they are set too high they risk distorting the right to information; they could prevent people from exploiting their right of access to information. On the other hand, the charging of fees might have the benefit of preventing trivial requests for information based merely on curiosity.

Another issue dealt with in this part is that of the connection of administrative costs with tax compliance: as compliance increases, tax collection increases, while costs for collection decrease. Hence, tax compliance has large benefits for the tax administration’s expenses level.

The third benchmarks embraces what is perhaps the most prominent field of interest discussed in tax confidentiality/tax transparency contexts – taxpayer privacy. While there seems to be a lack of a unified definition on the concept of privacy, a common denominator has been identified. This holds that the right to privacy is a right to a personal sphere and the right of its protection from violations. The right to privacy is not an absolute right, which means that an individual may well have to tolerate its violations to a certain degree.

An invasion of privacy occurs on the mere disclosure of personal information to a third party without considerations of the possible harm resulting from it. It is not necessary to consider the nature of the information disclosed or the consequences of disclosure when determining whether there has been a transgression of the right to privacy.

While the nature of the information or any harm caused by its disclosure are not to be considered when determining whether there has been a viola-

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344 This step is delimited from any further analysis.
tion of privacy, only the scope of the breach may determine whether or not such interference is legitimate. This means that the type of information, the way it is disclosed, and the consequences of disclosure, might justify high levels of privacy protection.

The evaluation of the tax confidentiality rules thus start by considering whether the rules provide disclosure of personal tax information. If they do, privacy is violated. In the second step of the evaluation lies the assessment of the scope of the invasion, which in turn decides whether it is legitimate. As indicated, this thesis stops with the assessment of the scope of the violation, embracing considerations as to the type of information disclosed, the way in which it is disclosed, and the possible consequences of disclosure.
PART II

Country comparison
3 Sweden

3.1 Outline
This chapter contains a close study of Swedish tax secrecy legislation. It starts with a brief presentation of the Swedish Tax Agency. The topic of tax secrecy is then addressed, first through a description of the historical development of tax secrecy. Thereafter a more in-depth description regarding the current rules on tax secrecy is provided. This part begins with a subsection concerning the basis for tax secrecy, presenting the basics of the right of access to official documents and the provision that allows restrictions on this right – that is, the basis for secrecy – in terms of tax information.

When the basis for tax secrecy is presented the details of the substantive content of the rules governing tax secrecy are provided, addressing secrecy applied at the Tax Agency, secrecy time limits, the open nature of tax administration decisions, secrecy concerning tax information in court proceedings, secrecy in terms of court decisions, and secrecy breaking rules directly related to tax information.

Throughout this part of the thesis the balancing of interests as formulated in preparatory works and the description of the legislation due to the choices of the balancing are dealt with concurrently.

The chapter concludes with an evaluation of Swedish tax secrecy against the benchmarks set out in Chapter 2.

3.2 The Swedish Tax Agency
The Swedish Tax Agency is a government agency responsible, inter alia, for collecting taxes in Sweden. It was formed on 1 January 2004 from the merging of the Swedish National Tax Board (Sw. Riksskatteverket) and 10

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regional tax authorities (Sw. *skattemyndigheter*). The Agency is accountable to the government but operates as an autonomous public authority. Its vision is that of “[a] society where everyone is willing to pay their fair share”.

Today the Swedish Tax Agency consists of a head office that directs and guides eight regions. It is the regions with their tax offices, at some 100 locations, that handle tax matters for individuals and businesses, matters pertaining to public records, real estate and estate inventories. Moreover, the regions make investigations, issue ID cards and monitor state claims.

### 3.3 Historical Development of Swedish Tax Secrecy

Secrecy as dealt with in this thesis starts with constitutional law, namely with the Freedom of the Press Act (Sw. *tryckfrihetsförordning*), hereinafter FPA, since secrecy constitutes a restriction of the right of public access to official documents, a right introduced with Sweden’s first FPA in 1766. This FPA contained, *inter alia*, a rule on the public nature of official documents and the exceptions associated with them. Every citizen was thus given the constitutional right to freely gain access to almost all documents relating to the administration of justice and public administration, and to publish them at will. The FPA not only contained the right of access to official documents, but also exemptions from that right. Secrecy provisions were thus found in constitutional law.

The issue of tax secrecy 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 on a proposal for Regulation on Income Tax. In this bill it is held that it is an undisputed necessity to keep tax returns from disclosure. The proposed regulation contained a provision on confidentiality of tax returns, while at the same time recognizing its impotence, since § 2 para 4 of the FPA prescribed the possibility open for every-
one to obtain a copy of a tax return.\textsuperscript{351} This proposal was enacted, leading to changes in the FPA. Subsequently, from 1903 the FPA included secrecy of tax information on individual taxpayers. This exemption from the right of public 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 for guidance on the calculation of inheritance tax or gift tax.

The amount of secrecy provision in the 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. In consideration of the fact that this rapid increase in secrecy rules and the fact that the FPA, with its status as constitutional law, is more complicated to change than ordinary law, the secrecy provisions were transferred from the FPA to a separate, ordinary law: the Secrecy Act of 1937\textsuperscript{352, 353}

Tax secrecy was governed by § 17 of the Secrecy Act of 1937, prescribing absolute secrecy for a time period of 20 years.\textsuperscript{354} Embraced by this provision were documents such as tax returns, income statements and audit memoranda. Within that time limit the documents could in principle be disclosed only upon the consent of the individual to whom the information related.

Rules governing tax secrecy did not include confidentiality of the results of the tax assessment, though the need for such a rule was raised on occasions. However, the issue revolved around a prohibition on publication of taxpayers’ taxable income and the result of such tax assessments, not the actual disclosure of the documents.\textsuperscript{355}

The Secrecy Act of 1937 was replaced by a new Secrecy Act in 1980. The most significant change was that the new Act brought together rules both on confidentiality in relation to documents and professional secrecy into one Act (rules on the latter were previously scattered). This Act was

\textsuperscript{351} Proposition 1902:16 med förslag till förordning om inkomstskatt 51.

\textsuperscript{352} Lag (1937:249) om inskränkningar i rätten att utbekomma allmänna handlingar.

\textsuperscript{353} Proposition 1936:140 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.

\textsuperscript{354} An inquiry report from 1927 proposed a 10 year time limit, expressing that too short a secrecy period would endanger the protection of tax information provided by the FPA, SOU 1927:2 Utredning med förslag till ändrade bestämmelser rörande allmänna handlingars offentlighet 214.

\textsuperscript{355} Ibid 214–215.
then replaced in 2009 when PAISA was introduced. The reasons for replacing the Secrecy Act of 1980 with a new law were mainly structural and linguistic in making it more user friendly by providing it with a table of contents, dividing it into parts, providing the chapters with sub-headings, and simplifying the language. The substantive content of the provisions were in large part unchanged. Consequently, absolute confidentiality in tax matters with its time limit of 20 years remained in the Secrecy Act of 1980 and in today’s current rules in PAISA.

3.4 Current Swedish Tax Secrecy Law

3.4.1 The Basis for Tax Secrecy

As held above, secrecy as dealt with in this work starts with the right of public access to official documents, which is found in FPA Chapter 2 § 1.

Every Swedish citizen 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.

357 The right of public access to official documents is one part 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 (FPA 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 (8th edn, Norstedts Juridik 2010) 20; Sigvard Holstad, Sekretess i allmän verksamhet: en introduktion till de grundläggande reglerna (5th edn, Norstedts juridik 2013) 13. See also Alf Bohlin and Wiweka Warnling-Nerép, Författningsrättens grunder (2nd edn, Norstedts juridik 2011) 24 and Wiweka Warnling-Nerép, ‘Offentlighet och yttrandefrihet’ in Ingvar Mattson and Olof Petersson (eds), Svensk författningspolitik (3rd edn, SNS förlag 2011) 66 where the authors first and foremost refer to the right of public access to official documents in FPA Chapter 2 § 1, when speaking of the principle of public access to information.
358 Tryckfrihetsförordning (1949:105)
359 Foreign nationals are equated with Swedish citizens in this matter, FPA Chapter 14 § 5 para 2. The right of public access to official documents also applies to a limited company, RÅ 2003 ref 83.
This right presupposes access only to documents that are considered to be official documents. This subsection accordingly starts with a brief description of what constitutes an official document and how such documents and the information in them may be accessed. This is followed by the provision that allows restrictions on the right of public access to official documents and information therein, that is, the provision permitting secrecy, more particularly tax secrecy. These rules are found in Chapter 2 of the FPA.

The term *document*, according to § 3, is understood to mean any written or pictorial matter or recording which may be read, listened to, or otherwise comprehended only using technical aids. Thus the concept of a document does not only include conventional documents usually found on paper with 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 photographs. For the purposes of the FPA, the term document has a broader sense, since it also includes information stored on other media such as microfilm, CDs, or computers.\(^\text{360}\)

In order for a document to be regarded as official § 3 requires that it is *held* by a public authority and that it has been *received* by the authority or *drawn up* there. 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. It should, 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.\(^\text{361}\) 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.\(^\text{362}\) Concerning recordings these are deemed to be held by the authority if they can be read, listen to or in other ways comprehended with technical aids that the authority normally uses itself, § 3 para 2.

A document, according to § 6, is *received* by an authority when the document has arrived at the authority or is in the hands of a authorized of-

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\(^{360}\) Bohlin (n 357) 44–45. There have been discussions in preparatory works on whether the concept ‘document’ should be discarded and replaced by a more modern concept, more suited to today’s information society. A suggested term is official information (Sw. *allmän uppgift*), see SOU 1997:39 (n 136) 7 and 493–500. However, the term official document is retained and given a more technology neutral tenor, see proposition 2001/02:70 Offentlighetsprincipen och informationstekniken 12–15.

\(^{361}\) Proposition 1975/76:160 om nya grundlagsbestämmelser angående allmänna handlingars offentlighet 122.

\(^{362}\) RÅ 1951 E 42.
ficer, for instance, the officer dealing with the matter to which the document refers. Section 4 contains special rules concerning letters and other messages that are not addressed to the authority directly but to one of the officers of the authority. According to this provision, a letter or other communication which is directed in person to an official at a public authority is deemed to be an official document if it refers to a case or other matter falling within the authority’s purview, and if it is not intended for the addressee solely in his or her capacity as holder of another position.

The conditions under which a document is deemed to be drawn up by an authority are provided in § 7. It is stated that a document is drawn up when an authority dispatches it. A document is dispatched when it has been made available to a third party, for example, another public authority. A document which is not dispatched is drawn up when the matter to which it relates is finally settled by the authority. If the particular document does not belong to any specific matter, it is drawn up when it has been finally checked or has otherwise received its final form.

Not all documents held by and received or drawn up by a public authority are considered to be official documents. For example, according to § 9 a draft of a decision or a written communication is not an official document if it is not used when the matter is finally determined.

The right of public access to official documents does not provide any automatic access to those documents that are to be considered official. In what follows rules on how to gain access to official documents is presented. These are also, like the rules on what constitutes an official document, found in FPA Chapter 2.

Section 12 states that an official document shall be made available upon request, free of charge, to any person wishing to examine it. The document must be provided immediately or as soon as possible. The person requesting the document has the right to read it at that place. Persons wishing to obtain official documents are entitled to obtain a transcript or a copy of the document on payment of a fee, § 13. A person wishing to obtain an official document should according to § 14 turn to the public authority keeping the document.

The right of public access to official documents involves a right for the individual to gain access to official documents without having to disclose his name or the purpose for which the documents are requested, § 14 para 3. The prohibition under this section 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 or not

363 See RÅ83 2:57; RÅ 1999 ref 36; HFD 2011 ref 52.
there is any obstacle to releasing the document. Upon a request for information in a document falling under one of the provisions of PAISA, the authority might therefore sometimes need to know who wishes to obtain it and what it will be used for. Otherwise, the authority might not be able to make a decision concerning whether or not the document can be made available. In such 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.\textsuperscript{364}

The rules in the FPA on access to official documents are complemented by rules in PAISA on disclosure of information in official documents. A public authority shall, according to PAISA Chapter 6 § 4, on the request of an individual, disclose information in an official document that is held by the authority if the information is not protected by secrecy. The duty to provide information under this section applies to the extent that disclosure does not impede the usual function of the authority.

Subsequently, a person requesting information held by a public authority may gain access to information either under the rules in the FPA concerning official documents or under the rules in PAISA concerning disclosure of information in an official document.

There are a few differences worth mentioning between requesting access to information under the FPA compared with requests under PAISA. First, as indicated above, documents must under the FPA be provided immediately or as soon as possible. This requirement for urgency is not found in PAISA. Second, requests under the FPA may not be refused based on whether it would impede the usual function of the authority, which is possible under PAISA. Third, while a decision not to disclose requested official documents under the FPA can be appealed, a decision not to disclose information under PAISA Chapter 6 § 4 cannot.\textsuperscript{365} Subsequently, a request under the FPA should be preferable.\textsuperscript{366}

\textsuperscript{364} Proposition 1981/82:37 om offentlighetssprincipen och ADB 47–48. See also prop 1979/80:2 Del A (n 114) 81–82.

\textsuperscript{365} Basic rules concerning appeals of an authority’s decision in matters on the disclosure of official documents are found in FPA chapter 2 § 15. According to this provision every decision may in principle be appealed, if it concerns rejection of a request for access to a document or if an official document may be disclosed with a restriction of the applicant’s right to disclose its contents or otherwise dispose of it. This general provision is complemented by PAISA chapter 6 §§ 7 and 8. Section 7 states which decisions in matters on disclosure of official documents and information in official documents that may be appealed. A decision to reject requests to obtain information under § 6 is not included in this section, while item 1 prescribes that an individual may appeal an authority’s decision not to disclose a document (Sw. handling) to the individual. This means that if an authority rejects an individ-
In the foregoing paragraphs rules concerning what constitutes an official document and how official documents or information in official documents can be accessed are provided. The rest of this subsection deals with the basis for restrictions on the right of public access to official documents, that is, the provision permitting secrecy, in particular tax secrecy.

As implied above, the right of public access to official documents can be restricted through rules on secrecy. Secrecy means that the right to obtain such documents can be restricted to a greater or lesser extent. FPA Chapter 2 § 2 distinctly indicates the ultimate limits of secrecy by an enumeration of protected interests and is thus of significant value for secrecy legislation. The right of access to official documents may 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 organisation
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.

Any restriction has to be laid down in a special act of law, § 2 para 2. The act referred to is PAISA. PAISA contains provisions that supplement the provisions contained in the FPA on the right to obtain official documents and provisions on secrecy.

It is important to note that the right of public access to official documents is the starting point of Swedish secrecy 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 above § 2.367 It is maintained that public access is of great im-

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367 Prop 1979/80:2 Del A (n 114) 56.
The importance of upholding the principle of public access in the balance of interests when creating secrecy legislation is emphasized in the preparatory works. It is stressed that the right of public access to official documents should not be limited because drawbacks of some importance can ensue. Public access should, according to preparatory works, be limited only when it appears necessary with reference to important conflicts of interests. Secrecy shall apply only to the extent necessary to protect the interests underlying the confidentiality provisions. In the preparatory works it is stated that the aim in the drafting of the Secrecy Act has been to avoid any form of secrecy for safety’s sake. These statements clearly show that the interests of transparency weigh heavily in Swedish public administration.

In order to emphasize that public access is the main rule and that secrecy is the exception, the provisions on registration and collection of official documents are placed before the secrecy provisions in PAISA. Yet another way of emphasizing public access as the main rule is seen in the title of the Act – public access is placed before secrecy in the title.

Tax secrecy falls under item 6 – the protection of the personal or economic circumstances of individuals. The specific rules on tax secrecy are found in PAISA Chapter 27, under the heading “Secrecy for the protection of individuals in activities concerning tax, customs duty, etc.”

The phrase ‘personal and economic circumstances’ in FPA Chapter 2 § 2 was adopted through government bill 1975/75:160. The rapporteur stated that the wide variety of considerations to different personal interests is summarized in those words. The preparatory works, however, do not provide any analysis of the meaning of the phrase. It is stated that ‘personal circumstances’ have to be defined according to everyday usage, but that there should not be any doubt that the term refers to such diverse condi-

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368 Prop 1975/76:160 (n 361) 71.
369 Ibid 73.
370 Ibid.
371 Ibid.
374 Prop 2008/09:150 (n 356).
tions as residential address, medical conditions and private economy. Nevertheless, the preparatory works continue by saying that the terms personal and economic circumstances should be kept apart to some extent. The main reason is that though confidentiality is there to protect not only private individuals but also legal persons, legal persons are considered not to have personal circumstances. Another reason for separating the terms personal and economic circumstances pointed out in the preparatory works is the situation where information of a more personal nature should remain secret while information on purely economic circumstances may be disclosed.

Subsequently, within this group two distinct categories can be identified: those that are purely financially oriented and those having an exclusively personal focus. These different aspects are not always easily distinguishable, since there are rules based on the consideration of individual economic interests as well as privacy and individual personal safety interests. These rules form a group of provisions representing a transition between the rules on financial and personal circumstances. Rules on tax secrecy belong to this large group of provisions that protect the individual’s finances and personal circumstances, since tax matters include information on both the individual’s personal as well as economic circumstances.

Tax information could be of a more or less sensitive character. A taxpayer can, for instance, apply for a deduction of fees for pension insurance. In such a case the taxpayer’s state of health could be an important factor. In many cases the taxpayer claims a doctor’s certificate regarding personal circumstances. Such information can be deemed sensitive and therefore worthy of strong secrecy protection. Furthermore, matters on deferment might contain sensitive information on personal circumstances. In preparatory works it is stated 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. Furthermore, secrecy with regard to information obtained during an audit should be preserved as far as possible.

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376 Prop 1979/80:2 Del A (n 114) 84.
377 Ibid.
378 Ibid. See also RÅ84 Ab 264 where names of certain companies and amounts withheld was considered secret.
379 Prop 1979/80:2 Del A (n 114) 84.
380 Prop 1979/80:2 Del A (n 114) 84.
381 Ibid 431.
382 Prop 1979/80:2 Del A (n 114) 259.
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. Information on membership of registered religious communities and trade union membership has been considered particularly sensitive. Data 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.

The rules designed to protect information in tax matters – that is, rules on tax secrecy – are, as held, found in PAISA Chapter 27. The rules dealt with in this thesis are §§ 1, 2, 4 and 6-8.

3.4.2 The Core Substantive Content of Tax Secrecy

As indicated above, PAISA Chapter 27 contains provisions concerning the protection of individuals’ personal or financial circumstances in activities relating to tax, customs duty, and more. This subsection deals with §§ 1 and 2.

Section 1 states that secrecy applies to information on an individual’s personal or financial circumstances held in connection with activities that relate to the determination of tax or to establishing the basis for determining such tax. It furthermore states that secrecy applies to information held in connection with activities relating to the assessment for taxes on real property. Secrecy covers both information on the individual being the subject of taxation and that relating to third parties whose circumstances are connected. Case law contends that secrecy also applies to information on a deceased taxpayer.

The wording of § 1 has consequences with regard to what is held in the foregoing subsection concerning access to official documents; that a person wishing to obtain an official document should apply to the public authority that holds it, FPA Chapter 2 § 14. It has been concluded by the Supreme Administrative Court that § 1, because of its wording, can only apply to requests made at an authority that determines tax or establishes the basis for such determination – that is, the Tax Agency.

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384 Proposition 2005/06:169 Effektivare skattekontroll mm 82.
385 RÅ85 2:62; RÅ80 2:47.
386 RÅ 1998 not 167.
The definition of secrecy is found in PAISA Chapter 3 § 1. According to this provision, secrecy means a prohibition on disclosing information whether made orally or through disclosure of an official document, or in any other way. Prohibition on disclosing information applies to authorities (which includes the Tax Agency) and for those participating in such activities, PAISA Chapter 2 § 1. Subsequently, secrecy may be considered to be a restriction on the right of public access to official documents in that its essential quality is that of making it possible for information in an official document to be kept secret.

It is important to stress that secrecy in PAISA refers to information, not to documents, though information might be revealed through the disclosure of a document as described in the foregoing paragraph. This can be compared to the FPA, which provides access to official documents. The Secrecy Act of 1937 corresponded with the FPA in that the scope of the rules on tax secrecy was determined mainly through enumeration of different documents, such as tax returns and income statements. As a consequence, information could be kept secret when occurring in one document but public when existing in another. The issue of unwanted consequences due to the focus on documents was brought up on the basis of implementing the Automatic Data Processing (ADP) system in the tax administration. Its implementation led to undesired consequences owing to its focus on documents because, as it was pointed out, a legislation according to which secrecy applies to documents would result in its dependence on the source of information. That is, if information exists in one of the enumerated documents protected by secrecy the information would be secret. However, if the same information instead existed in a tax record, which is deemed an official document, it would be public information. These inconsistencies were adjusted with the Secrecy Act of 1980, under which rules on tax secrecy went from being document-oriented to information-based.

The definition of tax is found in PAISA Chapter 27 § 1 para 3, which states that the term tax refers to tax on income and other direct taxes, and to sales tax, customs duty and any other form of indirect taxes.

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387 Prop 1979/80:2 Del A (n 114) 252.
389 Direct taxes are taxes that are imposed and collected on one and the same the individual or business, that is, the individual upon whom the tax is levied is responsible for the fulfilment of the tax payment. An indirect tax, on the other hand, is a tax that is shifted from one taxpayer to another, that is, the tax is collected from another individual or business than would normally be responsible for the tax, Christina Moëll, ‘WTO som ett multilateralt forum för skattefrågor’, Festskrift till
Besides taxes, certain charges are sometimes levied. The difference between a tax and a charge is that a tax is a payment to the public where the individual, not as a condition of such payment, might require consideration from the public. That is to say, taxes are paid regardless of whether the individual actually uses the consideration financed by them, such as roads, schools and medical care. A charge, on the other hand, is a payment to the public, where the individual as a condition of its payment might require direct consideration.\(^{390}\)

According to § 1 para 3, certain charges that are not taxes are to be treated as such. This applies to charges such as employer contributions, price regulation fees and similar payments.\(^{391}\) Furthermore, charges such as 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\(^{392}\).

As held, secrecy under § 1 applies to information on an individual’s personal or financial circumstances in activities relating to the determination of tax or to establishing the basis for determining the tax. The meaning of this is explained in the following.

*Determinations of tax* primarily refers to the charging of provisional or final tax, or adjustment or reduction of a deduction for provisional tax. Determination of tax also includes reduction of tax or tax exemption.\(^{393}\)

*Activities* relating to the determination of tax or establishing the basis for determining the tax embrace activities under the Tax Procedure Act\(^{394}\). This covers a wide range of activities, such as certain matters on exemption and those concerning advance rulings.\(^{395}\) However, it covers not only tax matters, but also record-keeping and other administrative activities.\(^{396}\) Representing the public as a party in tax proceedings in court is also re-

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\(^{390}\) Hans-Heinrich Vogel (Juristförlaget i Lund 2008) 319. Income tax, for instance, is a direct tax since it is collected from the individual or business earning the income. VAT is an indirect tax, since it is collected from merchants rather than from the individuals who pay the taxes, that is, the consumer.


\(^{392}\) ‘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 (n 114) 260.

\(^{393}\) Lag (2004:629) om trängselskatt

\(^{394}\) Prop 1979/80:2 Del A (n 114) 258.

\(^{395}\) Skatteförfarandefal (2011:1244)

\(^{396}\) Prop 1979/80:2 Del A (n 114) 258.

\(^{396}\) RÅ 1992 not 502.
garded as being an activity relating to the determination of tax.\textsuperscript{397} Determination of pension-entitled income is equated with activities relating to the determination of tax, § 1 para 3. Information on whether a certain income has been declared,\textsuperscript{398} names and withheld amounts of companies that are subjects of audit,\textsuperscript{399} all fall under this provision. With regard to secrecy under this provision on property declaration, it applies only to current and not former owners, since the property having been divested is no longer part of the former owner’s personal or economic circumstances.\textsuperscript{400}

There are certain activities not considered to relate to the determination of tax or for establishing the basis for its determination. One of them is the assignment and registration of a corporate identity number in tax records.\textsuperscript{401} Determination of liability for payment based on the employer’s failure to deduct employees’ provisional or permanent tax is considered not to be an action that comes within this provision.\textsuperscript{402} Furthermore, consultancy activities are not included.\textsuperscript{403} This means that the Tax Agency’s consulting activities such as telephone panels and answers to written questions are not protected by secrecy. The Tax Agency’s position in this matter is that if the consultation is closely connected to a certain matter that is protected by secrecy, then secrecy should also apply to such consultation.\textsuperscript{404} This position is maintained in matters relating to Enhanced Relationship programs (Sw. \textit{fördjupad dialog}).\textsuperscript{405}

Whether activities relating to Enhanced Relationship are to be considered to fall under the secrecy protection in § 1 has been the subject of discussion. The Tax Agency’s position has changed from that of transparency, by which information on participating companies was public infor-

\textsuperscript{397} Prop 1979/80:2 Del A (n 114) 258.
\textsuperscript{398} RÅ 1993 not 568.
\textsuperscript{399} RÅ84 Ab 264 (n 378).
\textsuperscript{400} RÅ 1986 ref 163.
\textsuperscript{401} RÅ 1996 ref 82; RÅ 1996 not 273. Information concerning whether an individual is registered for VAT and information concerning whether a company is registered as employer is not public, RÅ81 2:47 and RÅ83 Ab 124.
\textsuperscript{402} RÅ 1988 ref 152.
\textsuperscript{403} Prop 1979/80:2 Del A (n 114) 258.
\textsuperscript{404} Skatteverket, \textit{Offentligt eller hemligt} (4th edn, Skatteverket 2009) 89.
\textsuperscript{405} Horizontal Monitoring and Co-operative Compliance are other names for these types of activity.
mation, to that of secrecy, by which Enhanced Relationship was considered to fall under § 1, since the activities intended to ensure that the basis for taxation was correct from the earliest point possible. This position changed yet again after the Supreme Administrative Court decided that activities relating to Enhanced Relationship are of a consultative nature, as to why such activities fall outside the scope of § 1. The Tax Agency has adjusted its position to this ruling, but as mentioned in the foregoing paragraph, it considers questions that contain information closely connected to the taxpayer’s future taxation and the Tax Agency’s answers, to be part of the activities relating to the determination of tax or establishing the basis for determining the tax, thus coming under the protection in § 1. Where to draw the line between information of merely consultative nature and information connected to future taxation is, however, not clear.

Reasons held in Swedish legal scholarship are both in favour of confidentiality and disclosure with regard to Enhanced Relationship. On the one hand it is considered that secrecy is a prerequisite for Enhanced Relationship to function properly and companies might not participate in such activities if the information disclosed in them is not protected by secrecy. On the other hand transparency concerning such activities is held to be


408 SKV decision dnr 480 713075-12/263. See also Ingemar Hansson, Inga-Lill Askersjö and Anette Landén, ‘Debatt: Granska oss gärna!’ [2012] Dagens Industri <http://www.di.se/artiklar/2012/12/7/debatt-granska-oss-garna/> accessed 9 December 2014 where, inter alia, the then Director General of the Tax Agency stated that the names of the companies could not be disclosed.

409 HFD 2013 ref 48.

410 Skatteverket, ‘Skatteverkets riktlinje för fördjupad dialog’ (n 406), commentary to item 13.


beneficial in terms of legal certainty and equal treatment of taxpayers. Enhanced Relationship in itself means that taxpayers are not treated equally, since not all taxpayers can take part in such action. Despite the concern that companies might not participate in them because of transparency, there is, in my view good reason to provide as much of it as possible concerning these activities in order to avoid public suspicion of unequal treatment between taxpayers. Transparency, however, does not mean that all information is necessarily disclosed. Information identifying taxpayers could well be redacted.

PAISA Chapter 27 § 2 stipulates secrecy 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 concern special matters on audits or other controls on taxes (para 1 item 1), affairs on tax compensation or tax refunds (para 1 item 2), issues on deferment of payment on tax (para 1 item 3), and matters on cash register (para 1 item 4). The Tax Agency holds that since audits are almost always a part of the procedure leading to a decision on tax assessment, taxation or charges, then audit memoranda and other similar documents that occur in such audits are protected by secrecy in § 1 and not § 2. According to para 3 decisions on matters specified in para 1 item 2 and 3 are exempt from secrecy and are thus public. This means that information on an individual’s personal and economic circumstances in decisions on special matters on audits or other control on taxes (para 1 item 1) are protected by secrecy.

When dealing with § 2 there is reason to return to secrecy concerning activities related to Enhanced Relationship, since Hanna Grylin suggests an examination of whether such activities could belong under § 2. She appears to base her suggestion on a paragraph in government bill 1979/80:2, which starts by saying that consulting activities do not come under the

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413 Ibid; Kristoffersson (n 411) 960. See also Robert Pålsson, ‘Enhanced Relationship Challenging the Swedish Model’ (2013) 41 Intertax 252.


415 See also Kristoffersson (n 411) 960.

416 Skatteverket, Offentligt eller hemligt (n 404) 87 cf Holstad (n 357) 172.

417 RÅ 1988 not 165.

418 Hanna Grylin, ‘Fördjupad samverkan utifrån ett offentlighets- och sekretessperspektiv’ Svensk Skattetidning 598, 608.
activities set out in 1 §.\textsuperscript{419} The paragraph then continues to enumerate certain matters that are also considered to fall outside that scope.\textsuperscript{420} It ends with the statement that such matters instead belong under § 2.\textsuperscript{421} It might be considered unfortunate that all of this is found in the same (short) paragraph because at first reading it could be interpreted to mean that consulting activities fall under § 2. However, it is my interpretation that the last sentence – “the now mentioned specific matters (Sw. ärendetyper) fall under § 2 instead”\textsuperscript{422} – refers to the specific matters enumerated in the paragraph and not to the introductory sentence in the paragraph which holds that consulting activities do not fall under the activities referred to in § 1. This is also reflected in the legal text of § 2, which as shown above, explicitly states the different types of matters protected by secrecy without mentioning consulting activities. It is therefore, in my view, hardly possible (under the current wording of § 2) to include consulting activities such as Enhanced Relationship within its scope of secrecy.

The above provisions (with the exception of § 2 para 2 which is dealt with further below) require what is called absolute secrecy (Sw. absolut sekretess). Swedish secrecy legislation affords, in principle, three different levels, of which absolute secrecy is the highest. Other levels are provided through different requirements of damage (Sw. skaderekvisit). These requirements are constructed so that in order for secrecy to apply, there must in the particular case be a likelihood of damage occurring upon disclosure. Briefly, the first of these three levels (that is, that with the lowest level of secrecy protection) is the straight requirement of damage (Sw. rakt skaderekvisit) assuming disclosure to be the main rule. The second is the reverse requirement of damage (Sw. omvänt skaderekvisit) assuming confidentiality to be the main rule. The third (which, as stated, is the highest level) is absolute secrecy which means that no disclosure is permitted.\textsuperscript{423} Requirements of damage are stated in the preparatory works to help achieve an eligible delimitation of the scope of secrecy from a transparency

\textsuperscript{419} Prop 1979/80:2 Del A (n 114) 258.
\textsuperscript{420} Ibid.
\textsuperscript{421} Ibid.
\textsuperscript{422} Ibid.
\textsuperscript{423} 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 (n 372) 135–137 and 141–143 and prop 2008/09:150 (n 356) 350–351.
Preparatory works stress that for the purpose of protecting the interests of transparency secrecy legislation should not create more secrecy than is absolutely necessary in order to protect the interests that prompted the provision. For this reason information should not be subject to secrecy if disclosure cannot be foreseen as the cause of any damage, hence the implementation of requirements of damage.\footnote{424}{Prop 1979/80:2 Del A (n 114) 78; SOU 2003:99 (n 372) 141; prop 2008/09:150 (n 356) 350–351.}

These different levels of secrecy are further elaborated on as the rules that they appear in are dealt with. Absolute secrecy is considered first, while the requirements of damage are subsequently described and discussed.

Information protected by absolute secrecy, as in §§ 1 and 2, is always secret, unless there are any secrecy-breaking rules. Examples of secrecy-breaking rules are PAISA Chapter 10 § 1, which refers to Chapter 12, under which secrecy to protect the individual does not apply in relation to the individual personally, unless otherwise specified in PAISA, Chapter 12 § 1. The individual can fully or partially waive secrecy applicable for personal protection, unless otherwise indicated in PAISA, Chapter 12 § 2. Under this provision the individual can consent to the disclosure of information that in and of itself is secret. The Supreme Administrative Court has in cases on waiver of secrecy in tax matters in relation to a receiver in bankruptcy decided that neither the trustee appointment\footnote{426}{RÅ85 2:18.} nor the consent of the receiver in bankruptcy\footnote{427}{RÅ 1993 not 63.} is considered sufficient to waive secrecy.\footnote{428}{See also RÅ 1994 not 449.} The court has furthermore decided that a legal representative has the right of access to the principal’s tax returns to the extent needed for fulfilment of the legal assignment in those situations where the principal lacks the ability to dispose of secrecy.\footnote{429}{RÅ 1999 ref 38.} Moreover, the court has dealt with the issue of waiver of secrecy when the taxpayer is deceased.\footnote{430}{RÅ85 2:62 (n 385); RÅ80 2:47 (n 385).} In such circumstances a waiver of secrecy should be given by all estate partners.\footnote{431}{RÅ85 2:62 (n 385).} Of special interest in this case is RÅ80 2:47, which refers to circumstances where no representative of the estate exists who could consent to the disclosure of the
requested tax return. The interesting part of this judgment is that the court decided that in situations where there was nobody who could give such consent then a damage assessment should be conducted. In this assessment the court took the age of the taxpayer and the 20 year time limit into consideration. The court stated that since the tax return in question referred to the taxpayer’s income and wealth at the age of 90 and that half the secrecy period had elapsed, there was no reason to believe that the interests linked to the deceased taxpayer would suffer any significant damage upon disclosure.

PAISA Chapter 12 § 2 para 2 includes the provision 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.

Secrecy legislation furthermore contains secrecy-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 secrecy provision. Accordingly, secrecy does not prevent information being made available to another authority or to an individual if it is necessary for the authority to perform its function(s), PAISA Chapter 10 § 2. Moreover, Chapter 10 § 27 contains a provision (Sw. *generalklausulen*) that allows for secret information to be disclosed to another authority if the interests of disclosure outweighs the interests to be protected by secrecy.

These types of secrecy-breaking rules have called into question whether the term ‘absolute secrecy’ is wholly accurate. The term *semi-absolute* secrecy has been suggested to depict this level of secrecy more precisely, thus constituting a fourth level. Since this, in my view, appears to be an appropriate term, separating secrecy rules that do not provide complete secrecy from those that actually do afford this high level, the term ‘semi-absolute’ secrecy will be employed in the following to demarcate secrecy provisions that do not contain a requirement of damage, but nonetheless do not afford total secrecy due to secrecy-breaking rules.

Information contained within §§ 1 and 2 (with the exception of § 2 para 2 which is dealt with further below) are protected by semi-absolute secrecy

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432 Ds 2012:34 Sekretess i det internationella samarbetet 24.
433 Ekroth and Kristoffersson, ‘Skattesekretess: del 1’ (n 345) 817–819.
434 PAISA Chapter 27 § 5 on secrecy concerning international agreements, is a provision affording absolute secrecy in its core denotation, a provision not dealt with in this thesis.
rather than absolute secrecy, since there are rules (mentioned above) that break this secrecy.

The main reason for the high level of secrecy in these matters appears, according to the preparatory works, to be to protect taxpayer privacy.\footnote{Prop 1979/80:2 Del A (n 114) 256.} The taxpayers’ far-reaching duty to provide information about their economic circumstances is given particular weight.\footnote{Ibid.} It is held that most taxpayers would consider it a violation of privacy for information in their tax returns to be made public, though some of this information is fairly unremarkable.\footnote{Ibid.} Furthermore, it is said to be clear that the disclosure of information on a company’s business and operating conditions can often cause damage to the company.\footnote{Ibid.} Given that most people are affected by tax matters each year and that information may be reported on personal or financial circumstances of a sensitive nature, the need for secrecy in the tax field is strong.\footnote{Ibid.} Consequently, semi-absolute secrecy applies (absolute secrecy in preparatory works).\footnote{Ibid 252.} However, the reasons given for a high degree of secrecy in taxation must, according to the preparatory works, be set against the constitutional principle that official documents are public and that secrecy should be the exception to that rule.\footnote{Ibid 253.}

One exception from the semi-absolute level of secrecy provided in §§ 1 and 2 is, as mentioned, § 2 para 2. This provision does not provide semi-absolute secrecy. Rather it contains a reverse requirement of damage by stating that secrecy applies concerning an individual’s personal and economic circumstances in matters under the Act on the Tax Agency’s Handling of Certain Creditor Undertakings\footnote{Lag (2007:324) om Skatteverkets hantering av vissa borgenärsuppgifter.} unless it is clear that the information can be disclosed without causing damage or harm to the individual. This Act applies to the recovery of debts where the government is creditor, such as taxes and charges. According to para 3 item 1, secrecy does not apply to decisions in matters falling under § 2 para 2.

Matters falling under the secrecy protection in this section are, for instance, those concerning a natural person’s liability for payment of taxes of
a legal entity (Sw. företrädaransvar). 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 personal 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 Swedish Tax Agency on adjustment of that tax. This possibility, as indicated, is limited to a natural person’s liability of the tax debts of a legal entity and does not pave the way for entering into an agreement regarding a taxpayer’s personal tax liability.

The possibility of entering into such an agreement gives rise to issues of secrecy regarding such agreements. This discussion relates to the public nature of decisions and this is why it is further dealt with in subsection 3.4.4.

A reverse requirement of damage presumes confidentiality to be the main rule by stating that secrecy applies unless it is manifestly evident that the information in question may be disclosed without causing damage to the individual. The reverse requirement allows a fairly limited scope with regard to the damage assessment, which in practice means that an official often cannot disclose information embraced by a reverse requirement of damage without having knowledge of the recipient’s identity and intentions with regard to the information. This constitutes a departure from the requester’s right to anonymity, which implies that issues of disclosure are primarily determined regardless of who asks for the information or for what purpose. The prohibition under FPA Chapter 2 § 14 para 3 on a public authority to inquire into a requester’s identity or the purpose for the request, applies (as mentioned) except insofar as such inquiry is necessary to enable the authority to judge whether there is any obstacle to release of the document. A public authority has thus the ability to inquire into the identity of the requester and the purpose for the request under a requirement of damage. Circumstances of this kind may be important for deciding the secrecy issue in both directions, that is to say, not only in order to de-

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444 Proposition 2002/03:128 Företrädaransvar mm 36.

445 Prop 1979/80:2 Del A (n 114) 82.

446 See subsection 3.4.1.
cide whether the information concerned should be kept secret but also if it may be disclosed. Information about the identity of the requester and his or her purpose in seeking the information can result in there no longer being any reason to believe that the damage stated in the secrecy provision will occur. Information on the purpose of the request thus results in disclosure of the information. In such cases it is considered in preparatory works not objectionable from a public access point of view to ask the person requesting specific information to choose between abandoning such request and revealing his or her identity or the purpose for which he or she is requesting the information, or both.447

Elimination of the risk of damage is furthermore possible through setting up a restriction that limits the recipient’s right to spread such information or exploit it.448 The possibility open to authorities for setting up a restriction on the use of requested information is found in PAISA Chapter 10 § 14.449 A restriction can include a prohibition on the distribution of the contents of the particular document or of the publication of names or secret information from it.450

In 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*). Generally, secrecy provisions comprising a requirement of damage designed to protect individuals’ circumstances include the terms damage and harm in order to define the injury caused by disclosure of information. 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 hold that a company showing worse results in its business due to disclosure of information is an example of economic damage. Another such example is when disclosure of information has led to the individual being the subject of successful recovery measures.451

Harm, in this context, has a broad meaning. It refers to injuries that typically arise as a result of disclosure of information on an individual’s personal circumstances. These primarily include non-pecuniary damage of various kinds, such as someone being exposed to the contempt of others

447 Prop 1979/80:2 Del A (n 114) 81.
448 Ibid.
449 This is not to be confused with the provision providing an individual possibility to claim such restriction prior to disclosure, PAISA Chapter 12 § 2 para 2.
450 Prop 1979/80:2 Del A (n 114) 349; Ds Ju 1977:11 Del 2 (n 388) 268.
because of disclosure of certain information.\textsuperscript{452} In principle, everything that the individual experiences as a more significant discomfort should be considered in the assessment of harm.\textsuperscript{453} It is stated in the preparatory works that the mere fact that some people know of information perceived to be delicate from the viewpoint of an individual person could in many cases be considered sufficient to cause harm.\textsuperscript{454} The assessment of damage is thus to be based on the person’s own experience.\textsuperscript{455} It is stressed, however, that the assessment must to some extent be corrected on the basis of common values in society.\textsuperscript{456} The mere fact that a person is generally discomforted by the fact that others know where he lives, for example, does not constitute harm in a legal sense.\textsuperscript{457} Disclosure of information that is not normally sensitive (for instance, a person’s address) might, however, sometimes involve harm – for example, if it were to be assumed that the person who received the particular information would use it to expose the other person to violence or harassment.\textsuperscript{458}

To further clarify the concepts of damage and harm it is held in preparatory works that they do not only include a certain effect of disclosure, such as those mentioned in the foregoing paragraph.\textsuperscript{459} The concepts also maintain that this effect occurs upon disclosure of a certain type of information.\textsuperscript{460} In other words, damage refers to economic damage caused by disclosure of information of an economic nature, while harm refers to non-pecuniary or economic injury caused by disclosure of information of personal circumstances.\textsuperscript{461}

The reason for the departure from the semi-absolute secrecy afforded by § 2 para 2 is that these undertakings, now regulated under the Act on the Tax Agency’s Handling of Certain Creditor Undertakings\textsuperscript{462}, were subject to a reverse requirement of damage at the Swedish Enforcement Authority (Sw. Kronofodgemyndigheten), which previously dealt with such undertakings.

\begin{itemize}
\item \textsuperscript{452} Prop 1979/80:2 Del A (n 114) 83.
\item \textsuperscript{453} Ibid.
\item \textsuperscript{454} Ibid.
\item \textsuperscript{455} Ibid.
\item \textsuperscript{456} Ibid.
\item \textsuperscript{457} Ibid.
\item \textsuperscript{458} Ds Ju 1977:11 Del 1 (n 373) 134–135.
\item \textsuperscript{459} Prop 1979/80:2 Del A (n 114) 456–457.
\item \textsuperscript{460} Ibid 457.
\item \textsuperscript{461} Ibid 457 and 493.
\item \textsuperscript{462} Lag (2007:324) om Skatteverkets hantering av vissa borgenärsuppgifter.
\end{itemize}
ings. The question was raised in preparatory works whether the information in such matters should continue to be protected by a reverse requirement of damage or protected by the (semi-)absolute secrecy otherwise provided on tax matters.\(^{463}\) It was decided that the lower secrecy level should remain.\(^{464}\) It is pointed out in the preparatory works that the changes (that is, changes as to which authority deals with these affairs) led to a tightening of secrecy, since some of the information in these matters are processed in the Tax Database, which is protected by semi-absolute secrecy under § 1 para 2 item 1.\(^{465}\)

On the one hand the fact that information is protected by semi-absolute secrecy when contained in the Tax Database, but protected by the lower level of secrecy through the reverse requirement of damage when contained in a matter falling under § 2 para 2, might be seen, as in the preparatory works, as a strengthening of the secrecy protection (compared to when the information was protected only by the reverse requirement of damage). On the other hand, this could be considered an inconsistency,\(^{466}\) resembling those in the Secrecy Act of 1937 noted previously in this subsection concerning the fact that secrecy under this Act was dependent on the source of the information. That is, if information existed in one of the enumerated documents protected by secrecy, it was secret, but if the same information instead existed in a tax record, which is deemed an official document, the information would be in the public domain. These inconsistencies were adjusted so that the Secrecy Act came to be information-oriented rather than document-oriented.\(^{467}\) The question arises as to why the inconsistency occurring in § 2 para 2 and § 1 para 2 item 1 is defended and not adjusted, as were the inconsistencies in the Secrecy Act of 1937. An explanation could be that the inconsistencies in the Secrecy Act of 1937 were adjusted to gain a stronger protection of sensitive taxpayer information. That is, by granting information rather than documents confidentiality protection the scope of protected information was secured, since information in a tax return was protected also when registered in the Tax Database. Keeping the inconsistency in PAISA – that is, keeping the reverse requirement of damage for those matters falling under § 2 while preserving the semi-absolute secrecy concerning information in the Tax Database under § 1 –

\(^{463}\) Proposition 2006/07:99 En fristående kronofogdemyndighet mm 34–35.

\(^{464}\) Ibid 35.

\(^{465}\) Ibid 34–35.

\(^{466}\) Ekröth and Kristoffersson, ‘Skattesekretess: del 2’ (n 345) 906.

\(^{467}\) Prop 1979/80:2 Del A (n 114) 251–252; Ds Ju 1977:11 Del 2 (n 388) 531–535.
leads to the same result, that is, a (somewhat) stronger secrecy protection (though an adjustment from a reverse requirement of damage to semi-absolute secrecy would undoubtedly provide even stronger protection).

A reverse requirement of damage has been proposed to apply on a more overall level concerning tax secrecy. The semi-absolute secrecy provided in § 1 and 2 has thus not remained uncontested. The 1977 proposal for a new Secrecy Act included a reverse requirement of damage in almost every provision regarding information on the individual’s circumstances in tax matters. The issue was raised that a rule prescribing semi-absolute secrecy (absolute secrecy in the preparatory works) would not be properly consistent with statements on public access being the starting point of Swedish secrecy legislation. Arguments regarding the value of having easily applicable rules and the fact that tax matters often entail sensitive information for the individual were advanced against that proposal. The advantage of having easily applicable secrecy rules is noted in the preparatory works, especially when dealing with matters that amount to several millions per year, as is the case for the tax administration. Nevertheless, the conclusion in the proposal of 1977 was to implement a requirement of damage. Criticism, however, was directed at the proposed rules on tax secrecy during the consultation process. Criticism mainly boiled down to the rules being too transparency-oriented. In the end, this proposal was rejected and semi-absolute secrecy maintained.

### 3.4.3 Time Limits

The high levels of secrecy afforded in §§ 1 and 2 are not without limit of time; they are limited to 20 years for information contained in an official document, § 1 para 5 and 2 § para 4. This subsection deals with these time limits.

Time limits have often been employed in Swedish secrecy legislation to restrict the extent of secrecy. The secrecy period is usually formulated as a maximum, specifying the longest time that information in an official document may be kept secret. The secrecy period varies from two to 70 years, depending on the interests 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

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468 Ds Ju 1977:11 Del 1 (n 373) 57.
470 Prop 1979/80:2 Del A (n 114) 256.
471 Ibid 256–257.
relating to the individual’s personal circumstances, such as information on state of health, has been considered to be in greater need of protection than personal information in general or information relating to public interests. This is reflected by the maximum time allowed for sensitive information, which is 70 years, while the maximum time for public interest is usually 40 years. The use of time limits has a practical aspect. It is stated in the preparatory works that there is a need for some standardization in order for secrecy legislation to be manageable. To lighten the burden on the tax administration it has to follow from the legislation when the risk of damage is deemed to cease to exist.\textsuperscript{472}

Concerning the starting point for calculating the time limit, the main rule is found in PAISA Chapter 7 § 5, according to which time is counted from the date of the creation of the document. If the document lacks dating, it should be possible to set an approximate date with regard to its contents. If this fails, the date of arrival at the authority or a note in a register could be used.\textsuperscript{473}

Since time limits are to be considered as constituting the maximum time that the information concerned may be kept secret, the assessment of whether or not it can be disclosed shall, within the specified secrecy period, always be determined on the basis of an assessment of the risk of damage. This applies only in respect of provisions containing a requirement of damage because it is only in such cases that an assessment of damage is done. Since such risk usually decreases over time, an assessment should in most cases lead to confidential information being disclosed before the end of the secrecy period.\textsuperscript{474} Setting a long enough secrecy period to accommodate all reasonable needs for secrecy but at the same time requiring authorities to make an assessment of the risk of damage throughout the secrecy period is (according to the preparatory works) an easy way of gaining an optimal balance between the interests of transparency and those of secrecy.\textsuperscript{475}

The secrecy period for tax information is, as held above, set at 20 years, § 1 para 5 and § 2 para 4. This is the standard time limit for information regarding the individual’s economic circumstances.\textsuperscript{476} The preparatory works proposed that the secrecy period should be set to a maximum of 20 years in cases where the reason for secrecy is of a predominantly economic

\textsuperscript{472} Ibid 86–87.
\textsuperscript{473} Ibid 88.
\textsuperscript{474} Ibid 87; Ds Ju 1977:11 Del 1 (n 373) 137–140. See also RÅ80 2:47.
\textsuperscript{475} Ds Ju 1977:11 Del 1 (n 373) 140.
\textsuperscript{476} Prop 1979/80:2 Del A (n 114) 87.
nature. Though in accord 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 secrecy with reference to privacy violations, since the sensitive nature of tax information is continually emphasized in preparatory works. It is, as stated above, maintained in preparatory works that most taxpayers would consider it a violation of privacy for information in their tax returns to be made public, though such details are often unremarkable. The taxpayers’ far-reaching duty to provide information about their economic circumstances is given particular weight. Moreover, it is held that since most of the population is annually affected by tax matters and that information may be reported on personal or financial circumstances of a sensitive nature, the need for confidentiality is strong. It is stressed that tax information could be of a more or less sensitive nature. For instance, a taxpayer applying for a deduction of fees for pension insurance or information on state of health could be important factors. In many cases the taxpayer claims a doctor’s certificate regarding personal circumstances. Such information can be deemed sensitive and therefore worthy of strong secrecy protection. Furthermore, matters on deferment may contain sensitive information on personal circumstances. Moreover, in preparatory works it is stated that disclosure of information on illness as a basis for claiming a deduction for impaired ability to pay tax is to be considered a cause of harm to the individual. Furthermore, confidentiality on information obtained during an audit should, according to preparatory works, be preserved as far as possible.

The choice of making the standard time limit for economic circumstances 20 years suggests that privacy violations are of minor concern. This, in my view, is inconsistent when bearing in mind the weight put on possible privacy invasions when deciding the level of secrecy. This peculiar inconsistency is further enhanced when studying the preparatory works regarding the time limit in § 2. When the matters under § 2 were considered by the Enforcement Authority there were different secrecy periods for infor-

477 SOU 1975:22 (n 383) 19, 225.
478 Prop 1979/80:2 Del A (n 114) 256.
479 Ibid.
480 Ibid 252.
481 Prop 1979/80:2 Del B (n 380) 427.
482 Ibid 431.
483 Prop 1979/80:2 Del A (n 114) 259; RÅ83 2:9 2; RÅ85 Ab 137; RÅ 1990 not 286; RÅ 1990 not 379; RÅ 1996 not 179.
formation on an individual’s personal and economic circumstances. The secrecy period was set at 50 years regarding information on an individual’s personal circumstances but 20 years in respect of an individual’s economic circumstances. The preparatory works conclude that it is inappropriate to have different time limits within one and the same authority, which is the reason why the time limit was set at 20 years regarding information on economic as well as personal circumstances in accordance with the time limit in § 1. This means that the time limit in these matters was reduced by 30 years in respect of information on an individual’s personal circumstances, when these undertakings were transferred from the Enforcement Authority to the Tax Agency. No further discussion is provided as to whether this is appropriate, other than in reference to the desire to have uniform rules. This position appears somewhat weak because (as noted by Eleonor Kristoffersson and Jesper Ekroth) the argument to have uniform rules within one and the same authority is not advanced with regard to the level of secrecy in § 2 para 2 cf § 1 para 2 item 1, as discussed in the foregoing subsection. On the contrary, there is an explicit discussion leading to different levels of secrecy – that is, non-uniform rules within one and the same authority – through a reverse requirement of damage when the information is contained in a matter falling under § 2 para 2, but semi-absolute secrecy when the same information is contained within the Tax Database. The striving after uniform rules could have encompassed at least a discussion on perhaps changing the time limits in § 1, so that the more sensitive information of a personal nature could be embraced by a longer time period (perhaps 50 years) than information of strictly economic nature. Such a change would also have led to uniform rules within the Tax Agency.

3.4.4 The Public Nature of Decisions

As seen above, the need for protection of privacy is strong in the field of taxation, hence its high levels of secrecy. However, the interest of transparency must also be considered. In the preparatory works preceding the Secrecy Act of 1980 it was underlined that there was a significant interest of transparency, but that this could be met in ways other than through a secrecy provision with a reverse requirement of damage (as suggested in Ds Ju 1977:11). Methods suggested of meeting the interests of transparency

484 Prop 2006/07:99 (n 463) 35–36.
485 Ekroth and Kristoffersson, ‘Skattesekretess: del 2’ (n 345) 906.
486 Prop 2006/07:99 (n 463) 35.
487 See subsection 3.4.2.
are to allow proceedings at the tax court (in principle) to be public and to exclude decisions on taxation and tax etc of confidentiality. The balance between the interests of public access and those of protection of privacy has resulted in most of the tax administration’s decisions being made public. 488 This subsection deals with this latter issue, the public nature of the Tax Agency’s decisions.

Under PAISA Chapter 27 § 6, secrecy does not apply to decisions determining tax or pension-entitled income. Nor does secrecy apply to decisions establishing the basis for determining the tax. Decisions referred to in this provision include those on the charging or adjustment of provisional tax; on taxation; on the imposition of special tax assessment on real estate; on the rectification of past decisions; on additional assessment; and decisions whereby tax assessment is adjusted or dropped. Disclosure of decisions includes not only final decisions, but also preliminary decisions, which have been communicated during the procedure 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. 489

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 secret. Some 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 § 6. For instance, advance rulings on taxation or tax issues are not public decisions but decisions protected by absolute secrecy under § 1. However, it must be remembered that confidentiality under PAISA regards information and not documents (cf the FPA that prescribes a right of public access to official documents). 490 Confidentiality in respect of advance rulings therefore applies to information on an individual’s personal or economic circumstances, that is to say, confidentiality applies to information identifying an individual, whether a company or a private individual. In practice, this means that advance rulings are disclosed anonymously – with identifying information redacted. If the circumstances make it possible to identify to whom it pertains even where disclosure is anonymous, the entire ruling may be kept secret. 491 The legal conclusion held in the ruling is not secret unless it reveals information that identifies

488 Prop 1979/80:2 Del A (n 114) 256–257. See also Konstitutionsutskottet betänkande 1979/80:37 (n 114) 34.
489 Prop 1979/80:2 Del A (n 114) 260.
490 See subsections 3.4.1 and 3.4.2.
491 Roger Persson Österman, Förhandsbesked i skattefrågor (Iustus 2013) 43–44.
who the ruling concerns.492 The rulings are accessible on the Council on Advance Tax Rulings (Sw. Skatterättsnämndens) website.493

Decisions in matters on exemption are not explicitly mentioned in this provision, though they are discussed in the preparatory works. These decisions were secret under the tax secrecy legislation at that time and the intention was apparently to keep it that way.494 Nevertheless, according to the Swedish Tax Agency the legislation is to be interpreted as being exhaustive, in that only those decisions stated in the provision should be embraced by it. Thus because decisions on exemption are not explicitly mentioned in the enumeration in § 6, such decisions should be public – despite the intentions expressed in the preparatory works.495

A decision consists of both the decision itself and the reasons that settled the outcome.496 The fact that a decision is public therefore means that both parts are public.

On the reasons for the decision, public authorities are required under the Administrative Procedure Act497 § 20 to justify their decisions498 if they concern the exercise of public authority499. Provisions requiring authorities to include the rationale for any decision if it is held to constitute an indispensable element of an administrative law aimed at strengthening the individual’s legal rights in public administration.500 It is held in preparatory works that it is essential for the individual that the authority concerned explains how it arrived at its decision.501 Only when the reasons for it are transparent is it possible to see how the authority has distinguished and

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492 Skatteverket, Offentligt eller hemligt (n 404) 169.
494 Prop 1979/80:2 Del A (n 114) 260, 423, 471, 497.
495 Skatteverket, Offentligt eller hemligt (n 404) 94.
496 Ibid 95.
497 Förvaltningslag (1986:223)
498 Regarding decisions whereby a matter is determined by an authority.
499 'Exercise of public authority’ refers to exercise of public authority vis-à-vis a private subject (Sw. myndigheitsutövning mot enskild), covering and including all kinds of exercises of public power by authorities against individuals, see Nergelius (n 80) 87.
500 Proposition 1971:30 med förslag till lag om allmänna förvaltningsdomstolar, mm 491.
evaluated the relevant facts related to its decision and how those facts are applied in accordance with the law. Preparatory works furthermore stress that public trust in the competence and objectivity of authorities also requires that they show that their decisions are well founded. JO maintains that it is important, not only for the individual but also for the public’s right to transparency, that public authorities write their decisions so that their reasoning is clearly understood. This is, furthermore, a prerequisite for an open and free discussion of the authority’s activities. The basis for this provision is thus to create assurances that the matters in question are subject to sound examination, giving the individual the opportunity of checking the objectivity of any decision. It needs to be noted that the requirement to justify any decision is strongest with regard to an unfavourable one, and why justification may be omitted in the reverse case, § 20 item 1.

Secrecy rules do not prevent information that in itself is secret from being included in the rationale. 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 § 20 be included in the rationale.

A dissenting opinion is not included in the decision and if well managed (that is, if not attached to the decision) it therefore remains secret. If an audit memorandum is enclosed in the decision, the whole memorandum is a part of that decision and therefore public in its entirety. This is in many cases inappropriate, according to JO. Rather than attaching the entire memorandum, which makes all of the information in it public, the circumstances emerging from the audit that are invoked to justify the decision should be thoroughly specified in that decision. In this way, the particular decision is adequately justified but only the information specified in it is public, not the entire memorandum.

Subsequently, for the vast majority of the Tax Agency’s decisions there is no confidentiality. Nonetheless, this does not always mean that decisions must immediately be disclosed. The right of public access to official docu-

502 Ibid.
503 Ibid.
504 JO 2004/05 s 188.
505 Bohlin and Warnling-Nerep (n 357) 149; Håkan Strömberg and Bengt Lundell, Allmän förvaltningsrätt (26th edn, Liber ekonomi 2014) 124.
506 Skatteverket, Rätt handlagt (SKV 119, 5th edn, Skatteverket 2011) 106.
507 Skatteverket, Offentligt eller hemligt (n 404) 95.
508 JO dnr 1134-1985 5–6.
ments only implies a right of access to official documents in the parts not covered by confidentiality. Only when a decision has been made and documented in an official document, is the tax authority liable for letting the public take part of the decision. The rules in FPA on when a document becomes an official document are therefore essential.

Previously, when a decision on tax assessment was taken in accordance with the income tax return, the decision was considered to be public when the case was finalized and the chairman’s signature was put to the tax return.\(^{509}\) Today, decisions on assessment and debit are in most cases made through electronic processing. Such decisions are not signed and thus cannot be linked to a specific decision-maker. In order to decide when such a decision is part of an official document, there is a note in the database stating that final tax data is withdrawn. When such a note exists the information is considered to be part of an official document and may therefore be disclosed.\(^{510}\)

The public nature of tax decisions, with its conflict of interests, has been addressed in preparatory works. In the inquiry report presented during the drafting of a new Secrecy Act the view was expressed that one could well imagine tax assessment being altogether a private matter between the individual and the tax authorities. But in taxation, as in many other areas, 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 report. The tax administration’s decisions in tax matters must therefore remain public, according to the preparatory works.\(^{511}\)

Furthermore, it is noted that the taxpayer, on the one hand, would want a thorough justification for a decision in order to ensure the accuracy of the assessment.\(^{512}\) On the other hand, the taxpayer dislikes the fact that a decision might reveal information otherwise protected by confidentiality.\(^{513}\) Also information that under the law is public through the provision on the public nature of decisions, such as information on taxable income, could be intrusive from a privacy perspective.\(^{514}\) Moreover, it is held that it would be impossible to gain insight into how an assessment is carried out if

\(^{509}\) Proposition 1989/90:74 om ny taxeringslag mm 298.

\(^{510}\) Skatteverket, *Offentligt eller hemligt* (n 404) 96–97.

\(^{511}\) SOU 1975:22 (n 383) 224.

\(^{512}\) SOU 1987:31 (n 4) 123.

\(^{513}\) Ibid.

\(^{514}\) Ibid.
tax decisions remained confidential.\textsuperscript{515} Public decisions, however, place great responsibility on the tax officers, who write them. Great care is required not to include any excess information in the justification.\textsuperscript{516}

In subsection 3.4.2 the issue of secrecy concerning agreements between a taxpayer liable for payment of a tax debt pertaining to a legal entity is touched upon. This issue is dealt with in what follows, since it (as held) relates to the issue of public decisions.

It is stated that the rules on these agreements are found in the Tax Procedure Act. This Act entered into effect in 2012. Prior to this, provisions governing such agreements were found in the Tax Payment Act\textsuperscript{517} which contained a provision\textsuperscript{518} under which a completed agreement was to be considered a tax decision. Therefore, such agreements fell under PAISA Chapter 27 § 6 on the public nature of decisions. The Tax Procedure Act does not contain such a provision.\textsuperscript{519} Apart from such lack of equation provision, the preparatory works furthermore explicitly contend that such agreements shall not be considered tax decisions.\textsuperscript{520} The Tax Agency’s decision to offer an agreement is considered to be a decision of another kind – namely of a type termed \textit{partsbesked}, which could be translated as a “party statement”.\textsuperscript{521} A party statement contains the position of an authority when it represents the public as a party in civil matters and suchlike – for instance, when requiring payment of a claim that cannot be enforced without previous court judgment.\textsuperscript{522} Agreements of the kind in question do not involve the exercise of authority; it does not conclude the issue of liability since it merely contains the Tax Agency’s opinion on how a particular matter should be resolved. Furthermore, it has no binding effect on the

\textsuperscript{515} Ibid 83 and 123.
\textsuperscript{516} Ibid 123–124.
\textsuperscript{517} Skattebetalningslag (1997:483)
\textsuperscript{518} Tax Payment Act Chapter 11 § 1 para 2 item 8.
\textsuperscript{519} Many of the provision on equation of terms and concepts (Sw. \textit{likställighetsbestämmelser}) in the Tax Payment Act were 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.
\textsuperscript{520} SOU 2009:58 (n 519) 1465–1466.
\textsuperscript{521} Ibid 1466.
\textsuperscript{522} Proposition 1985/86:80 om ny förvaltningslag 51; SOU 2007:65 Domstolarnas handläggning av ärenden. Betänkande av Ärendeutredningen 125. See also Strömberg and Lundell (n 505) 61 on the distinction between a binding decision and other statements of an authority.
individual.\textsuperscript{523} Agreements are therefore to be considered party statements.\textsuperscript{524} A completed agreement cannot be (due to its not being a tax decision but a party statement) subject to review (though the individual may bring an action before a court on its nullity based on contractual rules).\textsuperscript{525}

Deciding that completed agreements are not to be regarded as tax decisions but party statements has a noteworthy consequence in terms of secrecy. As indicated above, when completed agreements were considered tax decisions, they were public under § 6. When not considered a tax decision, the question is raised whether such agreements fall under the reverse requirement of damage in § 2 para 2 regarding matters on, \textit{inter alia}, personal liability, or under § 2 para 3 item 1 prescribing public access to decisions in matters coming 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 §, are public, there is much reason to decide whether an agreement is to be considered to be such a decision falling under this item or under the reverse requirement of damage in para 2.

There is not, to my knowledge, any discussion in preparatory works on this matter. It is therefore possible that during the (massive) work of drafting the Tax Procedure Act, this issue was not at all recognized as a consequence of the decision that completed agreements are no longer tax decisions. Since great weight is placed 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 unity in the law if a tax decision is to be public information, while an agreement, which constitutes a decision (though not a tax decision but a party statement), is not. It is, on the contrary, remarkable if agreements were to go from being totally transparent to being the subject of a reverse requirement of damage presuming secrecy to be the main rule, though they have not changed in character (that is, there is no change in how they are administered and what they contain) other than how they are categorized.

Since a party statement does not involve the exercise of public authority it does not require justification.\textsuperscript{526} The content of such an agreement is

\textsuperscript{523} SOU 2009:58 (n 519) 1466.
\textsuperscript{524} Ibid.
\textsuperscript{525} Ibid 1467.
\textsuperscript{526} SOU 2004:23 Från verksförordning till myndighetsförordning. Betänkande av Utredningen om en översyn av verksförordningen 281. Decisions requiring a justifi-
therefore restricted to what is required under the Tax Procedure Ordinance\textsuperscript{527} Chapter 13 § 11. The information to be included in an agreement is in accordance with this provision:

1. the names of the parties and personal, corporate, or other identification number
2. the date of the agreement
3. the tax liability in question
4. the amount to be paid
5. when payment is due

The possible argument that agreements contain sensitive information, in my view, affords no great defence in favour of keeping them secret, since they should contain less (sensitive) information than many tax decisions (that are public under § 6). A tax decision, for instance, where the Tax Agency decides to deviate from the tax return by not approving a deduction might contain information of a far more sensitive nature than that found in such agreements.

It is asserted above that it is of significance to decide whether or not an agreement is a decision of the kind embraced by § 2 para 3 item 1. A distinction between binding decisions and other authority statements is of importance in some situations. This is the case if a rule is considered to be applicable only to decisions involving the exercise of authority.\textsuperscript{528} There is, to my knowledge, no indication in preparatory works that the public nature of decisions of necessity only concerns decisions involving the exercise of authority. Current legislative text in § 2 para 3 item 1 therefore makes way for an interpretation that includes agreements in the scope of the term ‘decision’, since it is a decision but of the kind called a party statement.

If this interpretation is considered impossible then there is in my view great reason to make adjustments of the law so that such agreements are publicly accessible. This is in large part based on the same reasons as provided above concerning Enhanced Relationship. I have held that there is great reason to provide as much transparency as possible concerning activities relating to Enhanced Relationship in order to avoid arousing public suspicion of unequal treatment among taxpayers. An agreement as such affords unequal treatment of taxpayers, since it deviates from what origi-
nally would have been the case in that it settles a tax debt for less than the full amount owed. This is why an agreement might not only arouse suspicion of unequal treatment – an agreement constitutes de facto unequal treatment. This provides, in my view, greater reasons to keep transparency at the highest possible level because the hiding of actions affording deviations from an ordinary situation might create a basis for mistrust as to how such activities are carried out. Activities such as these agreements that afford deviations as to tax liability should therefore be made public to the greatest extent possible.

A possible opposition to this might be that since an agreement does not contain any justification for the compromise there is a limit as to the controlling function of transparency. In other words, an agreement does not provide the reasons for the deviation and thus it is not possible to decide whether or not the compromise is just and fair. In this context it could therefore be reasonable to discuss whether an agreement, though it is a party statement which does not under current law require any justification, should require that. This, however, is not further elaborated in this thesis, but merely mentioned as a relevant issue with regard to agreements, since the issue of requiring a justification for a decision does not fall within its scope.

3.4.5 Tax Confidentiality in Court Proceedings

Allowing decisions to be public is one of the measures chosen in legislation in order to meet the interests of transparency. Another means is to permit tax information in court proceedings (in principle) to be made public.\(^{529}\) This subsection deals with tax secrecy in court proceedings.

PAISA Chapter 43 contains provisions on secrecy regarding information in a case in a court’s judicial or law enforcement activities. It follows from § 1 that a secrecy provision shall be applied as a primary rule on secrecy in the handling of the proceedings of the administrative court if the secrecy provision regards information on a matter of a certain nature or in a certain type of activity, and a public authority decision on such a matter or in such an activity is appealed to an administrative court. Section 2 states that if a court receives confidential information from an authority or another court, the secrecy provision protecting that information at the disclosing authority also applies at the receiving court. This provision on transfer of secrecy aims to preserve confidentiality and means that the same level of secrecy applied at the disclosing authority will apply at the receiving authority. Nevertheless, if there is another primary rule on secrecy, this ap-

\(^{529}\) Prop 1979/80:2 Del A (n 114) 256–257.
plies. This is the case regardless of whether the primary rule provides a stronger, equal or weaker protection.\footnote{Ibid 301. Cf PAISA Chapter 3 § 1 on the definitions of primary secrecy (Sw. primär sekretess) and secondary secrecy (Sw. sekundär sekretess).}

PAISA Chapter 27 § 4 provides a secrecy provision that is directly applicable in court proceedings with regard to tax information, that is, a primary rule on secrecy. In contrast to the secrecy at the Tax Agency, which is semi absolute under §§ 1 and 2, § 4 sets forth a straight requirement of damage. It contends that secrecy applies to information in court proceedings, if it can be assumed that disclosure would cause damage or harm to an individual. This means that the presumption is public access, but the information in question may be kept secret if disclosure is considered to cause damage or harm.

The straight requirement of damage in § 4 applies to all information relevant to the particular case. For it to be relevant, the information must relate to a matter that is subject to judicial review. The situation in which a tax assessment is under appeal (for instance, because a claim in a tax return regarding deductions has not been observed) does not mean that all information in the tax return is subject to the openness prevailing in tax proceedings.\footnote{Ibid 258–259.} Information that is not relevant to the case in question and is obtained from another authority, where such information is confidential, retains the secrecy level it had at the disclosing authority, § 4 last sentence. This section thus contains a provision on transfer of secrecy. For instance, if the Tax Agency submits a file with tax returns and audit memorandums to the Administrative Court, all the information not relevant to the case is also embraced by absolute secrecy in court.\footnote{RÅ82 Bb 98; cf. RÅ83 2:9 (n 483) and RÅ 1986 not 624.} Information that is not confidential at the disclosing authority is subject to the straight requirement of damage.\footnote{Prop 1979/80:2 Del A (n 114) 259.} Additionally, if the information is not relevant to the case and has not been obtained from an authority, but from the taxpayer, the straight requirement of damage applies.\footnote{See RÅ 2007 ref 60.}

If a court file is temporarily held at the Tax Agency because it has been submitted for a statement and someone requests the disclosure of that information, the Tax Agency must perform a damage assessment in accordance with the secrecy rules in PAISA Chapter 27 § 4. Regardless of the fact that the information (temporarily) exists at an authority outside the court,
the information is classified as documents in a court case and thus comes under the provisions of the straight requirement of damage.535

According to preparatory works, the straight requirement of damage provides the officers with fairly broad frames regarding the damage assessment.536 Such 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.537 The decision should instead be based on whether the information as such is of a kind which indicates that disclosure might typically be liable to cause damage to the interest protected by the provision.538 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.539

The preparatory works 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.540 Information relating to income and deductions may also normally be considered secret, according to preparatory works.541 It is held that in most cases information gathered through tax audits and similar inspections should be deemed to meet the requirement of damage.542

The question of the application of the straight requirement of damage in tax proceedings has been before the courts in a number of cases. Such case law alters to a certain extent what is held in the above statements in preparatory works, which is elaborated in the following.

In applying the straight requirement in PAISA Chapter 27 § 4 the Supreme Administrative Court found that information on illness and deductions does not always enjoy secrecy protection.543 In RÅ81 2:35 the court reasoned that information on a taxpayer who was ill when filling out a tax

535 RÅ81 2:57. See also subsection 3.4.1 concerning when documents are deemed to be held by an authority.
536 Prop 1979/80:2 Del A (n 114) 80.
537 Ibid.
538 Ibid.
539 Ibid 81.
540 Ibid 259.
541 Ibid.
542 Ibid.
543 RÅ81 2:35; RÅ81 Ab 179.
return and as a result submitted incorrect information, and information on an incorrect deduction, were to be considered being of such general nature and that disclosure would therefore not cause any damage or harm. The court accordingly found that the information in question was not protected by secrecy. RÅ81 Ab 179 concerned information revealing certain deductions. The court found that the reasoning in the requested documents was held to be rather general and contained no details regarding amounts and this was the reason why disclosure of the information was considered not to cause damage or harm.

Subsequently, case law has been seen to contradict somewhat the preparatory works, which, as maintained above, state that information on illness and deductions should normally be considered secret. Case law thus appears to apply the straight requirement of damage, as provided in § 4, while the reasoning in preparatory works is closer to the reverse requirement of damage.

In RÅ81 2:57 the court stated that disclosure of information revealing that a taxpayer had submitted inaccurate information in his tax return was (though it might cause discomfort for the taxpayer) not considered to cause harm in the sense of the straight requirement of damage concerning tax matters in court proceedings.544

Furthermore, the statement in preparatory works concerning cases where information gathered through tax audits and similar inspections is considered to be of such a sensitive nature that in most cases it should remain secret, appears to presume a higher level of secrecy than that intended by a straight requirement of damage. That is, it is held that the information should be considered secret in most cases, suggesting that secrecy should be the main rule while the straight requirement of damage presumes public access to be the main rule. This is also upheld in case law, as shown below.545

The court stated in RÅ83 2:9 that it seemed reasonable that when applying the rules on disclosure it should as far as possible preserve the secrecy of information provided in tax returns and attachments, as well as information obtained during audits and other controls. Therefore, documents that the court had 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 secrecy. The court referred to

544 RÅ81 2:57 (n 535).
545 RÅ83 2:9 (n 483); RÅ85 Ab 137 (n 483); RÅ 1986 not 613; RÅ 1986 not 623; RÅ 1990 not 286 (n 483); RÅ 1996 not 179 (n 483). See also Ekroth and Kristoffersson, ‘Skattesekretess i domstol’ (n 345) 90.
this case in RÅ85 Ab 137 and cited the statements therein. 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 those 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 a disclosure of 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 passing on the information or using it for any reason other than to examine the grounds of the ruling. This is thus an example of a case where the core of the right to obtain public information – to scrutinize government activities – is considered to outweigh the taxpayer’s right to privacy protection. This, however, is not to be taken to the extent that privacy is not protected at all, since the court made a restriction on passing it on or using it in ways other than intended.

Moreover, the court has dealt with the issue of secrecy 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 in certain attachments in a case on additional assessment could lead to damage or harm for the individual. RÅ 1990 not 286 concerned a request to obtain a decision on impoundment and an attached preliminary memorandum. 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 and to RÅ83 2:9, RÅ85 Ab 137 and RÅ 1990 not 286, holding that information on individuals’ 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

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546 An 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 (SKV 626, 2nd edn, 2006) 32.
deviate from this and this was why secrecy was considered to apply to the names of the board members.

Subsequently, as maintained above, case law upholds the statement in preparatory works concerning cases where information gathered through tax audits and similar inspections is considered to be of such a sensitive nature that in most cases it should remain secret. The court appears (in accordance with the preparatory works) to grant a higher level of secrecy to these types of information than that intended by a straight requirement of damage, which presumes public access to be the main rule.\textsuperscript{547}

However, this position could be held to be in accordance with other statements in preparatory works regarding a straight requirement of damage, mentioned previously in this subsection. In RÅ 2007 ref 60, the court referred to these statements, which hold that the damage assessment with regard to the straight requirement of damage generally is to be conducted on the basis of the actual information and thus not does need to be linked to a damage assessment in the individual case. It is contended that the determinant should be whether the information typically could be considered to cause damage upon disclosure. As noted, preparatory works and case law assert that the straight requirement of damage in § 4 is sufficient in order for information in, \textit{inter alia}, audit memoranda to be kept secret. This appears to have been upheld on the same basis for justifying the high level of secrecy in § 1 and 2. There is a high level of secrecy regarding information submitted in tax returns and attachments at the tax administration, since its disclosure is considered to cause damage or harm to the individual. It is argued that it seemed reasonable that when applying the rules on disclosure as far as possible to preserve the secrecy of such information, as well as information acquired during audits and other controls. Subsequently, the same reason appears to be the basis for also affording a high level of secrecy in court proceedings, despite the fact that it is argued in preparatory works that such high levels applied at the tax administration need to be balanced with high levels of transparency in court proceedings. This may therefore be questioned.\textsuperscript{548}

In order to uphold the underlying reasons for the different levels of secrecy, that is, the high levels at the tax administration and the rather low levels in court proceedings it might, in my view, be more appropriate to place more weight on the damage assessment in each individual case rather than to consider merely the type of information in question. This is also pointed out in HFD 2011 ref 67, where the court appears to deviate

\textsuperscript{547} See also Ekroth and Kristoffersson, ‘Skattesekretess i domstol’ (n 345) 90.

\textsuperscript{548} See ibid 92.
somewhat from the interpretation in preparatory works and earlier case law by stressing that the mere fact that information is collected during tax audits or similar controls cannot be decisive for the issue of whether or not confidentiality should apply – that is, in order for confidentiality to apply it needs to be assumed that an individual will suffer damage or harm if information is disclosed. (In this particular case, the requested information was disclosed, since it pertained to a company in liquidation and the court contended that a company dissolved in this way cannot suffer any damage or harm upon disclosure of such information.)

Though this is not entirely in agreement with what (according to preparatory works) is intended in the damage assessment of the straight requirement of damage (since the preparatory works hold that a straight requirement of damage should mainly consider the type of information) such application might provide greater possibility of disclosure. This is because such an approach does not presume that every individual will suffer damage or harm upon disclosure of such information. Thus it might to a greater extent uphold the straight requirement of damage’s presumption of public access.

Information other than the type dealt with in the foregoing paragraphs that in case law has been considered being of sensitive nature thus requiring a high level of confidentiality protection, is that of information in advance rulings. In RÅ 1986 not 322 the court decided that the part of an audit memoranda that contained a description of the documents of the case concerning an advance ruling was protected by secrecy. In RÅ 1987 not 5 the court concluded that the taxpayer was likely to suffer damage or harm if the requested documents in a matter on an advance ruling concerning income tax were to be disclosed. In RÅ 1992 ref 9 the court asserted that for an applicant in a case on an advance ruling, it was routinely of the utmost importance that secret information in such a case was not disclosed. The court, however, ruled that the documents could be disclosed in redacted form. In RÅ 2002 not 156 the applicant of an advance ruling had waived secrecy and gave consent for the information to be disclosed. The court decided that the information could be disclosed, except for the names of applicants in two other cases on advance rulings, the disclosure of which was considered to cause damage or harm to the individual concerned. 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,

\[^{549}\text{HFD 2011 ref 67.}\]
organizational structure, business sectors, ownership, and shareholdings were redacted.\textsuperscript{550}

As Eleonor Kristoffersson and Jesper Ekroth contend, the court seems (similarly with 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.\textsuperscript{551}

3.4.6 Tax Confidentiality and Court Judgments

As indicated above, the interests of transparency are held to be of significant value in preparatory works. In order to meet these interests and to balance them with the otherwise high levels of confidentiality in tax matters, court proceedings on taxation and related issues are in principle public, and decisions on such matters are exempted from confidentiality.

On court proceedings in Sweden great importance is traditionally attached (as far as possible) to the principle of public scrutiny. Openness is held to both help strengthen legal certainty for individuals and to preserve public confidence in law enforcement.\textsuperscript{552} In the preparatory works preceding the Secrecy Act of 1980 it was maintained that the public should have as great an insight into court activities as possible and that it was of the utmost importance that the judgments should be made public.\textsuperscript{553} Therefore a secrecy provision that applies to information in a case in a court’s judicial or law enforcement activities ceases to be applicable in such a case if the information concerned is included in a judgment, PAISA Chapter 43 § 8. This means that tax information that enjoys secrecy protection under PAISA Chapter 27 in principle loses this protection when it is included in a judgment. However, PAISA Chapter 43 § 8 provides the court with the possibility of deciding that a secrecy provision that applies to certain information shall also continue to apply to it when it forms part of a judgment. This allows the courts to take into account both the interests in favour of public court judgments, and the interests in favour of preserving secrecy when necessary with respect to the circumstances in an individual

\textsuperscript{550} RÅ 1986 not 322; RÅ 1987 not 5; RÅ 1992 ref 9; RÅ 2002 not 156; RÅ 2002 not 172. Other cases in which the court has applied the straight requirement of damage concerning tax information in court proceedings are, for instance, RÅ 1986 not 612, RÅ 1990 not 379 (n 483) and RÅ 2007 ref 60 (n 534).
\textsuperscript{551} Ekroth and Kristoffersson, ‘Skattesekretess i domstol’ (n 345) 97 and 100–101.
\textsuperscript{552} Ds 2014:33 Offentlighet och sekretess för uppgifter i domstolsavgöranden 24.
\textsuperscript{553} Prop 1979/80:2 Del A (n 114) 102.
case.\textsuperscript{554} Nevertheless, a decision on continued secrecy may not encompass the ruling, unless national security or other interests of extraordinary importance so require it, § 8 para 3.

The court may not decide on continued secrecy if the information in question is presented in a public hearing, since a secret provision that applies to information in a case in a court’s judicial or law enforcement activities ceases to apply in the case if the information is presented at a public hearing, according to PAISA Chapter 43 § 5. However, the provision continues to apply in cases where information is presented in hearings behind closed doors.

The possibility is open to the court to limit the secret order to include only the underlying material, by which the judgment becomes public. It is held in preparatory works that such an order may be completely natural, since the data in the underlying material might be more detailed and thus of a more sensitive nature than the information included in the judgment. It is assumed in the preparatory works that the courts should make use of the possibility open to them to decide on continued secrecy restrictively.\textsuperscript{555}

In preparatory works, it is explicitly suggested that the court should be able to decide on continued secrecy regarding taxpayer-identifying information in judgments concerning advance rulings.\textsuperscript{556} Numerous cases from the Supreme Administrative Court show that the courts do in fact exercise this possibility of deciding on continued secrecy on taxpayer-identifying information in cases concerning advance rulings. In such judgments, taxpayer-identifying information is redacted.\textsuperscript{557} Information in advance rulings is thus again (cf the high level of secrecy in preparatory works and case law asserted in relation to information in cases on advance rulings when applying the straight requirement of damage in PAISA Chapter 27 § 4) considered to be of a highly sensitive nature.

\section*{3.4.7 Secrecy-Breaking Rules}

While the starting point is that secrecy applies both to individuals and between authorities (and to some extent even within authorities) in certain

\textsuperscript{554} Ds 2014:33 (n 552) 26.
\textsuperscript{555} Prop 1979/80:2 Del A (n 114) 309.
\textsuperscript{556} Ds 2014:33 (n 552) 35–36.
\textsuperscript{557} 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 1998 not 213; RÅ 1999 ref 33; RÅ 2000 not 86 (though it should not be particularly difficult to identify the company with the help of other information in the judgement); RÅ 2001 not 164; RÅ 2002 not 210.
cases secret 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 are required to cooperate with social services for interventions among children and youths. There are secrecy-breaking rules that apply at a more general level, such as those mentioned in subsection 3.4.2 on secrecy in relation to the individual, or rules that allow the exchange of secret information between authorities. PAISA Chapter 27 §§ 7-8 provide secrecy-breaking rules specifically related to tax information.

These two sections provide rules that breach the secrecy set forth in sections 1-4. For instance, according to § 1 para 2 item 1 secrecy applies to information in the tax database. Section 7 item 2 contains a provision making it possible to, despite the secrecy provided in § 1, disclose certain information to an individual, by stipulating that such information can be disclosed, notwithstanding secrecy, in accordance with the provisions in the Tax Database Act. This provision contains a straight requirement of damage – that is, the presumption is that the information is public. It is stated that the information may be disclosed unless if for a particular reason it can be assumed that a disclosure would cause damage to the individual or to someone closely related. An enumeration of information that may be disclosed is found in Chapter 2 § 5. Information that may be disclosed in accordance with this provision is, inter alia, the name and personal or corporate identity number, legal form, type of business activity, registration of liability to make tax deductions or pay employer’s contributions, and decisions on liquidation or bankruptcy. Section 8 provides for the possibility of disclosing information regarding an individual’s bankruptcy to the trustee, notwithstanding secrecy.

3.4.8 Summary of the Swedish Tax Confidentiality

The core of the Swedish tax secrecy legislation is found in PAISA Chapter 27. The basis for these rules is found in constitutional law – FPA Chapter 2. FPA provides the right of public access to official documents and the

558 Lag (2001:181) om behandling av uppgifter i Skatteverkets beskattningsverksamhet
559 RÅ81 2:47 (n 401); RÅ83 Ab 124 (n 401) information concerning whether an individual is registered for VAT and information on whether a company is registered as an employer is not covered by this provision, as to why such information is not public.
possible restrictions to that right. Tax secrecy falls under FPA Chapter 2 § 2 item 6, stating that the right of access to official documents may be restricted if such restriction is necessary with regard to the protection of the personal or economic circumstances of individuals.

Simplified, the rules on tax secrecy afford that information in tax returns is protected by secrecy but that decisions are public. It is important to note that it is the information in a tax return that is protected by secrecy, not the tax return itself. That is to say, a tax return is an official document in accordance with the rules in FPA Chapter 2, since a tax return is held and received by a public authority (the Tax Agency). However, access is restricted through rules on secrecy in PAISA Chapter 27. This means, briefly, that information on the calculated income of a particular source of income is public, but the separate information on income or deduction in the acquisition source is confidential.\textsuperscript{560} For instance, the total amount of earned income or capital income is public because it occurs in a decision, but the source (or sources) and any deductions remain secret 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 set up a decision containing the reasons for that decision, the deduction that is otherwise protected by secrecy under § 1 becomes public information under § 6. Subsequently, secrecy in PAISA Chapter 27 § 1 does not protect the tax return as a document, but protects the information within it from disclosure.

Section 1 affords semi-absolute secrecy on, \textit{inter alia}, information in tax returns. Section 2 also provides semi-absolute secrecy with regard to information in certain specified matters, such as special matters on audits or other controls on taxes, affairs on tax compensation or tax refunds, issues on deferment of payment on tax, and matters on cash registering.

The high level of secrecy under §§ 1 and 2 (with the exception of § 2 para 2) is compensated by a corresponding high level of transparency in tax court proceedings (and court judgments) and public decisions. Accordingly, information protected by secrecy under 1 may be publicly accessible under either § 4 or § 6.

Transparency in respect of 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 secret if it is concluded that disclosure would cause damage to the individual in question. The straight requirement of damage in § 4 provides a stark contrast to the semi-absolute secrecy provided in § 1. Though transparency is not com-

\textsuperscript{560} Prop 1989/90:74 (n 509) 299.
plete, public access is the presumption, which weighs heavily on the side of the right of public access to official documents. This weakening of tax secrecy is enhanced by the rules in PAISA Chapter 43. According to § 8 a secrecy provision that applies to information in a case in a court's judicial or law enforcement activities ceases to be applicable in such a case if the information is included in a judgment. This means that tax information that enjoys secrecy protection under PAISA Chapter 27 in principle loses its secrecy protection when included in a judgment. The reason for this openness, according to preparatory works, is that the public should have as great an insight into court activities as possible and that court judgments as far as possible should be public. However, this provision provides the court with the possibility of deciding that a secrecy provision that applies to certain information shall also continue to apply to that information when it is part of a judgment.

An even starker contrast to the semi-absolute secrecy is § 6, which provides for total transparency of decisions. That is, there is no restriction on the level of transparency with regard to the decisions embraced by this provision. Additionally, under § 2 para 3 secrecy does not apply to decisions on affairs on tax compensation or tax refunds and on issues on deferment of payment on tax. This means that there are other types of decisions than those covered by § 6 that are subject to full disclosure.

The public nature of tax decisions is the most eye-catching feature of the Swedish tax secrecy regime. The reason for such wide transparency is basically that the constitutional right of public access to official documents is the starting point and secrecy is the exception in Swedish secrecy legislation. A rule prescribing complete secrecy is inconsistent with this basis. That there is a strong need for protection of privacy in the tax field is recognized in preparatory works. In the inquiry report presented during the drafting of the Secrecy Act of 1980 it was expressed that one could well imagine tax assessment being altogether a private matter between the individual and the tax authorities. However, there is a significant interest of transparency. In the taxation field, as in many other areas of the law, public access has great importance from a rule of law perspective. Public access is of great importance in matters where authorities appear as bearers of public authority. The transparency interest is met through providing

561 Prop 1979/80:2 Del A (n 114) 102.
562 Ibid 256.
563 Ibid 256–257.
564 SOU 1975:22 (n 383) 224.
public decisions and a high level of transparency in tax court proceedings.\textsuperscript{566} Swedish law requires public authorities to justify their decisions.\textsuperscript{567} The transparency afforded by § 6 includes the decision as a whole, that is to say, it includes the justification for the decision.\textsuperscript{568} The conflict of interests that the issue of public decisions carries includes the taxpayer’s interest in having a thorough justification for the decision in order to ensure that his or her assessment is correct and that the tax laws are applied correctly. However, access to decisions is not only of interest to the individual to whom the decision pertains, but also because public decisions provide people with the opportunity of scrutinizing the work of the administration. Public decisions, including the rationale, facilitate to a high degree insight into how the assessment work is carried out. People are able for themselves to examine whether or not the tax administration has applied the tax laws correctly and if taxpayers are treated equally.

Since § 4 requires a damage assessment to be conducted prior to disclosure, which is not required in §§ 1 and 6, tax secrecy in court proceedings is more complex than the secrecy provided for in the Tax Agency (apart from § 2 para 2 that contains a reverse requirement of damage to be applied at the Tax Agency in certain matters).\textsuperscript{569} The fact that the tax administration deals with a larger amount of tax matters each year than the court and that the court might be better equipped for applying a requirement of damage appear to be the reasons justifying this difference.\textsuperscript{570}

A requirement of damage is, as implicated in the foregoing paragraph, furthermore found in § 2 para 2, stating that secrecy applies concerning an individual’s personal and economic circumstances in matters under the Act on the Tax Agency’s Handling of Certain Creditor Undertakings unless it is clear that the information can be disclosed without causing damage or harm to the individual concerned. This Act applies to the recovery of debts where the government is a creditor, such as taxes and charges. This provision contains a departure from the semi-absolute secrecy otherwise stipulated in § 2. The reason for this is that such undertakings were subject to a reverse requirement of damage when dealt with by the Enforcement Authority.

\textsuperscript{566} Prop 1979/80:2 Del A (n 114) 256–257.
\textsuperscript{567} See subsection 3.4.4.
\textsuperscript{568} A thorough analysis with regard to public decision is provided in subsection 6.3.
\textsuperscript{569} Note the reversed requirement of damage in PAISA Chapter 27 § 2 para 2.
\textsuperscript{570} Prop 1979/80:2 Del A (n 114) 253–254.
According to § 2 para 3 item 1 secrecy does not apply to decisions in such matters. It is stressed in this thesis that this provision raises the issue of whether agreements between a taxpayer and the Tax Agency liable for payment of a tax debt pertaining to a legal entity falls under the reverse requirement of damage in para 2 or para 3 on the public nature of decisions in such matters.

3.5 Swedish Tax Confidentiality and the Benchmarks

3.5.1 Introduction
This part of the thesis aims at evaluating the Swedish tax secrecy legislation, or, more specifically, its most prominent features (summarized in the foregoing subsection). This is done by connecting the law as it stands and the statements in the preparatory works with the theoretical framework presented in Chapter 2.

3.5.2 Tax Compliance
This subsection entails the evaluation of the Swedish tax secrecy legislation against the benchmark regarding tax compliance set out in subsection 2.2, including fair treatment of taxpayers and taxpayer trust in tax administration.

As has been shown, there are several reasons for tax compliance. Both deterrence and norms are important as to whether or not a person chooses to comply. Rules can be followed primarily in order to avoid informal or formal punishment or a person can choose to comply with rules chiefly because of social norms. In the latter case rules are complied with quite voluntarily because they are regarded as representing the right thing to do. Most people obey rules not because they are afraid of being caught and punished for not doing so, but because they regard it as right, especially when others are seen to be doing so. Subsequently, the risk of detection and punishment is less important than the influence of norms and moral values.

Norms involve reciprocity, that is, the taxpayer repays the behaviour of others. In short, this means that people are more likely to pay taxes if they believe that “the others” do so. Correspondingly, people are more likely to cheat on their taxes if they perceive the social norm to be on of non-compliance – that others cheat.

Besides deterrence and norms, trust in the tax administration and the perception of fairness in the tax administration’s procedures have an im-

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571 See subsection 2.3.
pact on tax compliance. If taxpayers feel unfairly treated by a tax administration this can lead to a decrease in taxpayer trust. This decrease can then go on to negatively affect voluntary tax compliance. Congruently, if taxpayers believe that the tax administration treats taxpayers equally this increases their trust in the tax administration. A high level of trust in turn increases the likelihood of voluntary tax compliance. Tax transparency could help nurture taxpayer trust in the tax administration because if taxpayers are able to take part in the tax administration’s procedures they can decide for themselves whether or not the tax administration treats taxpayers fairly and equally.

Accordingly, rules on tax confidentiality (or perhaps rather rules in favour of tax transparency) should enhance voluntary tax compliance if the rules are formed primarily on the basis of creating or upholding a compliance norm, or both. Focus should be set on reinforcing compliance norms rather than using tax confidentiality rules as a deterrence method to make taxpayers comply. Rules on tax confidentiality (or tax transparency) should be applied in ways that do not (only) evoke deterrence, but rather create trust and promote strong social compliance norms.

Moreover, a high level of tax transparency enhances the demands on the tax administration in its dealings with the taxpayer’s affairs, which in turn should enhance the quality of its work, thus increasing the taxpayer’s trust in the tax administration, and as a further consequence increasing tax compliance.

Based on the above, it can be held that PAISA Chapter 27 § 1, prescribing semi-absolute secrecy with regard to information in tax returns, does not promote tax compliance as it does not open the way for public access to information. However, transparent tax returns do not to a great extent offer insight into the tax administration’s activities, which is the main purpose behind the right of public access to information. Transparent tax returns rather reveal only raw tax information submitted to the tax administration by the taxpayer. It does not show how the tax administration carries out its duties in respect of, for instance, tax assessment. For this reason semi-absolute secrecy in terms of tax returns should not provide any particular costs with regard to tax compliance.572

Section 6, which provides for public decisions, should correspondingly have an impact on tax compliance. Public decisions afford the public insight into how the tax administration carries out its duties. That is to say, a decision on the tax administration deviating from a submitted tax return

572 For more on confidentiality of tax returns and tax compliance, see subsection 6.2.
by not approving a deduction claimed shows the reasons for this position. This nurtures the taxpayer’s trust in the tax administration in that it enables individuals to gain insight into the actual assessment work to examine whether the tax administration applies the tax laws correctly and treats taxpayers equally. Such a perception enhances the prospects of voluntary compliance.

The same applies as to § 4, providing for transparency with regard to tax information in court proceedings. This is because even though § 4 affords a limitation to transparency in terms of a straight requirement of damage, it should provide enough transparency to entail such benefits as the above stated. The benefits of transparency in terms of tax compliance should furthermore be enhanced through the provisions in PAISA Chapter 43 stating disclosure of tax information when included in a court judgement, since this widens the scope of transparency with regard to tax information. These chances of achieving these benefits should be further improved by PAISA Chapter 43 § 8, which prescribes even greater transparency with regard to court decisions.

Transparency in court proceedings and public decisions might give the impression that non-compliance is wide-spread. For instance, disclosure of decisions could to a great extent reveal non-compliance, since the tax administration is required to provide detailed decisions when deviating from a tax return submitted by a taxpayer. As earlier held, the non-compliant behaviour of others could create a picture of cheating being rife, which in turn could create the perception of a norm that says: “Cheating is ok”. If non-compliance is the norm, then more taxpayers will adhere to that norm and therefore cheat on their taxes. However, a decision (as well as tax cases before the court) showing non-compliant behaviour most probably also includes the fact that the tax administration has detected the errant taxpayer and moreover corrected the information in his or her tax return, making the non-compliant taxpayer pay the right amount of tax (and perhaps also penalty fees). Though the decision shows that a taxpayer has cheated, which could create a non-compliance norm, the fact that the tax administration has detected the fraud and taken measures to correct it, should weigh up the risk of the formation of the non-compliance norm and instead increase the likelihood of the taxpayer obeying the tax laws.

Subsequently, §§ 1, 2, 4 and 6 (together with Chapter 43 § 8) provides no particular threats to tax compliance, since the high level of tax secrecy afforded in §§ 1 and 2 does not withhold information on how the Tax

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573 A more in-depth evaluation of public decisions is found in subsection 6.3.
Agency carries out its duties and that §§ 4 and 6 provides considerable access to information of such kind.

### 3.5.3 Administrative Costs

This section entails the evaluation of the Swedish tax secrecy legislation against the benchmark regarding administrative costs. It takes its starting point in three of the four different steps that have been identified, namely 2) review, 3) reproduce, and 4) disclose. The second involves the tax administration needing to review the information to determine whether any of the information falls under any rule exempting it from disclosure. If so, the tax administration might need to make deletions to make the information ready for disclosure, or if the information is secret in its entirety, give the requester some sort of notification in respect of why the information may not be disclosed. In the third step, the tax administration must reproduce the information (that is, providing it may be disclosed). The fourth step involves sending the information to the requester.

The costs are presumably the highest and the most difficult to calculate within the second step. Calculating the costs of the second step includes estimating the hours of work put into the application of the confidentiality rules. Within the second step lies the aspect of easily accessible and easily understandable confidentiality legislation. Too complicated rules will inevitably require more resources in terms of time or staff, or both. Complicated rules on tax confidentiality furthermore risk lengthening the procedures, in turn increasing costs. If the tax administration needs to take special steps to extract information, verify it or correct errors before transmitting it, the costs will be greater than if no special steps are required. Simple and less formal procedures facilitate the efficiency and speed of the procedures. Making sure that tax confidentiality legislation is clear and easily applicable is thus important when designing rules on tax confidentiality.

Arguments regarding the value of having easily applicable rules and the fact that tax matters often entail for the individual sensitive information is highlighted in preparatory works. The advantage of having easily applicable secrecy rules is noted in the preparatory works, especially when dealing with matters that amount to several millions per year, which is the case for the tax administration.

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574 This first step (search) is delineated from the scope of this thesis, as it relates to the tax administration’s record-keeping, in itself a delineated issue (see subsection 1.5).

The rules provided in PAISA Chapter 27 §§ 1, 2 and 6 are rather easy in their application, in that the first rule provides (semi-)absolute secrecy and the second full disclosure. Neither rule requires a damage assessment, redaction of information, or other action to be performed prior to disclosure or non-disclosure. Thus neither PAISA Chapter 27 § 1 nor § 6 induces high costs on the tax administration within the second step of the chain of identified administrative costs. These rules consequently have significant advantages with regard to administrative costs. However, PAISA Chapter 27 § 6 induces costs within the third and fourth step, that is to say, on reproducing and actually disclosing the decision. How high the costs are depends on the amount of copies and in what form the decision is disclosed (for instance, whether paper or electronic copies).

It should primarily be §§ 2 para 2 and § 4 that induce higher costs on the Tax Agency, since these provisions contain requirements of damage. Additionally, § 2 para 2 might induce higher costs than § 4 because it contains a reverse requirement of damage, which enables a more thorough damage assessment than the straight requirement of damage in § 4.

3.5.4 Taxpayer Privacy

This subsection provides an evaluation of the most prominent features of the Swedish tax secrecy regime against the third benchmark – taxpayer privacy. This is conducted in accordance with the conclusions regarding the benchmark on taxpayer privacy, suggesting that the evaluation of different tax secrecy rules against the benchmark of taxpayer privacy is to be made by starting with the consideration as to whether the rules provide disclosure of personal tax information. If they do, privacy is violated. It is not necessary to consider the nature of the information disclosed or the consequences of disclosure when determining whether there has been a breach of taxpayer privacy. The scope of the violation is instead of interest when determining whether or not it is legitimate. This thesis stops at providing discussion on the scope of the violation. That is to say, its legitimacy is left to each jurisdiction to determine. When dealing with the scope of tax privacy violations consideration is to be made as to the type of information that the rules permit may be disclosed, the way in which it is disclosed, and the possible consequences of disclosure.

Confidentiality of an individual's personal or financial circumstances concerning taxation is primarily based on the individual's interest in privacy protection. Preparatory works hold that most taxpayers would consider it an invasion of privacy if information in their tax returns were to be

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576 RÅ 1986 ref 163 (n 400).
made public, though some of it in itself is fairly unremarkable. The taxpayers’ far-reaching duty to provide information about personal economic circumstances places particular weight on the interests of secrecy protection.577 The reasons given for a high degree of secrecy in the tax area, however, must (according to the preparatory works) be set against the constitutional right of public access to official documents and that secrecy should be the exception to that rule.578 There are strong reasons from a principal perspective for a wide transparency in the tax area. Taxes and public fees are essential for society and the citizens’ interrelationships.579 The undertakings of the tax administration often have great influence on the individual’s personal finances. The tax administration’s decisions are typically regarded as being intrusive to the individual.580 The balancing of interests, as stated, has resulted in a high level of secrecy on information in tax returns, but a correspondingly high level of transparency in terms of decision.

The provision in PAISA Chapter 27 § 1 of semi-absolute secrecy with regard, for instance, to information in tax returns does not generate any lively debate in terms of taxpayer privacy protection. The most eye-catching feature of the Swedish tax secrecy regime from a privacy perspective is instead the rule providing for transparency in respect of tax administration decisions, § 6.

Public decisions mean that information otherwise protected by secrecy is made publicly accessible. For instance, any deduction claimed in a tax return, in accordance with § 1, is secret. However, if the tax administration decides not to approve this deduction, that is, to deviate from the submitted tax return, the deduction and the reasons as to why the tax administration disapproves the deduction become public information, since it is contained in a decision embraced by § 6. As the chosen demarcation of privacy violation holds that a breach occurs upon mere disclosure, determining whether this rule affords a breach of privacy is no difficult task: the answer is a definite yes. Section 6 affords a violation of taxpayer privacy because it provides disclosure of decisions containing taxpayer information.

Another rule, providing a high level of transparency is § 4, which affords a straight requirement of damage concerning tax information in court proceedings. The conclusion that this also involves taxpayer privacy violations is obvious, since the rule provides for disclosure of taxpayer

577 Prop 1979/80:2 Del A (n 114) 256.
578 Ibid 253.
579 Prop 1979/80:2 Del B (n 380) 409.
information. However, since this rule contains a requirement of damage, the scope of the infringements may be more restricted than disclosure in accordance with § 6.

The provisions in PAISA Chapter 43, which prescribes transparency regarding information contained in a court judgement, further widens the scope of transparency and thus also the existence of privacy violations. The court, however, also has the authority to decide whether secrecy under Chapter 27 shall remain concerning information in court judgements, which affords the possibility of restricting disclosure.

It has now been concluded that §§ 4 and 6 and the rules in Chapter 43 involve violations of taxpayer privacy. The next step is to demarcate the scope of the infringements, which means studying the type of information that the rules permit may be disclosed, the way it is disclosed, and the possible consequences of disclosure.

Information on an individual’s economic circumstances is considered to be typically sensitive from a privacy perspective. However, purely personal details are rated as being more deserving of protection than economic circumstances.\(^{581}\) The preparatory works specify certain information that is considered to be of such a nature that a disclosure would cause damage or harm to the individual. Information on membership of registered religious communities and trade union membership has been considered to be particularly sensitive.\(^{582}\) A tax return could furthermore contain information on illness, for instance, as the basis for deduction for reduced ability to pay tax. The disclosure of such information (according to preparatory works) is generally assumed to cause damage to the individual. Data relating to gains and deductions is normally also considered to be secret.\(^{583}\) Nonetheless, case law holds that information on illness and deductions do not always enjoy secrecy protection. Requested information containing details about the taxpayer being ill on the completion of the tax return, the description of a house, and information on an improperly made deduction, was considered to be of such a general nature that it could be assumed that disclosure would not cause harm to the taxpayer.\(^{584}\) Though this case might appear to contradict the statement in the preparatory works the conclusion can be drawn that it does not constitute a denunciation of preparatory works, but rather accords with them. This is because while discl-


\(^{583}\) Prop 1979/80:2 Del B (n 380) 259.

\(^{584}\) RÅ81 2:35 (n 543).
sure of information revealing that a taxpayer suffers or has suffered from a disease can in general be considered to cause harm to the taxpayer, it need not always be the case.\textsuperscript{585}

Information that has been considered harmless, and thus may be disclosed, is the name and address of the taxpayer and place of residence.\textsuperscript{586} However, information such as this, regarded as harmless when occurring in a tax return, has been considered highly sensitive and hence requiring secrecy protection when it is contained in an advance ruling. Advance rulings often contain tax issues regarding ownership changes in businesses, the use of patents, new forms of marketing, etc. This constitutes a very strong interest for secrecy protection. Guarantees for non-disclosure could be decisive for the application for an advance ruling.\textsuperscript{587}

The Supreme Administrative Court has noted that with regard to advance rulings it is, on a regular basis, of the utmost importance that secret information is not revealed.\textsuperscript{588} The Supreme Administrative Court has furthermore held that advance rulings may be disclosed provided that information such as name, address, identification number, registration number, area of business, ownership, and shareholdings, may not be disclosed. By redacting this information in the advance ruling, the risk of damage occurring upon disclosure is eliminated, as the advance ruling after redaction cannot be attributed to a particular taxpayer.\textsuperscript{589} Subsequently, it is clear that the sensitive nature of information and thus whether it needs to be protected by secrecy in order not to constitute unwarranted privacy violations depends on the situation in which the information occurs.

Furthermore, the conflict between the interests of transparency and those of protecting trade secrets was noted in the comments during the referral treatment of the proposed new Secrecy Act. From a decision on debit of advertising tax, it could in some cases be directly read what advertising volume the taxpayer has. This kind of information can be considered worthy of secrecy protection.\textsuperscript{590} However, in the government bill the rapporteur stated without any further analysis that decisions on such matters ought not to be secret.\textsuperscript{591}

\textsuperscript{585} Ekroth and Kristoffersson, ‘Skattesekretess i domstol’ (n 345) 95. See also subsection 3.4.5.
\textsuperscript{586} Ds Ju 1977:11 Del 2 (n 388) 535–536.
\textsuperscript{587} Prop 1979/80:2 Del B (n 380) 425–426.
\textsuperscript{588} RÅ 1992 ref 9 (n 550).
\textsuperscript{589} RÅ 2002 not 172 (n 550).
\textsuperscript{590} Prop 1979/80:2 Del B (n 380) 420.
\textsuperscript{591} Prop 1979/80:2 Del A (n 114) 260.
Since § 6 states full disclosure of decisions, it is theoretically possible (though rather unlikely) that a tax return in its entirety is made publicly accessible. It is more often the case that the decision concerns one or a few selected items in the tax return. However, every bit of information contained in a tax return could be publicly accessible as the Tax Agency might decide to audit any item in the tax return and thus include the information in a subsequent public decision. Consequently, the scope of taxpayer privacy violation provided by § 6 is somewhat extensive in terms of the kind of information that may be disclosed.

It is suggested above that the scope of taxpayer privacy violation under § 4 is more limited than that under § 6, as the former rule contains a requirement of damage and therefore provides an opportunity to deny disclosure of certain information due to a risk of harm or damage. The straight requirement of damage presumes transparency to be the main rule and provides for secrecy only if it can be assumed that disclosure causes damage or harm to the individual. This thesis and other research, however, conclude that the court in the application of this rule often presumes confidentiality to be the main rule – that is, the court often applies a reversed instead of a straight requirement of damage.\(^{592}\) The limitation to the scope of the privacy violations afforded by the straight requirement of damage is thus in practice even stronger.

Previously in this subsection it has been held that the rule on semi-absolute tax secrecy provided by § 1 does not generate any lively debate in terms of taxpayer privacy protection. This is true considering that this level of secrecy provides a very high level of protection of privacy. However, the last paragraph of this section reveals an issue that needs to be considered when demarcating the scope of privacy violations. Section 1 para 5 entails a time limit for confidentiality by stating that secrecy in accordance with § 1 applies for twenty years. After twenty years, confidentiality ceases and full disclosure applies.

Twenty years is the standard time limit for information regarding an individual’s economic circumstances.\(^{593}\) The preparatory works proposed that the secrecy period should be set to a maximum of twenty years in cases where the reason for secrecy is of a predominantly economic nature.\(^{594}\) However, the protected information relates not only to economic circumstances but to both personal and economic states of affairs. Though in line with the proposal on setting the time limit to twenty years where the

\(^{592}\) Ekroth and Kristoffersson, ‘Skattesekretess i domstol’ (n 345) 100.

\(^{593}\) Prop 1979/80:2 Del A (n 114) 87.

\(^{594}\) SOU 1975:22 (n 383) 19 and 225.
economic nature of the information is predominant, I contended that it is odd that there is no further discussion on the time limit for tax secrecy with reference to privacy violations, since the sensitive nature of tax information is continually highlighted in preparatory works. The choice of using the standard time limit for economic circumstances of twenty years suggests that only economic damage is concerned, and that privacy violations causing harm of a nature other than the economic are of minor concern. This, in my view, is inconsistent, especially in considering reducing the time limit of 30 years when transferring matters under § 2 para 2 from the Enforcement Authority to the Tax Agency.\footnote{595 See subsection 3.4.3.}

For much of the times information in a tax return is most sensitive when it is current and as time passes the risk of damage or harm upon disclosure usually decreases. However, it cannot be disregarded that a tax return might hold information the disclosure of which could cause harm to the individual even after a long period of time. A tax return might contain information regarding a taxpayer’s health, such as illnesses (physical or mental, or both), disability, medication, and religious affiliation. The harm incurred upon disclosure of information regarding a taxpayer’s health might not decrease to the same extent as information on income, since an illness may well be permanent. Consequently, information on personal circumstances might need protection for a longer period than that on economic circumstances.

Another aspect worthy of consideration when discussing the scope of a privacy violation is (as stated) the way public information is disclosed. The rules extracted and evaluated in this and the foregoing subsections do not provide any provisions on how information may be disclosed. Access to such information is provided in accordance with the rules in FPA, affording that requests for information are to be directed to the authority keeping the information, FPA Chapter 2 § 14. There is no requirement for written requests. Any person wishing to obtain public tax information may thus turn to the Tax Agency (or the court, if the request concerns tax information in court proceedings), either in writing, by physically visiting a Tax Agency office (or the court), or by contacting the Tax Agency (or the court) by telephone. The actual disclosure of the requested information may be provided in different ways, FPA Chapter 2 §§ 12-13. As far as possible, the authority shall provide the requester the opportunity of reading the public information at that place. Requesters are furthermore entitled to obtain a transcript or a copy of the document on payment of a fee.
According to the above, it is possible to obtain information on a person’s taxable income over the telephone.

Subsequently, the Swedish rules thus provide different methods by which a person may request and obtain public information, thus making it fairly easy to gain access to it. Much tax information is publicly accessible, but a person wishing to obtain it must take certain steps to gain access. A telephone call to the Tax Agency to obtain certain public tax information is probably easier than if a written request is required. However, while access is not as easy as getting it over the Internet, the rules do not provide for any far-reaching restrictions on access.\textsuperscript{596} This provides a certain limitation to the scope of privacy violations.

The third aspect to consider in demarcating the scope of privacy violations is that of possible consequences. Different consequences of disclosure have been presented earlier,\textsuperscript{597} inter alia, possible embarrassment or humiliation, blatant comparisons (favourable or unfavourable) with others, commercial solicitation (for instance, by purveyors of luxury goods or investment management) and the risk of being the target of crime – such as scam artists or kidnappings for ransom. Another aspect that could justify a high level of privacy protection is the possibility, enhanced by modern technology, of bringing together and reviewing large amounts of information. Even relatively innocuous information can if aggregated with other details provide a complete picture of a person’s circumstances, which may result in an unwarranted invasion of privacy. Consolidated bits of information, each part relatively uninteresting, can when aggregated be capable of making a portrait of a person’s life. The potential to quickly compile many details about a person is deemed to be a threat to personal privacy.

Possible consequences of disclosure mentioned in Swedish preparatory works are instances of someone being exposed to contempt, violence or harassment, and of a showing worsened business results.\textsuperscript{598}

Both the enumerated consequences in subsection 2.5.3, as well as the consequences held in Swedish preparatory works, need to be considered. Certain consequences might be at greater risk of occurring than others. For instance, while Sweden is not immune from crime (such as kidnappings for ransom) it is perhaps still less prevalent than in other countries.

Before concluding this subsection the following should be noted. As previously asserted easily applicable rules, such as §§ 1 and 6, facilitate the

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\textsuperscript{596} For a more thorough discussion on the different ways of gaining access to public tax information, see subsection 6.10.
\textsuperscript{597} See subsection 2.5.3.
\textsuperscript{598} Ds Ju 1977:11 Del 1 (n 373) 134–135; Prop 1979/80:2 Del A (n 114) 83.
\end{flushright}
handling of secrecy matters and thus provide benefits in administrative costs.\(^{599}\) Easily applicable rules do not only provide benefits in that regard, but also make it easier for the individual to determine whether one’s personal information is protected by secrecy or if certain information that one wishes to obtain is secret or public.\(^{600}\) This enables people to have greater control over their information, which is beneficial from a privacy perspective. Moreover, complicated tax secrecy rules may not only jeopardize efficiency, but also to a greater or lesser extent put up unwarranted restrictions on the right to information as well as providing for illegitimate violations of privacy, since complicated rules hampers applications and open the way for misinterpretation. Sections 1 and 6 are rather easy in their application, in that the first rule provides absolute secrecy and the second full disclosure. There is no damage assessment, no redaction, or other actions to be performed prior to disclosure. The room for misinterpretation, abuse and other types of action providing unwarranted application of the rules are minimized.

To summarize, in this subsection the most prominent features of the Swedish tax secrecy regime are evaluated against the benchmark on taxpayer privacy. The scope of taxpayer privacy violations with reference to Swedish tax secrecy is demarcated by depicting the kind of information the disclosure of which is permitted by Swedish secrecy legislation, the different ways by which disclosure is provided, and possible consequences of disclosure in terms of privacy invasions.

Public access is of significant importance in matters where authorities appear as bearers of public authority. Hence the interests of transparency in this field are abundant. Against the transparency interest stand the interests of taxpayer privacy protection, a reason justifying confidentiality to a greater or lesser extent. Swedish tax secrecy provides high privacy protection by affording semi-absolute secrecy with regard to information in tax returns, § 1. This high level of protection, however, is severely weakened by the provisions in §§ 4 and 6 (together with Chapter 43 § 8), which afford a high level of transparency.

A rule providing for total transparency of tax administration decisions, such as § 6, unquestionably provides a remarkably low level of protection of taxpayer privacy. Section 4 also provides a high degree of transparency, but as it provides a requirement of damage it affords a higher protection of privacy than § 6. Though these rules bear costs in terms of taxpayer privacy by granting such a low level of confidentiality, they do not provide as

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\(^{599}\) See subsection 3.5.3.

\(^{600}\) Prop 1979/80:2 Del B (n 380) 123.
low a privacy protection as a rule on full transparency of tax returns, since a decision rarely includes every detail in the tax return. However, the rules on transparency with regard to Tax Agency decisions and tax court proceedings provide that information that otherwise may be protected by confidentiality can be made public. For instance, transparent decisions may reveal any deduction, including the reasons for such deduction, the source of an income, employment status, disability status, associations and club memberships, religious affiliation, mortgage costs, marital status, child support and alimony, and the amount and size of gifts to family members and others. Much of this material is of such a kind that it reveals highly personal information. Thus, §§ 4 and 6 to a great extent threaten taxpayer privacy. Due to the fact that a rule on transparent decisions poses a substantial threat to taxpayer privacy, great responsibility is put on tax officers when writing their decisions. Immense care is required so as not to include any excess information in the justification.

3.5.5 Summary of the Evaluation against the Benchmarks

In the foregoing subsections the most prominent features of the Swedish tax secrecy regime were evaluated on the basis of the benchmarks, tax compliance, administrative costs, and taxpayer privacy. To summarize: first, the Swedish tax secrecy regime has benefits with regard to tax compliance, as public decisions and transparency in tax court proceedings offers considerable insight into the tax administration’s assessment activities, thus forming a sound basis for monitoring. Assuming that transparency reveals a trustworthy tax administration, together with complying taxpayers, it promotes tax compliance in that it enhances vertical as well as horizontal trust. Second, administrative costs are not exorbitant, because they are primarily induced in the third and fourth step of the disclosure chain, that is to say, in reproducing and disclosing information. PAISA Chapter 27 §§ 1, 2 (except § 2 para 2) and 6 are rather easy in their application, in that § 1 provides semi-absolute secrecy and § 6 full disclosure. Section 2 gives provisions for both semi-absolute secrecy (para 1) and full transparency (para 3). There is no damage assessment, no redaction, or other action to be performed prior to disclosure. It is primarily § 2 para 2 and § 4 that induce costs in the second step, as they hold a requirement of damage, requiring more recourses in their application. Section 6 item 1 also induces certain administrative costs, since this prescribes secrecy in respect of advance rulings, thus requiring redaction of information. Third, full transparency of tax administration decisions and the rather high level of transparency afforded by the straight requirement of damage have costs with re-
gard to taxpayer privacy because such a regime provides low protection of individual tax information.

3.6 Summarizing Chapter 3

This subsection provides a summary of Swedish tax secrecy legislation as dealt with in this chapter.

One specific feature of the Swedish constitutional tradition is the widespread transparency in public administration and the principle of public access to information, most commonly associated with the right of public access to official documents, FPA Chapter 2 § 1. This right, holding that each citizen may gain access to official documents, is limited by rules on secrecy – that is, rules based on interests deemed to override the interests of transparency. Any restrictions on the right of public access to official documents based on these interests are laid down in a special act of law, namely PAISA. The aim of the secrecy rules is that secrecy shall apply only to the extent necessary to protect the interests underlying the confidentiality provision, that is, to avoid any form of secrecy for safety’s sake.

One of the disclosure-protected interests enumerated in the FPA is the protection of personal or economic circumstances of individuals, FPA Chapter 2 § 2. Information on an individual’s economic circumstances is considered typically sensitive from a privacy perspective, though information on personal circumstances is deemed to be even more worthy of secrecy protection. Tax secrecy falls under this interest.

Tax secrecy as an exception to the right of access to official documents was enacted through changes in the FPA 1903, later transferred from the FPA to the Secrecy Act of 1937. This act underwent thorough systematization in the late 1970s, ending in the new Secrecy Act of 1980. Today, the rules governing secrecy of the individual’s tax information are found in PAISA Chapter 27.

PAISA Chapter 27 shows that the Swedish rules on tax secrecy dealt with in this thesis hold three different levels of secrecy. That is, the rules contain semi-absolute secrecy (§ 1 and 2), the straight requirement of damage (§ 4), and the reverse requirement of damage (§ 2 para 2).601

The requirements of damage are constructed so that in order for secrecy to apply there must in the particular case be a likelihood of damage occurring upon disclosure of information. The straight requirement of damage

601 If adhering to the separation between absolute secrecy and semi-absolute secrecy, PAISA Chapter 27 contains four levels of tax secrecy, since § 5 contains absolute secrecy in terms of international agreements. However, this section is not dealt with in this thesis.
presumes public access to be the main rule, but secrecy is possible if it can be assumed that disclosure would cause damage to the individual concerned. The reverse requirement of damage on the other hand, presumes secrecy to be the main rule, but disclosure is possible if it is manifestly evident that disclosure would not cause damage to the individual. Both of these require a damage assessment to be performed by the tax officer, though the frames for the assessment are broader as regards the straight requirement of damage than that of the reverse requirement of damage. The highest level of secrecy is gained through absolute secrecy. In these cases there is no requirement of damage, but the information is always secret, unless there are any secrecy-breaking rules, the presence of which makes the level semi-absolute.

As held, § 1 prescribes semi-absolute secrecy. That is, secrecy applies to information about an individual’s personal or financial circumstances in activities relating to the determination of tax or establishing the basis for determining such tax. Secrecy in accordance with this rule applies for 20 years, § 1 para 5.

The main reason for the high degree of secrecy in tax matters pointed out in preparatory works is the far-reaching duty of taxpayers 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 held in preparatory works is the number of people affected by tax matters each year. However, the importance of upholding the principle of public access to official documents is emphasized in preparatory works. The high level of secrecy in tax matters must be set against the constitutional principle that official documents are public and that secrecy should be the exception to that rule. It is recognized that there is a significant interest of transparency.

This interest is, inter alia, met through the public nature of decisions. Under § 6, secrecy does not apply to decisions determining tax or pension-entitled income. This provision includes decisions on the charging or adjustment of provisional tax; decisions on taxation; decisions on the imposition of a special tax assessment on real estate; those on the rectification of past decisions as well as decisions on additional assessment; and decisions whereby tax assessment is adjusted or dropped. Certain explicitly mentioned decisions, such as advance rulings, are exempted from this rule. However, in respect of advance rulings secrecy applies to information identifying a specific taxpayer and not to the legal conclusion of the ruling.

The rules on tax secrecy afford that information in tax returns are secret, but that the decisions are public. On the public nature of decisions, this applies both to the decision itself as well as the reasons that settled the
outcome. From this it follows that information on the total amount of earned income or capital income is public because it appears in a decision, while the source or sources and any deductions are secret because that information stems from the tax return. Notwithstanding, this latter information may be disclosed if the Tax Agency conducts an audit regarding this particular item and thus includes the information in a decision.

As mentioned, public decisions are a means of balancing the otherwise high level of secrecy in tax matters. Another means is found in § 4, setting up a straight requirement of damage with regard to tax information in court proceedings. The requirement applies to all information relevant to the case, that is to say, the information must relate to a matter that is subject to judicial review. This means that if a claim in a tax return regarding a certain deduction is under appeal, only that information and not the entire tax return is subject to the openness prevailing in tax proceedings.

As for the evaluation of the Swedish rules on tax secrecy against the benchmarks, the following is concluded. Because the Swedish rules offer high levels of transparency through the public nature of decisions and the straight requirement of damage as to tax information in court proceedings, this regime should have benefits in respect of tax compliance. This is based on the conclusions holding that transparency increases tax compliance in that insight into government activities (assuming this reveals a trustworthy authority) enhances both vertical as well as horizontal trust, which is considered to be a firm basis for whether or not taxpayers choose to comply with tax rules. The openness provided through PAISA Chapter 27 §§ 4 and 6 and Chapter 43 § 8 (under which a confidentiality provision that applies to information in a case in a court's judicial or law enforcement activities ceases to be applicable in the case if the information is included in a judgment) afford great insight into how the tax administration carries out its duties with regard to individuals, thus forming a sound basis for monitoring. It could be argued that the high level of secrecy provided by PAISA Chapter 27 § 1 counteracts the benefits recognized within the benchmark on tax compliance, as it affords no insight into tax returns. However, insight into tax returns does not offer insight into tax administration activities, but only provides raw tax information submitted by the taxpayer. Hence absolute secrecy in relation to information in tax returns does not hinder insight into how the tax administration carries out its duties.

Certain issues of the Swedish tax secrecy regime have been subject to more in-depth discussion. This is the case concerning secrecy regarding

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602 Subsections 3.5.2 through 3.5.4.
603 See subsection 2.2, where the benchmark on tax compliance is set.
Enhanced Relationship\textsuperscript{604} and agreements between a taxpayer and the Tax Agency under the rules in Chapter 59 of the Tax Procedure Act.\textsuperscript{605} On Enhanced Relationship it is asserted that despite concern that companies might not participate in these activities as a result of transparency, there are substantial reasons for providing as much transparency as possible on them in order to avoid arousing public suspicion of unequal treatment of taxpayers. A perception of a tax administration treating taxpayers unequally might lead to decreased trust, which in turn lowers the chances of tax compliance.\textsuperscript{606}

At the time of writing, the issue of confidentiality concerning such agreements is not entirely clear in legislation, and this is why it is stressed that this matter needs to be finally settled without further delay. Transparency has been said to be of even greater importance concerning agreements between a taxpayer and the Tax Agency than on Enhanced Relationship. This is because agreements that compromise a natural person’s tax liability for the tax debt of a legal entity afford deviations from what is initially determined by tax law and as such thus provide unequal treatment of taxpayers. Transparency provides the public with measures to examine such deviations, which might have benefits concerning the perception of procedural justice, which in turn benefits taxpayer trust in the tax administration. Empirical evidence shows that people who feel they have been treated in a procedurally fair manner by an organization are more likely to trust that organization and be more inclined to accept its decisions and follow its directives. If the procedures are perceived to be just and fair, the authority will be perceived accordingly. This leads to the perception of the decisions of the authority as being just and fair. If an authority acts fairly when dealing with cases it will be perceived as being just and fair even if the decision goes against the individual. Thus a person will more readily accept a negative decision if the authority is perceived to be fair in its dealings.\textsuperscript{607}

Subsequently, even though people might not approve of a particular settlement of a tax debt for less than the full amount owed, openness provides them with the means of reassurance that at least the procedures are fair. This enhances taxpayer trust in the tax administration, which enhances tax compliance.

On administrative costs, these are deemed not to be exorbitant. This is because both PAISA Chapter 27 §§ 1 and 6 are rather easy in their applica-

\textsuperscript{604} See subsection 3.4.2.
\textsuperscript{605} See subsection 3.4.4.
\textsuperscript{606} See subsection 2.3.2.4.
\textsuperscript{607} See subsection 2.3.2.4.
tion, as they do not prescribe any damage assessment to be conducted. Costs are rather induced by PAISA Chapter 27 § 4, where a straight requirement of damage demands a damage assessment to be conducted on a case-by-case basis. This induces costs as it is more time- and personnel consuming than §§ 1 and 6.

Notwithstanding the benefits afforded by §§ 4 and 6 on tax compliance, and the benefits recognized as regards the administrative costs induced when applying the tax secrecy rules, full transparency of tax administration decisions and the rather high level of transparency provided by the straight requirement of damage in respect of court proceedings, raise serious threats concerning the protection of taxpayer privacy.
4 The United States of America

4.1 Outline
This following chapter contains a study of the federal tax confidentiality legislation in the United States. Its structure is similar to that of Chapter 3. It starts with a brief description of the tax administration, the IRS. This is followed by a brief description of the historical development of tax confidentiality legislation in the United States. Then follows a study of the current rules governing the disclosure of taxpayer information, beginning with the basis for tax confidentiality rules, continuing on to the substantive content of the (for the purpose of this thesis) relevant provisions. The chapter concludes with an evaluation where the rules studied are measured against the theoretical framework set out in Chapter 2.

4.2 The Internal Revenue Service
Taxes in the United States are administered by tax authorities at both federal and state level. Federal income tax is collected by the IRS, a bureau of the Department of the Treasury. The IRS Mission is to “[p]rovide America’s taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all”.

IRS has four primary divisions which, within their respective fields, focus on routine activities of processing tax returns, communicating with taxpayers, conducting audits, and collecting taxes.

Organization of state and local tax administrations varies widely. Every state in the United States has its own tax administration. These are referred to in most states as the Department of Revenue or Department of Taxation.

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610 As stated, the focus is set at federal level, and why tax administration at state level is only briefly mentioned.
4.3 Historical Development of US Tax Confidentiality

Public access to individual tax return information in the United States has fluctuated widely over time, ranging from broad accessibility when 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, through six key time periods, of tax confidentiality legislation in the United States.

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

Change came a few years later, with the Revenue Act of 1870. Section 11 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 may make public, under such rules and regulations as the commissioner of internal revenue shall prescribe.

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.

The Revenue Act of 1913 contained a provision 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 individual returns were to be confidential.

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612 Ibid 65; Blank (n 247) 275–276.
613 Zaritsky (n 611) 8.
614 Ibid 10, 27.
615 Ibid 55–58.
In 1924 and 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, the amount of tax paid, was open to the public. It furthermore provided for publication of the amount of refunds. However, changes were made in 1926 so that only name and address, and not the amount of tax, was open to the public. 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. The limitation of disclosure provided in the Revenue Act of 1934 stated that only the pink slip, not the entire tax return, was to be open to the public. The Revenue Act of 1934 was repealed in 1936, after substantial debate over the propriety of the pink slip provisions.

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. However, tax returns were generally open to inspection only under regulations approved by the President, or under Presidential order. The statutory rules were also supplemented by a number of regulations and executive orders. Under these rules and regulations many agencies could gain access to tax information held by the IRS. 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 was being abused, mostly based on Congress coming to know that the Nixon Administration was using tax information obtained from the IRS as a political tool. Concern was raised that Congress had not specifically considered whether the agencies that had access to tax information in fact should have such access. Furthermore, these rules had not been reviewed by Congress for 40 years. In response to the perceived abuse of the existing disclosure provisions, and in order to significantly tighten restrictions relating to other government agencies’ use of information collected by the IRS, 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 should be treated as confidential and subject to disclosure only when authorized by statute. The committee tried to

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616 Kornhauser (n 246) 21.
617 Zaritsky (n 612) 60.
618 Ibid 61.
balance the particular office or agency’s need for the information with the citizen’s right to privacy.\(^{619}\)

The committee also considered the impact of the disclosure upon the continuation of compliance with the US voluntary assessment system. 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.\(^{620}\) The committee decided that the information that the American citizen is compelled by the tax laws to disclose to the IRS was entitled to essentially the same degree of privacy as those private papers maintained in the taxpayer’s home.\(^{621}\)

Though 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.\(^{622}\)

4.4 Current US Tax Confidentiality Law

4.4.1 The Basis for Tax Confidentiality

The rules governing tax confidentiality are found in the Privacy Act of 1974, the Freedom of Information Act (FOIA), and the IRC.

The Privacy Act of 1974 provides a way for a taxpayer to obtain his own records. Thus the Privacy Act is only a limited source of access to IRS records granting a right of access only to records that pertain to the requestor.\(^{623}\) Because access to a taxpayer’s own tax information is not dealt with in this thesis, but rather the public’s access to tax information, it falls outside the scope of this work.

FOIA (Title 5 of the United States Code (5 USC § 552), was enacted in 1966. It gives any person the right of access to federal agency records or information. FOIA is based on the presumption that the government and its information belong to the people.\(^{624}\)


\(^{620}\) Ibid 317.

\(^{621}\) Ibid 328.


\(^{624}\) More on FOIA and its link to tax confidentiality are found in subsection 4.4.1.
FOIA was enacted in 1966 in order to facilitate public access to government records. It provides that any person has a right, enforceable in court, to obtain access to federal agency 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.” The intention of FOIA has been interpreted by several courts. The United States Supreme Court has held that “[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed”. Moreover, courts have stated that the intention was opening administrative process to the scrutiny of the press and general public and that the dominant objective of the FOIA is disclosure, not confidentiality. At the same time, the committee recognized the necessity of protecting certain interests such as the right to privacy. It is stressed that this balance of interests that is necessary is not an easy task.

FOIA requires, inter alia, that every federal entity presented with a request for records under the statute to make such records promptly available to any person, § 552(a)(3)(A). The disclosure requirement does not apply, however, if the requested information falls within one of nine exemptions enumerated in § 552(b). The exemptions are explicitly made exclusive, § 552(d), stating that “[t]his section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section”. It has furthermore been held in court that FOIA exemptions are to be narrowly understood.

There are nine exemptions to disclosure provided in § 552(b):

1. national defense/foreign policy
2. personnel rules and practices
3. statutory exemption
4. trade secrets
5. privileged material
6. private personal files

627 Department of the Air Force v. Rose (n 626).
628 ‘Senate Report No 813, 89th Cong, 1st Sess’ (n 625) 3.
629 As stated above in section 4.4.2, IRS is a federal agency.
7. law enforcement
8. bank regulations, and
9. geological/geophysical information.

Section 552(b)(3) exempts from disclosure information specifically exempted from disclosure by statute, provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. The exemption statute invoked by FOIA Exemption 3 as regards disclosure requests made to the IRS is the IRC § 6103 “Confidentiality and Disclosure of Returns and Return Information” (hereinafter § 6103), which provides the general rule that “return information shall be confidential”, subsidized by a number of exceptions. Courts are in agreement that § 6103 qualifies as an exemption statute under FOIA exemption 3. Furthermore, according to the IRM, exemption 3 is mandatory and not subject to IRS discretion.

As mentioned earlier, taxes in the United States are levied at both federal and state level. Federal tax law begins with the IRC, enacted by Congress in Title 26 of the United States Code (26 USC). It is organized topically, into subtitles and sections, covering different types of taxes such as income tax, payroll taxes, estate taxes, gift taxes, and excise taxes, as well as procedure and administration. As regards the topic of this thesis, it is first and foremost § 6103 and § 6110 of this Title that are of interest. Section 6103 sets forth the general rule on tax confidentiality. Section 6110 opens the text of written determinations to public inspection. These provisions are examined in more detail further below, starting with § 6103.

4.4.2 Disclosure of Information under § 6103

4.4.2.1 General Rule

As stated above, information need not, under § 552(b)(3), be released if it is specifically exempted from disclosure by statute and that § 6103 constitutes such a statute embraced by the FOIA exemption 3.

Section 6103(a) sets down a general rule that returns and return information are confidential, and may not be disclosed by officers or employees

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631 Landmark Legal Foundation v IRS 267 F3d 1132 (DC Cir 2001) 1134; Long v IRS 742 F2d 1173 (9th Cir 1984) 177; Church of Scientology of California v IRS 792 F2d 146 (DC Cir 1986) 150.
632 IRM 11.3.13.7.1(4) (08-14-2013)
of the United States, or certain other individuals with access to such information, except as authorized by the statute.

Certain definitions are of relevance before proceeding into the details of § 6103. First, it is stated that a return is any tax return or information return, schedules, and attachments, including any amendment or supplement, which are required or permitted to be filed and is filed by a taxpayer with the Secretary of the Treasury, § 6103(b)(1). According to the IRM, a photocopy of a return is considered to be a return for this purpose. Second, return information is broadly defined:

§ 6103(b)(2)(A) The term “return information” means (A) 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.

It includes any information gathered by the IRS with regard to a taxpayer’s liability under the Code. As stated in the provision, return information includes the fact that a person has filed a return or that a person is under investigation. It furthermore includes the fact that the IRS has in its possession copies of public records secured from a county clerk’s office pursuant to an audit or investigation of a taxpayer. 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.” Thus return information covers almost all information pertaining to a taxpayer in the possession of the IRS.

The statute definition of return information contains the wording “received by”. This means that tax information not received or disclosed by the IRS does not constitute return information and is therefore not protected by § 6103. It has been held in court that § 6103 “does not prohibit

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633 IRM 9.3.1.2.2 (09-25-2006).
634 IRM 9.3.1.2.3 (09-25-2006).
636 Galotto, La Puma and Pai (n 623) 84–85.
the disclosure of tax return information that comes from a source other than the IRS”. 637

According to § 6103(b)(2), excluded from the term return information and thus from confidentiality is statistical compilations that cannot be associated with, or otherwise identify, a particular taxpayer. This is commonly referred to as the Haskell Amendment. 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 protection under § 6103(b). Return information is still subject to confidentiality under § 6103. 638 It was argued that such information consists of more than merely identifying information. 639 The court furthermore held that in addition to non-identification, some alteration by government of the form in which the return information originally was recorded is required. 640

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. 641

Section 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, local law enforcement agency, local child support enforcement agency or other specified local agencies. The third category includes certain other persons who have had access to returns or return information under particular § 6103 exceptions. The prohibitions set forth in § 6103 do not apply to persons not listed in § 6103. 642

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638 Up until this point, Long v IRS had been the leading case, providing disclosure of return information upon the mere redaction of identifying information. Long v IRS 596 F2d 362 (9th Cir 1979).

639 Church of Scientology of California v IRS 792 F2d 153 (DC Cir 1986) 158.

640 Ibid 163.

641 Galotto, La Puma and Pai (n 623) 88.

4.4.2.2 Exceptions

As stated, § 6103(a) contains the general non-disclosure rule. Tax returns and tax return information must be kept confidential, unless a statutory exception applies. All of the provisions from § 6103(c) to § 6103(o) contain exceptions from this general rule. These exceptions 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 somewhat extensive, so in the following only those exceptions that are of certain interest for this thesis are examined. These exceptions are found in § 6103(c), § 6103(h)(4), § 6103(k), and § 6103(m).

The first exception 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, § 6103(c). This type of consent is generally referred to as general purpose consent. General requirements for a request for or consent to such disclosure are set out in Reg § 301.6103(c)-1(b). 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. 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.

Section 6103(h) entails an exception which authorizes disclosure to certain Federal officers and employees for the purposes of tax administration. Under § 6103(h)(4) tax returns and return information may be disclosed in judicial or administrative proceedings if the taxpayer is a party to such proceedings or the proceedings arise from the taxpayer’s tax liability. The principal purpose behind § 6103(h)(4) is to regulate the sensitive returns and return information that is disclosed in proceedings that are often public. The Section states

A return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only, (A) if the taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer’s civil or criminal liaibil-

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643 IRS, Department of the Treasury (n 619) 2–19.
ity, or the collection of such civil liability, in respect of any tax imposed under this title; (B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding; (C) if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding.

However, the section furthermore states that if the Secretary determines that disclosure under these provisions would identify a confidential informant or seriously impair a civil or criminal tax investigation, such returns or return information shall not be disclosed.

The exception in § 6103(h)(4) is of special interest for this thesis, since it offers a way whereby the public may gain access to otherwise confidential returns and return information. This issue is further developed in subsection 4.4.4.

Section 6103(k) governs disclosure of certain returns and return information for tax administration purposes. Section 6103(k)(1) states that return information relating to matters under § 7122 with regard to accepted offers-in-compromise must be disclosed to the general public to comply with the public disclosure requirements of § 7122. Under § 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 taxpayer and the IRS that settles a tax debt for less than the full amount owed. An accepted offer-in-compromise is a legally binding agreement between the Service and the taxpayer, and is enforceable by either party.

A compromise shall be placed on file entailing the opinion and the reasons for it, including the amount of tax assessed, the amount of interest, additional amount, addition to the tax, or assessable penalty, imposed by law on the person against whom the tax is assessed, and the amount actu-

645 Reg § 301.7122-1(b) provides the grounds for compromise. First, doubt as to liability serves as grounds for compromise. Doubt as to liability exists where there is a genuine dispute as to the existence or amount of the correct tax liability under the law. Doubt as to liability does not exist where the liability has been established by a final court decision or judgment concerning the existence or amount of the liability. A doubt as to liability offer is an offer in compromise based on a legitimate doubt that you owe any part of the tax debt. A doubt as to collectibility offer is when you agree that you owe the taxes but you cannot pay your tax debt in full. To be considered for a doubt as to collectibility offer you must make an appropriate offer based on what the IRS considers your true ability to pay.

646 IRM 4.18.1.2 (01-07-2011).
ally paid in accordance with the terms of the compromise, § 7122(b). Offers-in-compromise are available for viewing on scheduled appointments in the Public Inspection File at certain locations. Public inspection of an offer-in-compromise concerns only information mentioned in the foregoing paragraph. Other information must be redacted for the public inspection file. Subsequently, only a redacted copy of the offer-in-compromise documentation is available for public inspection. The IRS carefully redacts significant information enumerated in the IRM:

A. Name and SSN of a co-obligor spouse if the spouse is not a party to the compromise
B. Address (house number and street name only)
C. Number of exemptions
D. Filing status
E. Adjusted gross income
F. Taxable income
G. Principal Industry Activity Code
H. Transaction Codes with no dollar amounts. Redact the entire line including the date should be redacted.
I. Transaction Codes and explanations dealing with fraud, negligence, or criminal investigations, but not the date and amount of the transaction.

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

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647 IRC Section 7122(b) does not require a report relating to amounts less than $50,000.
649 IRM 5.8.8.8(2) (08-08-2014)
650 IRM 5.8.8.6(6) (01-01-2015)
651 Johnson v Sawyer 120 F3d 1307 (5th Cir 1997) 1321.
4.4.2.3 Procedures for Disclosure under § 6103

Section 6103(p) sets forth general procedures and guidelines for the disclosure of returns and return information under § 6103(c)-(o). It includes procedures for the reproduction of returns and the manner in which return information may be reproduced.

Section 6103(p)(2)(A) governs 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. It furthermore states that a reasonable fee may be specified for furnishing such reproduction.

Section 6103(p)(2)(B) governs how the return information may 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 photo-impressions, or electronically-produced tapes, disks, or records, or by any other mode or means that the Secretary determines necessary or appropriate. As well as under the previous section, a reasonable fee may be prescribed for furnishing such return information.

This section furthermore contains requirements for certain federal agencies, to which the IRS may lawfully disclose information to safeguard returns and return information. 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 such request; (2) to establish a secure area in which to store the information; and (3) to restrict the access of persons to that information. However, the section furthermore states that such security requirements do not apply if information has been disclosed in judicial or administrative proceedings and are accordingly made a part of the public record.

4.4.3 Disclosure of Information under § 6110

4.4.3.1 Introduction

This part of the thesis deals with disclosure under § 6110. Section 6110 opens to public inspection (with certain identifying and other information deleted) written determinations and certain types of background materials relating to such written determinations.

Section 6110 was added to the 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 evenly. Congress explained that private rulings should be made
public because that 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.\textsuperscript{652}

\textbf{4.4.3.2 Written Determinations}

The IRS provides written legal analysis and advice in response to requests from 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, § 6110(b)(1)(A).\textsuperscript{653} However, these terms are not in themselves defined in the statute. This following section focuses on written determinations in the form of rulings.

A ruling, or (private) letter ruling, is a written statement issued to a taxpayer that interprets and applies tax laws to the taxpayer’s specific set of facts. It generally recites the relevant facts, sets out the applicable provisions of law, and shows the application of the law to the facts, Reg § 301.6110-2(d). It 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 has fully and accurately described the proposed transaction in the request and conducted the transaction as described, the ruling is binding on the IRS.\textsuperscript{654}

These rulings are to be made available for public inspection under § 6110. Section 6110 creates an affirmative obligation to the IRS to make certain written determinations, such as rulings, available for public inspection.\textsuperscript{655}

Before the IRS discloses rulings under § 6110 it must redact information that would identify any person whom the ruling concerns, § 6110(c)(1). According to Reg § 301.6110-3(a)(1)(i), such information includes names, addresses and identifying numbers. Identifying numbers include telephone, license, social security, employer identification, credit card, and selective service numbers. 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, Reg 301.6110-3(a)(1)(ii). This section furthermore states that in determining whether information

\textsuperscript{652} ‘Senate Report No 938, 94th Cong, 2d Sess’ (n 619) 305–306.

\textsuperscript{653} Galotto, La Puma and Pai (n 623) 133.

\textsuperscript{654} ‘Understanding IRS Guidance - A Brief Primer’ (n 78).

\textsuperscript{655} Galotto, La Puma and Pai (n 623) 133.
would permit identification of a person, the IRS will consider information publicly available at the time the ruling is made open as well as information that will subsequently become available. 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.

The IRS must delete information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, § 6110(c)(5). 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. 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. Presumably this weighing test is applied with the recognition that the taxpayer is to remain unidentified, Reg § 301.6110-3(a)(5).656

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 the intention to disclose such written determination, § 6110(f)(1). The contents of the Notice is described in Reg § 301.6110(a)(2) and includes a copy of the text of the written determination (or background file document) that 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. The Notice shall furthermore state that the document will be open to public inspection and inform the recipient of the right to contest the scope of deletions. Taxpayers may challenge the proposed redaction of too little identifying data, while a member of the public may challenge the withholding of too much identifying data.657

Most written determinations, pursuant Reg § 301.6110-1(c)(1), are routinely open to public inspection in the IRS’s Freedom of Information Reading Room. All the required records are available on the Internet.658

656 Ibid 146.
657 US Department of the Treasury, Office of Tax Policy (n 622) 27.
4.4.3.3 Closing Agreements

A number of categories of documents are formed out of § 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 in the scope of § 6110 is that of closing agreements. This subsection deals with such agreements.

The IRS, under § 7121(a), 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. A closing agreement, in short, is a final binding agreement between the IRS and the taxpayer relating to the taxpayer’s tax liability for one or more years. Further information on closing agreements is to be found in the Regulations. According to Reg 301.7121-1(a) “[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”. In other words, if the taxpayer shows good reasons for requesting a closing agreement and provides necessary facts and documentation, and the government is not put to disadvantage, a closing agreement will ordinarily be entered into.

Closing agreements are not written determinations subject to disclosure under § 6110 because they are generally the result of a negotiated settlement and, as such, do not necessarily represent the IRS view of the law.659 Furthermore, § 6103(b)(s)(D) defines closing agreements under § 7121 as return information. Thus closing agreements fall under the general nondisclosure rule in § 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 Reg § 301.6103(c)-1(b), that is, the same procedures as regards general consent, touched upon in section 4.4.2.2. In general, any public disclosure would be through an IRS news release or a jointly authored statement that would be released at the time the closing agreement is executed.660

659 ‘Senate Report No 938, 94th Cong, 2d Sess’ (n 6 19) 307.
660 Department of the Treasury, Internal Revenue Service and Office of Chief Counsel, ‘Notice CC-2008-014 Procedures for Closing Agreements with Taxpayer Consents to Publicize’.
4.4.4 Disclosure of Returns and Return Information in Judicial and Administrative Proceedings and its Redisclosure

4.4.4.1 Introduction

It is held above that § 6103(h)(4) is of special interest for this thesis because it offers a way for the public to gain access to tax information otherwise protected by confidentiality. The exception to the general non-disclosure rule set down in § 6103(h)(4) permits, as described above, disclosure of returns and return information in judicial and administrative tax proceedings. The following part of this thesis deals with the possibility of redisclosure of information contained in public court records due to disclosure under this exception.

4.4.4.2 Redisclosure

No provision of the IRC 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 under § 6103(h)(4). The absence of expressed statutory authority for the disclosure of such information has generated conflicting judicial opinions as to whether § 6103 prohibits such disclosure. The question of whether or not return information continues to be protected by § 6103 once it is made public through disclosure under § 6103(h)(4) has been addressed by a number of courts with varying results.

Some courts have held that owing to the absence of an explicit exception to § 6103 addressing the issue, information that has been made public nonetheless remains confidential in the hands of the IRS. These courts have focused on the literal language of § 6103 which has led them to the conclusion that because none of the exceptions in § 6103 include public records, disclosure of tax information in public records is a violation of § 6103. For example, in Rodgers v Hyatt the court stated that

[t]he fact that Mr. Hyatt had given prior “in court” testimony relative to the alleged “rumors and allegations” which likely removed them from their otherwise “confidential” cloak, did not justify Hyatt’s violation of the requirement that he, as an officer of the United States, is prohibited from disclosing “return information” absent express statutory authorization. Hyatt has not established such authorization.661

Moreover, in Mallas v US, the court held:

661 Rodgers v Hyatt 697 F2d 899 (10th Cir 1983) 906.
Section 6103(a) prohibits the disclosure of taxpayers’ “return information,” *except as authorized by this title,* (emphasis added). In so providing, Congress strictly circumscribed the contexts in which Government officers or employees may disclose such information. Unless the disclosure is authorized by a specific statutory exception, section 6103(a) prohibits it. The Government points to no such exception—and we are aware of none—permitting the disclosure of “return information” simply because it is otherwise available to the public.  

Others have maintained that once tax information is in the public domain, it loses its confidentiality protection under § 6103. In *Lampert v US,* for instance, the court focused on the word *confidential,* stressing that § 6103 only protects confidential tax return information and “[o]nce tax return information is made a part of the public domain, the taxpayer may no longer claim a right of privacy in that information.”  

The court contended that “once return information is lawfully disclosed in a judicial forum, its subsequent disclosure by press release does not violate the Act.”  

In *Rowley v US* the court ruled that once a taxpayer’s return information becomes part of the public domain through the filing and recording of a judicial lien, it loses its confidentiality and is not protected by Section 6103 if republished by the Internal Revenue Service for tax administration purposes.

Some 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. The court found in *Rice v US* that all the information contained in the press releases came from public documents and proceedings. The court further determined that because the IRS had not released confidential taxpayer information about Rice from its records, but obtained the information for the releases from public sources, disclosure was proper. The court stated:

> Like it or not, a trial is a public event. The IRS press releases in this case did not publicize Rice’s tax return information; they publicized public proceedings and documents. While those proceedings and documents may have revealed “return information,” that revelation was proper under the exception

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663 *Lampert v US* 854 F2d 335 (9th Cir 1988) 338.
664 Ibid.
666 *Rice v US* 166 F3d 1088 (10th Cir 1999) 1091–1092.
to § 6103 allowing such disclosure in federal court where the taxpayer is a party to the proceedings.\textsuperscript{667}

In \textit{Thomas v US} 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. These items come within the definition of return information in § 6103(b)(2). 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.\textsuperscript{668}

The information disclosed in the press release did not come from [the taxpayer’s] tax return – not directly, at any rate. It came from the Tax Court’s opinion. The disclosure of return information by the judges of the Tax Court in their opinion was authorized by the same statutory provision that authorized the IRS to disclose it in the Tax Court proceeding, § 6103(h)(4).\textsuperscript{669}

The court thus recognized that the disclosed information could have come indirectly from the taxpayer’s tax return. Nevertheless, the court stated that

the definition of return information comes into play only when the immediate source of the information is a return, as these terms are defined in § 6103(b)(2), and not when the immediate source is a public document lawfully prepared by an agency that is separate from the Internal Revenue Service and has lawful access to tax returns. The Tax Court is such an agency.\textsuperscript{670}

Following this opinion, the court in \textit{Johnson v Sawyer} argued that

[i]f the immediate source of the information claimed to be wrongfully disclosed is tax return information ("return" or "return information" pursuant to § 6103), the disclosure violates § 6103, \textit{regardless of} whether that information has been previously disclosed (lawfully) in a judicial proceeding and has therefore arguably lost its taxpayer “confidentiality”.\textsuperscript{671}

Furthermore, the court recognized that § 6103 protects more than simply confidential or private return information.

\textsuperscript{667} Ibid 1092.
\textsuperscript{668} \textit{Thomas v US} 890 F2d 18 (7th Cir 1989) 20–22.
\textsuperscript{669} Ibid 20.
\textsuperscript{670} Ibid 21.
\textsuperscript{671} \textit{Johnson v Sawyer} (n 651).
[S]ection 6103 is a regulation of the conduct of those who in the course of their duties as government employees or contractors glean information from tax returns. The regulation is prophylactic, proscribing disclosure by such an individual of any such information so obtained by him. Plainly, 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.672

Subsequently, if the disclosed information is taken directly from a public record, the disclosure does not contain tax information as statutorily defined and § 6103 is not contravened. However, if it is retrieved directly from IRS records then § 6103 is breached regardless of whether the disclosure is also part of a public record.

As mentioned above, the safeguards provided in § 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 legislative history that the safeguards do not apply when return information is open to the public generally.673 In Johnson v Sawyer the court also concluded that the receiving agency did not have to comply with the safeguards provided in § 6103(p) because the information had already been disclosed publicly in a judicial proceeding. Nonetheless, the court continued that this did not mean that the information may be disclosed by the receiving agency (or IRS) in a press release. The court contended that the information was still protected by the general non-disclosure rule in § 6103(a). According to the court § 6103(p)(4) does not create an exception to the general rule of non-disclosure.674 The court referred to legislative history and noted “the committee did not say that the rule of non-disclosure does not apply where the information is open to the public generally.”675 The conclusion could therefore be that § 6103(p)(4) does not authorize redisclosure of return information contained in public court rec-

672 Ibid 1322 citing the en banc opinion in Johnson v Sawyer 47 F3d 716.
673 ‘Senate Report No 938, 94th Cong, 2d Sess’ (n 619) 343–344.
674 Johnson v Sawyer (n 651).
675 Ibid 1321.
ords, but only provides an exception from the rules on safeguards. Redis-
disclosure of information disclosed under § 6104(h)(4) may therefore not be
based on § 6103(p)(4). Nevertheless, does this exception from the safe-
guards 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
§ 6103(a), notwithstanding its existence in (public) court records, would it
not be appropriate to apply the safeguards in respect of that information?
The court recognized in Johnson v Sawyer that § 6103(p)(4) indicates that
when Congress drafted § 6103 it considered the possibility that some tax
return information might be otherwise available to the public, for example,
in court records, because it had been disclosed in a judicial proceeding.676

Though no provision of the IRC explicitly authorizes disclosure of re-
turns or return information contained in a public record, the above sug-
gests that disclosure of tax information might constitute a violation of §
6103 if that information is retrieved from the IRS, while disclosure of the
same information is not a violation of § 6103 if the information is re-
trieved from a public record. Return information that would otherwise be
confidential may thus be publicly accessible if contained in a public record.

4.4.4.3 Internal Revenue Service’s Publication Strategy

As stated above, no provision of the IRC expressly authorizes the disclo-
sure of tax information solely on the basis that it has become a matter of
public record due to lawful disclosure under § 6103(h)(4). The dominant
view seems to be that redisclosure of information lawfully disclosed under
§ 6103(h)(4) is permitted because it is contained in public records, but only
if it is retrieved from those records and not a tax return held by the IRS
(which continues to enjoy confidentiality protection under the general non-
disclosure rule).

The IRS has consistently argued, in accordance with this view, that tax
information placed in the public record in connection with tax administra-
tion is no longer confidential. The IRS argues that according to §
6103(b)(8) disclosure means the making known to any person in any man-
ner whatever a return or return information and that the making known
means that information that the recipient already has knowledge of does
not fall under confidentiality protection provided in § 6103. The IRS ar-
gues that returns and return information cannot be disclosed within the

676 Ibid.
meaning of § 6103(b)(8) if the IRS has already made such information known in public records during tax administration activities.677

Based on this, the IRS has developed a publicity strategy. IRS Policy Statement 11-94 (Formerly P-1-183) has the title “News coverage to advance deterrent value of enforcement activities encouraged”. This policy provides that the IRS

will endeavor to obtain news coverage of its enforcement activities in order to: (a) help deter violations of the internal revenue laws, and (b) increase the confidence of conscientious taxpayers that the Service prosecutes violators. […] Accordingly, the Service will promote news coverage of its enforcement activities in the following manner: (2) Information which is a matter of public record (such as pleadings filed with the United States Tax Court or an indictment which has been made public) may be supplied upon request.678

IRS publicity policy thus permits and encourages press releases and responses to media inquiries regarding enforcement activities that have become a matter of public record.679 The Treasury believes that publicizing such offences could have a substantial deterrent effect and thus, in contrast to other disclosures of tax information, have a positive impact on taxpayer compliance.680

Indications as to the existence and application of this publicity strategy can be found in various sources, other than the above mentioned. For instance, in each field within the IRS’s Criminal Investigation Division (CI), an experienced special agent has been given a duty to provide public record information to the media about the field office’s cases.681 A former head of the CI has stated that “[o]ur efforts have shown that focused and direct contact with the local reporters does make an impact on media coverage of our compliance and enforcement efforts. And more important, having experienced agents in these positions help them address media question and provide background information to maximize media coverage.”682 Furthermore, the strategy that links individual cases in a systematic way to larger compliance issues and enforcement programs has been said to constitute a key element in improving the length, placement and targeting of

677 IRS, Department of the Treasury (n 619) 1–49, 2–7.
678 IRM 1.2.19.1.9 (05-23-1986).
679 IRM 1.3.11.13 (05-20-2005).
680 US Department of the Treasury, Office of Tax Policy (n 622) 37.
682 Ibid 740.
media stories about tax crime.\textsuperscript{683} This is said to allow the IRS to “generate multiple press stories nationwide about particular cases and to target our enforcement efforts to particular media outlets.”\textsuperscript{684} Finally, in Rice v US, the court referred to the IRS publicity strategy in stating that the IRS issued two press releases “[c]onsistent with its policy of publicizing successful tax prosecutions.”\textsuperscript{685}

The IRS advises that great care should be exercised when determining whether tax information has actually become a matter of public record. Before releasing information from a document that has become part of the public record, IRS employees should verify that the information conforms in all respects to what was made public.\textsuperscript{686}

IRS publicity strategy has met harsh criticism. In Thomas v US the court concluded:

The IRS’s tactic of publicizing Mr. Thomas’s defeat in the Tax Court to his home-town newspaper may be tawdry, mean, or inspired; it may be thought to intimidate taxpayers or, more plausibly, to warn them off a course of conduct that can only increase their tax liability. But even if what the Internal Revenue Service did here is an abuse of governmental power, it is not the sort of abuse at which § 7431 was aimed or for which it makes provision.”\textsuperscript{687}

The above provides a description of a consequence of the case law standpoint holding that tax information lawfully disclosed in court proceedings under § 6103(4)(h) is permitted if the information is retrieved from public court records. This, in my view, should bear costs with regard to tax compliance. However, since the evaluation of US tax confidentiality legislation in relation to the theoretical framework is provided in subsection 4.5, the discussion on such costs is provided in that subsection, more particularly in subsection 4.5.2.

\textbf{4.4.5 Summary of the US Tax Confidentiality}

The rules governing tax confidentiality dealt with above are found in the IRC. The basis for them is in the FOIA (5 USC § 552). FOIA allows any person the right of access to federal agency records or information. Tax confidentiality comes under FOIA exemption 3, stating that information

\begin{itemize}
\item \textsuperscript{683} Mark E Matthews, ‘New IRS Publicity Strategy’ US Att’y’s’ Bull 15.
\item \textsuperscript{684} Ibid.
\item \textsuperscript{685} Rice v US (n 666).
\item \textsuperscript{686} IRM 1.3.11.13 (05-20-2005).
\item \textsuperscript{687} Thomas v US (n 668).
\end{itemize}
explicitly exempted from disclosure by statute (in the case of tax confidentiality this means the IRC § 6103) may not be disclosed.

The US tax confidentiality regime affords a high level of confidentiality, due to the general non-disclosure rule in § 6103(a), stating that returns and return information are confidential. The high level of confidentiality is based on the taxpayer’s right to privacy protection and on the conclusion that a high degree of confidentiality supports voluntary compliance. Disclosure of information embraced by this general rule is only permitted if authorized by the statute.

Statutory exceptions from the general non-disclosure rule are located in § 6103(c) to § 6103(o), under which the IRS is authorized to disclose returns and return information to certain entities and persons for specific purposes. The exception in § 6103(c) holds the general purpose consent exception, under which the IRS is authorized 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 disclose. Under § 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 if they arise from the taxpayer’s tax liability. This exception is of special interest for this thesis because it opens a way for the public to gain access to otherwise confidential returns and return information. Section 6103(k)(1) states that return information relating to matters under § 7122 on accepted offers-in-compromise must be disclosed to the general public. The last exception to the general non-disclosure rule here presented is § 6103(m). This exception provides that the IRS may disclose taxpayer identity information to the press for the purposes of notifying who is entitled to refunds if the IRS, after a reasonable effort and lapse of time, is unable to locate such persons.

Moreover, § 6110 provides public access to private letter rulings, with certain identifying and other information deleted. One category of documents excluded from the definition of written determinations and thus not included in the scope of § 6110 are closing agreements. Such agreements are not written determinations subject to disclosure under § 6110 because they are generally the result of a negotiated settlement and, as such, do not necessarily represent the IRS view of the law. Furthermore, § 6103(b)(2)(D) defines closing agreements under § 7121 as return information. Thus closing agreements fall under the general non-disclosure rule in § 6103(a).

4.5 US Tax Confidentiality and the Benchmarks

4.5.1 Introduction
This concluding subsection of the chapter dealing with US tax confidentiality contains an evaluation of the rules presented and studied in the foregoing subsections against the theoretical framework set forth in Chapter 2. Similarly as to the evaluation of the Swedish tax secrecy regime, the evaluation concerns the most prominent features of the US tax confidentiality regime, summarized in the preceding subsection.

4.5.2 Tax Compliance
This subsection entails an evaluation of the US tax confidentiality regime against the benchmark on tax compliance. Considerations are made to the different factors impacting on the level of compliance: deterrence, norms, trust, and fairness.690

As stated above, the high level of confidentiality afforded by the US tax confidentiality regime is based on the taxpayer’s right to privacy protection and on the conclusion that such a high level supports voluntary compliance. It is maintained that if taxpayers are to comply they need to know that the information they reveal to the IRS remains confidential.

[T]he committee has tried to balance the particular office or agency’s need for the information involved with the citizen’s right to privacy and the related impact of the disclosure upon the continuation of compliance with our country’s voluntary assessment system.691

Confidentiality of tax returns and related information is an essential element in preserving the effectiveness of the tax system in this country.692

The IRS is acutely aware that in fostering our system of taxation the public must have and maintain a high degree of confidence that the personal and financial information furnished to us is protected from unauthorized use, inspection, or disclosure.693

Hence, confidentiality of taxpayer information in the United States is held to be a critical element in taxpayer willingness to comply with the tax laws. Concerns have been raised that more disclosure would significantly

690 See subsections 2.3.2.2 through 2.3.2.4.
691 ‘Senate Report No 938, 94th Cong, 2d Sess’ (n 619) 318.
erode privacy and furthermore compromise taxpayer compliance. This contradicts the conclusion in Chapter 2 holding that tax transparency boosts tax compliance. With all due respect to the position held as grounds for the US tax confidentiality level, the arguments advanced in favour of the conclusion in Chapter 2 that tax transparency promotes tax compliance is considered to be of such range that the position taken in terms of the benchmark on tax compliance can be maintained. The evaluation of the US rules on tax confidentiality below is thus based on the conclusions holding that transparency for the most part has benefits in terms of tax compliance.

In setting the benchmark on tax compliance, it is asserted that both deterrence and norms are important as to whether or not a person chooses to comply. This implies that rules can be followed primarily in order to avoid informal or formal punishment or for a person to choose to comply with rules primarily because of social norms. In the latter case rules are complied with voluntarily because they are regarded as representing the right and proper thing to do. Most people comply with rules, not because they are afraid of being caught and punished for not doing so, but because they regard it as being right and because others are also complying. Subsequently, the risk of detection and punishment is less important than the influence of norms and moral values. Furthermore, norms involve reciprocity, suggesting that people are more likely to cheat on their taxes if they perceive that others are doing so.

Apart from deterrence and norms trust in the tax administration and the perception of fairness in the tax administration’s procedures is held to have an impact on tax compliance. If taxpayers feel unfairly treated by a tax administration this can result in decreased taxpayer trust, which can then affect voluntary tax compliance. Tax transparency could help nurture taxpayer trust in the tax administration because if taxpayers are able to take a part in the tax administration’s procedures they can decide for themselves whether or not it treats taxpayers equally. Conversely, a tax administration that does not treat taxpayers equally could lose the trust of taxpayers if implementing a higher level of tax transparency, since taxpayers can then discover such inequality resulting in a loss of trust in the tax administration, which in turn increases the risk of non-compliance.

With this said, this subsection proceeds with the task of evaluating the US tax confidentiality regime. The evaluation starts with the general non-

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694 United States Government Accountability Office (n 245) 1.
695 See subsection 4.3.
696 See subsection 2.2.
disclosure rule in § 6103(a), through its exceptions provided above, over to § 6110, which opens up certain specified information to public inspection.

It is presumed in this thesis that transparency promotes taxpayer compliance with tax laws. Thus the US tax confidentiality regime providing such a high level of confidentiality by the general non-disclosure rule in § 6103(a) might be held to bear costs with regard to tax compliance. However, as maintained previously, a rule affording absolute confidentiality with regard to tax returns and return information does not have any particular costs on tax compliance, in the sense that it does not prevent public access to information on how the tax administration conducts its duties, but only prohibits public access to raw tax information submitted to the tax administration by the taxpayer. Transparent tax returns do not to a great extent afford insight into tax administration activities, which is the main purpose behind the right of public access to information. Transparent tax returns rather reveal only raw tax information disclosed by the taxpayer to the tax administration. It does not show how it carries out its duties with regard, for instance, to tax assessment. For this reason absolute confidentiality in terms of tax returns does not bear any particular costs with regard to tax compliance. Consequently, contrary to the initial supposition at the beginning of this paragraph, § 6103(a) with its high level of confidentiality of tax returns does not imply costs with regard to tax compliance.

However, if focusing on the term ‘return information’ instead of ‘tax return’ the discussion and conclusions on § 6103(a) with regard to tax compliance alters. This is because ‘return information’ is broadly defined, covering almost all information pertaining to a taxpayer in the possession of the IRS. All information relating to audits, investigations, settlements, and so on are thus protected under § 6103. Because such information might reveal more information on how the tax administration performs its duties compared with the raw tax information in a tax return, such confidentiality should carry costs with regard to tax compliance. This is because the opportunities for the public to scrutinize government activities thus decrease. In other words, individuals cannot by themselves control whether the IRS applies the tax laws correctly and fairly. The perception that the tax administration is doing its job properly and equitably is held to be a decisive factor as to whether or not the taxpayer chooses to comply with tax law.

Since the exceptions from non-disclosure in § 6103(c) provides disclosure only to those explicitly permitted by the taxpayer, this rule allows

697 See subsection 3.5.2.
only limited disclosure, not producing the benefits which publicly accessible information affords in terms of tax compliance. It furthermore does not induce any particular costs, with regard to such limited disclosure of tax returns, the disclosure of which does not provide any insight into the IRS actual assessment work, thus not counteracting the primary purpose behind public access to information.

A feature that can be argued as having an impact in terms of tax compliance is the exception in § 6103(h)(4), under which tax returns and tax return information may be disclosed in judicial or administrative proceedings if the taxpayer is a party to such proceedings or if they arise from the taxpayer’s tax liability. No provision of the IRC expressly authorizes the disclosure of returns and return information solely on the basis that such information has become a matter of public record owing to lawful disclosure under § 6103(h)(4). The absence of expressed statutory authority for the disclosure of such information has generated conflicting judicial opinions as to whether § 6103 prohibits such disclosure. The dominant view seems to be that redisclosure of information lawfully disclosed under § 6103(h)(4) is permitted, under the premise that such information is retrieved from public court records. Disclosure of tax information constitutes a violation of § 6103 if the disclosed information is retrieved from the IRS. Consequently, return information that would otherwise be confidential may be publicly accessible if contained in a public record.

An outcome of this current standpoint concerning the exception in § 6103(h)(4) is the IRS’s publicity strategy, by which the IRS chooses to publicly disclose information on cases where tax evaders are caught and punished. In short, on the one hand, this could be regarded as entailing benefits, since it can be held to enhance tax compliance. On the other hand, it could be viewed as having costs since it presents a distorted perception of the IRS and its efficiency and effectiveness and thus jeopardizes taxpayer trust in the tax administration. This is further elaborated on in what follows.

The IRS publicity strategy could be, and has been, defended by its function of increasing tax compliance, since it enables the government to influence individual perception of its tax enforcement capabilities by publicizing examples of its tax enforcement strengths without exposing specific examples of its tax enforcements weaknesses. It is held in Chapter 2 in setting the benchmark on tax compliance that communicating through the media about evaders and successful (large scale) audits might create the impres-

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698 The IRS publicity strategy is described in subsection 4.4.4.3.
sion that evasion is widely spread. This can cause taxpayers to believe that evasion is greater than it actually is. This promotes a strong non-compliant social norm, undermining compliance which leads taxpayers to cheat to a greater extent. If non-compliance becomes the norm this increases the notion that cheating is acceptable, making taxpayers feel that they do not need to feel shame by doing what everyone else is already doing, despite the fact that tax evaders are actually in the minority. Nonetheless, since the publication of tax evaders is complemented by disclosure of convictions negative impacts can be said to decrease. Publicizing information on individual cases on non-compliant taxpayers being caught and punished has positive impacts on tax compliance since it shows that non-compliant taxpayers are detected and punished, in turn increasing the perception of cheating being wrong and compliance being the correct behaviour.  

The IRS publicity strategy is essentially based on deterrence, which is shown in the different statements below. First, this strategy provides that the IRS will endeavor to obtain news coverage of its enforcement activities in order to: (a) help deter [emphasis added] violations of the internal revenue laws, and (b) increase the confidence of conscientious taxpayers that the Service prosecutes violators [...] Accordingly, the Service will promote news coverage of its enforcement activities in the following manner: (2) Information which is a matter of public record (such as pleadings filed with the United States Tax Court or an indictment which has been made public) may be supplied upon request.  

Second, this is further expressed by the Treasury holding that publicizing tax offenders could have a substantial deterrent effect and thus, in contrast to other disclosures of tax information, have a positive impact on taxpayer compliance. “Third, in Thomas v US the court concluded the following:

The IRS’s tactic of publicizing Mr. Thomas’s defeat in the Tax Court to his home-town newspaper may be tawdry, mean, or inspired; it may be thought to intimidate [emphasis added] taxpayers or, more plausibly, to warn them off [emphasis added] a course of conduct that can only increase their tax liability.”  

700 See subsection 2.3.3.
701 See subsection 4.4.4.3 and Blank, ‘In Defense of Individual Tax Privacy’ (n 247) 319–322.
702 IRM 1.2.19.1.9 (05-23-1986).
703 US Department of the Treasury, Office of Tax Policy (n 622) 37.
704 Thomas v US (n 668).
The conclusion held in Chapter 2 with regard to taxpayer compliance is that the risk of detection and punishment is less important than the influence of norms and moral values. Even so, based on the above, the publicity strategy has benefits with regard to tax compliance in enhancing the deterrent factor.

However, and this is a decisive point, this strategy causes individuals to develop an inflated perception of the government’s ability to detect tax offenses and punish their perpetrators. Without the curtain of tax confidentiality individuals could see specific examples of the government’s tax enforcement weaknesses that would contradict this perception. Confidentiality thus helps to hide the inefficiencies of the tax administration in order to enhance the level of compliance.

However effective this strategy might be in compelling taxpayers to comply out of fear of being detected and harshly punished, the public is presented with examples of tax enforcement portraying the government as enforcing the tax law effectively and efficiently, while in fact it is not. It might be alluring to use tax confidentiality as a means of hiding a poorly functioning tax administration to try to create an image of a well-functioning tax administration. But such an approach, according the UN Special Rapporteur on Freedom of Opinion and Expression, is not considered a legitimate limitation to access to information.

The IRS publicity strategy, in my view, puts too heavy a weight on the deterrent function of tax transparency taking it to the point where the public is actually misled, if not manipulated. It could be argued that such a regime could, when the truth is revealed, have severe negative impact on the taxpayer’s trust in the tax administration. As held previously, trust is difficult to earn but easy to shatter. Moreover, trust in the long run can only be built by consistent truth. Taxpayers who have experienced grave corruption in the tax administration are not likely to forget this the next time their tax bill arrives, because people do not forget treacherous and deceitful behaviour. Accordingly, taxpayers who discover that the tax administration is not as trustworthy as it implies, might have difficulty in

706 Only 1 percent of all returns are examined by the IRS, IRS, Department of the Treasury, Internal Revenue Service Data Book (2012) fig 9b. The chance of getting away with cheating is thus in reality quite large.
707 UN Special Rapporteur on Freedom of Opinion and Expression (n 117) 44.
708 Rothstein (n 116) 131.
709 Ibid 13 and 18.
forgetting that fact and start trusting the tax administration, despite any improvement in its trustworthiness.

An approach such as the IRS publicity strategy might consequently have serious drawbacks as for trust and compliance as to future trust and compliance. In order to lighten the risk of such drawbacks it might be argued that since this publicity strategy in itself is not confidential but as has been shown, publicly spoken of in various ways, the public is able to gain knowledge of this false image presented through this strategy. Subsequently, people might not be taken by surprise if or when the truth is revealed, since they more or less are already aware of the truth behind the veil. The IRS in being open about its strategy might thus limit the risks of serious drawbacks in terms of trust and compliance if or when the curtain is lifted and the detailed truth revealed.

The above considers primarily drawbacks for the future. The possible impacts of this strategy on taxpayer trust during its employment, however, should not be ignored. That is, the IRS shows that it adopts misleading behaviour through providing transparency regarding its publicity strategy. While this honesty about the strategy (in other words, its honesty of dishonest behaviour) is to some point beneficial, due to the reasons provided above, its impacts on trust not only for the future when or if the curtain is lifted, but also for the present, should be taken into consideration. However honest a tax administration is regarding its activities, showing dishonest behaviour such as the publicity strategy could affect taxpayer trust. Dishonest behaviour might arouse suspicion that there are other situations in addition to which the authority is resorting, behaviour that is not shown or talked about in the open as it is with the publicity strategy. Openness about dishonest behaviour does not deprive the behaviour of its dishonesty. Nevertheless, since the IRS is honest about this strategy this might, on the other hand, imply that the IRS would be honest about other kinds of dishonest behaviour as well.

Subsequently, though the IRS publicity strategy might be defended on the basis that allowing people to know that non-compliance is punished and implying that it is unacceptable (thus employing the deterrent factor in its norm-reinforcing function) the aim should, in my view, be to develop strategies that will have a true and sustainable impact on taxpayer compliance.

Another exception to the general non-disclosure rule is found in § 6103(k)(1), stating that return information shall be disclosed in accordance with the requirement for disclosure of accepted offers-in-compromise under § 7122. Accepted offers-in-compromise are redacted prior to disclosure, in order to protect taxpayer privacy. The information publicly acces-
sible is the opinion and the reasons for it, including the amount of tax assessed, the amount of interest, 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, § 7122(b). Accepted offers-in-compromise are made available for inspection and copying at designated locations.\textsuperscript{710}

As frequently maintained, insight into the tax administration’s activities is vital for the fulfilment of the main purpose behind public access to information. Insight into the tax administration’s activities promotes taxpayer trust (assuming that the information reveals a trustworthy tax administration). Under §§ 6103 and 7122 the public are provided with a large amount of information showing how the IRS administers the tax laws, facilitating public opportunities to monitor whether or not the tax administration applies the tax laws correctly and equably. Public access to the information in offers-in-compromise consequently should have benefits with regard to tax compliance.

Another rule weakening the confidentiality protection is § 6110, which opens up, \textit{inter alia}, letter rulings for public inspection. A private letter ruling is a written statement issued to a taxpayer that interprets and applies tax laws to the taxpayer’s specific set of facts. It 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. Prior to disclosure information identifying the person to whom the written determination pertains and of any other person identified in the ruling is redacted. Such information includes names, addresses and identifying numbers such as telephone, license, social security, employer identification, credit card, and selective service numbers. It is thus primarily the legal conclusion in the ruling that is publicly accessible. Opening up private letter rulings to public inspection was done because taxpayer access to the ruling positions was held to increase the public’s confidence that the tax system operates fairly and in an even-handed manner with respect to all taxpayers. Advance rulings are more thoroughly dealt with in subsection 6.4, but the following brief conclusion is drawn in this context.

Trust in the tax administration and the perception of fairness in its procedures has been shown to have an impact on tax compliance. It is held that tax transparency could help nurture taxpayer trust in the tax administration because if taxpayers are able to take a part in the administration’s procedures they can decide for themselves whether or not it treats them equally. Hence, publicly accessible private letter rulings carry benefits with

\textsuperscript{710} Reg 601.702(d)(8).
regard to tax compliance, assuming that such rulings reveal that the tax laws actually are being applied correctly and equably.

One category of documents excluded from the definition of written determinations and thus not included in the disclosure scope of § 6110 are closing agreements. This is a final agreement between the IRS and a taxpayer on a specific issue or liability. Closing agreements are not written determinations because they are generally the result of a negotiated settlement and, as such, do not necessarily represent the IRS view of the law. Furthermore, closing agreements are explicitly defined as return information in § 6103(b)(s)(D). Consequently, such agreements fall under the general non-disclosure rule in § 6103(a). By entailing negotiations these agreements provide deviations from the tax laws. As such they offer a ground for a perception of the tax laws being unequally applied by the IRS. This notion might be strengthened by the confidentiality protection afforded, as this impedes public opportunities of monitoring the tax administration activities, thus jeopardizing taxpayer trust in the tax administration. Trust has been asserted to be an important factor for tax compliance. The rule providing confidentiality of closing agreements might therefore bear costs in terms of tax compliance.

4.5.3 Administrative Costs
This subsection entails an evaluation of the US rules on tax confidentiality against the benchmark concerning administrative costs. It takes its starting point in three of the four different steps of the disclosure chain that have been identified: review, reproduce, and disclose.

As concluded, the costs are presumably the highest and the most difficult to calculate within the second step. Calculating the costs of the second step includes estimating the hours of work put into the application of the confidentiality rules. Within the second step is the aspect of being both easily accessible and understandable confidentiality legislation. Rules that are too complicated will inevitably require more time or staff, or both. Complicated rules on tax confidentiality furthermore risk lengthening the procedures, in turn increasing costs. If the tax administration needs to take special steps to extract the necessary information, verify or correct it before transmission, then costs will be greater than if no special measures were required.

711 Closing agreements are described in subsection 4.4.3.3.
712 A more in-depth evaluation of confidentiality of agreements is found in subsection 6.5.
713 This first step is delineated from the scope of this thesis as it relates to the tax administration’s record-keeping, in itself a delineated issue.
Simple and less formal procedures facilitate their efficiency and speed. Making sure that tax confidentiality legislation is clear and easily applicable is thus important when designing rules on tax confidentiality.

Moreover, besides the fact that complicated rules risk lengthening disclosure procedures and increase administrative costs, lengthy procedures might completely annul the meaning of the right of access to information. This right is of a kind that is current at the time the applicant exercises it. Information obtained after a certain period of time might not have the same value as current information.\footnote{See subsection 2.4.5.}

The general non-disclosure rule set out in § 6103(a) is on its own quite easy in its application because it provides total confidentiality and covers almost all information pertaining to a taxpayer in the possession of the IRS. Thus the application of this provision does not induce any particular costs on the IRS. However, there are a number of exceptions to this rule which by their design give rise to costs.

The disclosure rules dealt with in this thesis that require certain actions to be taken prior to disclosure that induce administrative costs are first § 6103(c), which provides general purpose consent and requires the written consent of the taxpayer. Though it is for the taxpayer to provide this information, it nevertheless induces costs on the IRS since such consent needs to be administered. Furthermore, having to await a written consent lengthens the procedure, compared with disclosure being permitted without any action. Second, redaction of taxpayer-identifying information is required both with regard to disclosure of offers-in-compromise and private letter rulings, which increases the workload of the IRS and lengthens the disclosure procedures, consequently increasing administrative costs.

On private rulings the following aspect needs to be noted when evaluating the rules against the benchmark on administrative costs. Prior to disclosure the person to whom the ruling relates shall, through a Notice of Intention to Disclose, be notified by the IRS of intention to disclose such ruling, § 6110(f)(1). The contents of the Notice is described in Reg § 301.6110(a)(2) and includes a copy of the text of the written determination, 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. The Notice shall furthermore state that the document will be open to public inspection and inform the recipient of the right to contest the scope of deletions. Taxpayers may challenge the proposed redaction of too
little identifying data, while a member of the public may challenge the withholding of too much identifying data.\textsuperscript{715} The requirement of a Notice of Intention to Disclose places a high administrative burden on the IRS because it inevitably provides for the personal attention of an officer and lengthens the disclosure procedure, consequently inducing administrative costs primarily in the second step in the disclosure chain.

Another provision inducing administrative costs on the IRS is the exception found in § 6103(m)(1), under which the IRS is authorized to publish in newspapers the names of taxpayers who are owed refunds if the IRS cannot trace them. Such a disclosure rule might be of benefit to the tax administration, as it helps it to save money because the agency does not have to undertake more costly steps to locate these taxpayers.\textsuperscript{716}

Lastly, rules providing public access induce administrative costs within the third and fourth step, that is, with regard to reproducing and actually disclosing the decision. The extent of the costs depends on the amount of copies and in what form the decision is disclosed (for instance, electronic or paper copies).

4.5.4 Taxpayer Privacy

This subsection provides an evaluation of the most prominent features of the US tax confidentiality regime against the third benchmark – taxpayer privacy. Similar to the evaluation of the Swedish tax confidentiality regime, the evaluation is conducted in two different steps. The first is to determine whether the US tax confidentiality rules provide violations of taxpayer privacy. A privacy invasion is demarcated as the mere disclosure of information.\textsuperscript{717} Second, after the determination of whether the US tax confidentiality regime provides taxpayer privacy violations the scope of them is demarcated. This is done by considering the type of information that may be disclosed, how disclosure is permitted and the possible consequences for the individual.

The US tax confidentiality legislation provides a general non-disclosure rule – § 6103(a) – stating that confidentiality applies to returns and return information. Accordingly, the first conclusion that can be drawn is that since the US tax confidentiality regime offers a high level of confidentiality, it consequently provides benefits with regard to taxpayer privacy protection. However, there are rules that to a greater or lesser extent weaken this high level of privacy protection. This is because the general non-disclosure

\textsuperscript{715} US Department of the Treasury, Office of Tax Policy (n 622) 27.

\textsuperscript{716} United States Government Accountability Office (n 245) 24–25.

\textsuperscript{717} See subsection 2.5.3.
rule makes way for exceptions, stating that confidentiality applies unless otherwise stated in the statute. These are dealt with in the following in relation to the benchmark on taxpayer privacy, starting with identifying which exceptions might afford privacy violations.

Section 6103(c) holds the general purpose consent exception, under which the IRS is authorized to disclose a taxpayer’s return or return information to any person or persons the taxpayer might designate in a request for or consent to disclose. This rule has benefits with regard to taxpayer privacy, since it provides the taxpayer with great control as to whom and for what reasons personal tax information is disclosed.

Under § 6103(h)(4) tax returns and return information may be disclosed in judicial or administrative proceedings. This exception has generated lively debate concerning whether or not the information continues to enjoy confidentiality protection under the general non-disclosure rule or if the information loses its protection because as part of court proceedings it is contained in public court records. As stated previously, the current position appears to be closer to the latter, that is to say, that confidentiality protection is lost once the information is contained in public court records. This, however, applies only to information retrieved from public court records. Information held by the IRS still enjoys confidentiality protection under § 6103(a). Because this exception does not entail any redaction of taxpayer-identifying information prior to disclosure, this affords privacy violations.

Section 6103(k)(l) provides disclosure of accepted offers-in-compromise. However, these are redacted prior to disclosure, to ensure that the taxpayer to whom the compromise pertains cannot be identified. Since measures are taken to ensure that the information cannot be attributed to a specific taxpayer, no violation of privacy can be said to be present.

Moreover, the IRS may disclose taxpayer-identifying information to the press in order to locate taxpayers entitled to a tax refund, § 6103(m). Since this includes information identifying a taxpayer, it affords privacy violations.

Furthermore, there is § 6110, which opens up certain specified information to public inspection. This provision provides disclosure, *inter alia*, of private letter rulings, a written statement issued to a taxpayer that interprets and applies tax laws to the taxpayer’s specific set of facts. It is issued to establish with certainty the federal tax consequences of a particular transaction before it is executed or before the taxpayer’s return is filed. However, prior to disclosure information identifying the person who the written determination concerns and of any other person identified in the ruling must be redacted. Such information includes names, addresses and identifying numbers such as telephone, license, social security, employer
identification, credit card, and selective service numbers. Consequently, consistent with the reasons for the design of the US tax confidentiality regime, primarily based on the taxpayer’s right to privacy protection, § 6110 affords a high level of protection of taxpayer privacy through the redaction provision, since such disclosure contains no invasion of privacy because the information cannot be attributed to a particular taxpayer.

One category of documents excluded from the definition of written determinations and thus not included in the disclosure scope of § 6110 are closing agreements. These agreements are not written determinations subject to disclosure because they are generally the result of a negotiated settlement and as such do not necessarily represent the IRS view of the law. Furthermore, closing agreements are explicitly defined as return information in § 6103(b)(s)(D) Thus such agreements fall under the general non-disclosure rule in § 6103(a). Subsequently, since no disclosure is made this provision does not provide any privacy violation, but a high level of taxpayer privacy protection.

The first step of the evaluation of the US tax confidentiality legislation dealt with in this thesis shows that taxpayer privacy enjoys a high level of confidentiality protection. This is because a privacy infringement is demarcated as the mere disclosure of information. Any exception to the general non-disclosure rule entails possible privacy violations insofar that it does not require redaction of taxpayer-identifying information (since if the specific taxpayer cannot be identified that taxpayer’s privacy is not breached). It is only § 6103(h)(4) and § 6103(m) that provide for possible privacy violations, since disclosure under these exceptions to the general non-disclosure rule is possible without redaction of information identifying the taxpayer.

The next step is then to demarcate the scope of the possible violations, which includes considerations as to the type of information that may be disclosed, the ways in which disclosure is permitted, and the potential consequences for the individual taxpayer on disclosure.

The exception in § 6103(m) involves disclosure of only limited information, since it provides disclosure only on taxpayer-identifying information in order for the IRS to locate taxpayers entitled to a tax refund. The scope of such violation could therefore be said to be rather limited, especially since it does not contain any negative information on the taxpayer, such as tax debts or that the taxpayer has engaged in non-compliant behaviour, which to most people probably would be considered to be more sensitive information than that of a tax refund. Moreover, since such dis-
closure is made only to locate taxpayers entitled to a tax refund, it might be argued that it is of benefit for the taxpayer and that it outweighs any potential privacy invasion.

That leaves the exception in § 6104(h)(4). Taxpayer information in general might, for example, show the amount one has given to particular charities, the dependants living in one’s household, gambling winnings and losses, the amount of loans to friends or relatives that have become worthless, amounts spent on childcare, tuition, business entertainment, or medical expenses. Furthermore, a tax return could contain information on an individual’s health, family life, or sexuality. Thus while an individual’s tax information might consist of mere figures on income and taxes owed it could reveal sensitive facts. Consequently, this information could reveal a great deal about the taxpayer’s activities and personality.719 Because any or all of such information might be the issue in court proceedings, this exception might provide disclosures of a highly sensitive nature.

Demarcating the scope of taxpayer privacy violation, as mentioned, also involves considerations to be made as to the different means that an individual could obtain public information. The provisions on how to gain access to public information is found in 5 USC 552(a)(3) complemented by Reg § 601.702(c). Accordingly, the request must be made in writing and signed by the individual making the request. A requirement for a written request might impose a barrier to those seeking to obtain information merely out of curiosity. As disclosure of information in this way might decrease, such a requirement could be said to provide a limit as to the scope of privacy violations.

Finally, considerations are to be given to the possible consequences of disclosure. Such consequences could be the loss of reputation, harassment or embarrassment, blatant comparisons (favourable or unfavourable) with others, becoming the target for requests for donations, or gifts to friends or family, corporate interests exploiting personal information in direct advertising, commercial solicitation by suppliers of luxury goods or investment management, and becoming targets of crime.720 The more details disclosed, the higher the risk of such consequences. Because, as held above, disclosure under § 6103(h)(4) could contain many details of a sensitive nature on a taxpayer, it is not possible to exclude any of the here mentioned consequences that would cause damage to the individual on disclosure.

Arguing in accordance with the assertions concerning time limits on confidentiality, that the risk of damage or harm upon disclosure decrease over

719 Blum (n 326) 609.
720 See subsection 2.5.3.
time, it could be contended that tax information revealed in court proceedings is likely to be at least several years out of date when the case is finally settled and subsequently becomes part of public court records. Consequently, the disclosure of information would not create a severe violation of privacy, assuming that the information does not reveal information, for instance, on a life-long disease, the disclosure of which might still cause harm to the individual even after a long time period.

4.5.5 Summary of the Evaluation against the Benchmarks

In the foregoing subsections the most prominent features of the US tax confidentiality regime were evaluated against the conclusions drawn with regard to the benchmarks tax compliance, administrative costs, and taxpayer privacy. In this subsection the evaluation is summarized.

The US tax confidentiality regime provides a very high level of taxpayer privacy protection, on the whole providing fairly limited possibilities for the public to gain access to tax information. At first this could be said to restrict to a great extent the benefits thereof in terms of tax compliance. Nonetheless, the high level of confidentiality regarding tax returns has been concluded not to be a particular threat to tax compliance, as tax returns merely contain raw tax information submitted to the tax administration by the taxpayer and do not reveal information on how the tax administration carries out its duties. As tax returns thus do not provide any insight into tax administration activities, their confidentiality might in this regard be defended. The opposite might be argued in respect of the high level of confidentiality concerning return information, a term that encompasses almost every piece of information (including, for instance, that relating to audits, investigations, settlements) on a taxpayer held by the IRS. This limits the opportunities open to the public to gain an insight into how the IRS undertakes its duties, such as tax assessment.

However, there are a few exceptions to the general non-disclosure rule that open the system to public inspection, thus providing a basis for the benefits of public access to information as concluded in subsection 2.2. Transparency with regard to offers-in-compromise and private rulings offers an insight into the tax administration’s assessment activities, thus forming a basis for monitoring.

Even greater transparency is offered by the interpretation of the exception found in § 6103(h)(4), which results in tax information otherwise

protected by a high level of confidentiality being made publicly accessible without redaction of identifying information. Assuming that transparency reveals a trustworthy tax administration and complying taxpayers, it promotes tax compliance in that it enhances both vertical and horizontal trust.

Since most of the disclosure rules require actions to be taken prior to disclosure, such as redaction of taxpayer-identifying information, the administrative costs induced in the second step need not be disregarded. Additional costs are induced in the third and fourth step of the disclosure chain, that is, in reproducing and disclosing information.

The primary purpose for the high level of tax confidentiality in the United States – protecting taxpayer privacy – is shown throughout the statute, from the general non-disclosure rule in § 6103(a) through to the provisions requiring redaction of taxpayer-identifying information in many of the exceptions from the general non-disclosure rule dealt with in this thesis. The US tax confidentiality regime thus affords great benefits with regard to taxpayer privacy. There are mainly two situations where redaction is not required. First, under § 6103(m) information on the taxpayer’s name and address is disclosed. However, as this is only done in order to locate taxpayers entitled to a tax refund it could be argued that it is of benefit for the taxpayer and outweighs any potential privacy violation. Second, information otherwise protected by confidentiality under the general non-disclosure rule may be disclosed when contained in public court records, § 6103(h)(4). This latter issue is the feature of the US tax confidentiality regime that creates a vivid deviation from the otherwise high level of confidentiality.

4.6 Summarizing Chapter 4

This subsection contains a summary of the US tax confidentiality legislation as dealt with in this chapter.

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 that is in effect today. Changes from a high level of accessibility to a high level of confidentiality, currently in force, 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 IRC. The tax confidentiality provisions dealt with in this chapter are certain provisions of § 6103 and § 6110.
Section 6103 sets forth the general rule on tax confidentiality, providing that tax returns and return information are to be kept confidential. This section also contains exceptions to this general non-disclosure rule, permitting the IRS in specified circumstances to disclose returns and return information to certain entities and persons for specific purposes. It is the exceptions in § 6103(c), § 6103(h)(4), § 6103(k), and § 6103(m) that are further examined in this thesis. The first of these exceptions authorizes the IRS to disclose a taxpayer’s return or return information to any person or persons the taxpayer might designate in a request for or consent to disclose. According to the second exception, tax returns and tax return information may be disclosed in judicial or administrative proceedings if the taxpayer is a party to such proceedings or if they arise from the taxpayer’s tax liability. This exception affords a way for the public to gain access to otherwise confidential tax returns and return information. The third exception examined states that return information relating to accepted offers-in-compromise must be disclosed to the general public. The last exception provides that the IRS may disclose taxpayer identity information to the press for the purpose of notifying those entitled to refunds if the IRS, after a reasonable effort and lapse of time, is unable to locate such persons.

Section 6110 opens the text of written determinations, including private letter rulings, to public inspection. The private letter rulings are accessible after certain identifying and other information has been redacted.

Another feature of the US tax legislation is the possibility open to taxpayers of entering into a closing agreement with the IRS. Such agreements are excluded from the definition of written determinations and are thus not included in the scope of § 6110. Closing agreements are not written determinations subject to disclosure under § 6110 because they are generally the result of a negotiated settlement and as such do not necessarily represent the IRS view of the law. Furthermore, § 6103(b)(2)(D) defines closing agreements under § 7121 as return information. Closing agreements thus come under the general non-disclosure rule in § 6103(a).

The high level of tax confidentiality provided by US legislation could be held to limit the benefits in terms of tax compliance, as it is concluded that a high level of transparency promotes tax compliance. However, when studying the provisions closely the regime affords certain features which provide benefits in terms of tax compliance.

First, confidential tax returns have been concluded not to be of a high threat to tax compliance because they do not provide any insight into tax administration activities, but only reveal raw tax information as submitted.

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722 See subsection 2.3.
by the taxpayer to the tax administration. Since the term ‘return information’ embraces almost all of the taxpayer information held by the IRS, the scope of confidential information widens, which might lead to decreased chances of enjoying the benefits in terms of tax compliance. This is because return information concerns not only raw tax information submitted in a tax return by a taxpayer but information related, for instance, to audits and investigations.

Second, there are a few exceptions to the general non-disclosure rule that open the system to public inspection. One of them is the exception to the general non-disclosure rule that provides transparency with regard to accepted offers-in-compromise (which are redacted prior to disclosure). Another transparency provision is § 6110, which open (redacted) private letter rulings to public inspection. Both of these sections furnish insight into how the tax administration applies the tax laws. This provides a basis for public monitoring, which in turn enhances the prospects of tax compliance (under the premise that the information reveals a well-functioning IRS and complying taxpayers, which promotes tax compliance in that it enhances both vertical and horizontal trust).

Even greater transparency is offered by the interpretation of the exception that affords that tax returns and return information may be disclosed in judicial or administrative proceedings if the taxpayer is a party to such proceedings or they arise from the taxpayer’s tax liability. In short, under this provision – or at least under its prevailing interpretation – tax information otherwise protected by the high level of confidentiality granted by the general non-disclosure rule is made publicly accessible without redaction of identifying information. This is because the dominant view permits redisclosure of information which is lawfully disclosed in judicial or administrative proceedings 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). The transparency thus provided has benefits in terms of tax compliance as disclosure of such information provides insight into how the tax laws are applied, that tax cheaters are detected and punished, which may enhance both vertical and horizontal trust, which in turn promotes tax compliance.

However, an outcome of this interpretation is the IRS’s publicity strategy, by which it chooses to publicly disclose information on cases where tax evaders are caught and punished, but withholds information on unsuccessful cases. It is intended to enhance tax compliance, as it enables the IRS to display its strengths without exposing its weaknesses, resulting in the belief that the tax administration is more effective and efficient than it actually is.
Though the IRS publicity strategy might be defended in this function of enhancing tax compliance by increasing the deterrent factor, in my view it carries large costs because it is misleading and presents the public with a distorted perception of the IRS’s efficiency and effectiveness, jeopardizing taxpayer trust in the long run. Eleonor Kristoffersson and Pasquale Pistone argue that the risk of serious harm to taxpayer trust in the tax administration must be taken into account in the use of such an approach. Furthermore, it has been maintained by the UN Special Rapporteur on Freedom of Opinion and Expression that using tax confidentiality as a means to hide a malfunctioning is not a legitimate limitation on gaining access to information.

It has been concluded on administrative costs that the general non-disclosure rule by itself does not induce any particular costs on the IRS, since it is simple in its application and covers most of the information pertaining to an individual taxpayer held by the IRS. However, many of the exceptions to this rule require actions to be taken prior to disclosure, such as redaction of taxpayer-identifying information. Such actions induce costs on the IRS as it is both time and personnel consuming. Another feature of the US tax confidentiality regime inducing costs for the IRS is the Notice of Intention to Disclose, with which the IRS shall provide the person to whom a private ruling pertains prior to the disclosure of the ruling.

The conclusion with regard to the benchmark on taxpayer privacy is that the US tax confidentiality regime affords great benefits, since it provides a high level of confidentiality. Protecting taxpayer privacy has been held as being the primary purpose for the high level of tax confidentiality provided by US legislation. This is also shown throughout the statute, from the general non-disclosure rule through the provisions requiring redaction of taxpayer identifying-information in almost every exception from the general non-disclosure rule dealt with in this study. A feature providing a salient deviation from the otherwise high level of confidentiality affording a similar level of taxpayer privacy protection is the consequence of § 6103(h(4), under which information otherwise protected by confidentiality under the general non-disclosure rule may be disclosed if contained in public court records.

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723 Kristoffersson and Pistone (n 120) 26.
724 See subsection 4.5.2.
725 See subsection 4.4.3.2.
5 Country Comparison

5.1 Introduction
As held, this thesis involves two kinds of comparisons. The first is a country comparison and the second an option comparison. The former revolves around the rules in co-operation, while the option comparison regards individual rules extracted from their context. This chapter contains the country comparison, that is, in it the major similarities and differences between the two jurisdictions’ tax confidentiality legislation are dealt with. This involves no detailed comparison as to specific rules but rather considerations with regard to the regimes at large, answering the country comparison research questions set out in subsection 1.2:

3. How did tax confidentiality legislation in Sweden/the United States develop? (Subsection 5.2)
4. What is the general legal framework regarding transparency/confidentiality of tax information in Sweden/the United States? (Subsection 5.3)
5. What is the reason (or reasons) behind the tax confidentiality regime in Sweden/the United States? (Subsection 5.4)
6. What is the main content of the provisions on tax transparency/confidentiality in Sweden/the United States? (Subsection 5.5)
7. How does tax confidentiality legislation in Sweden/the United States achieve the interests set forth in the benchmark? That is, how do the two different regimes achieve the objective of
   a. promoting taxpayer compliance,
   b. minimizing administrative costs, and
   c. protecting taxpayer privacy? (Subsection 5.6)

As indicated above, the questions are dealt with in the designated subsection below. The chapter ends with a subsection containing the conclusions of the findings (subsection 5.7).

5.2 Historical Development
This subsection revolves around research question 3 above, which means that it aims at answering how tax confidentiality legislation has developed in Sweden and in the United States and from this draws comparative conclusions.
In Sweden it was possible to obtain a transcript of a tax return under the FPA up until 1903, when a proposal for Regulation on Income Tax led to changes in the FPA. These changes included an exemption regarding, *inter alia*, information submitted by the taxpayer to the tax administration for the determination of tax. This is the most prominent change in terms of the content of tax confidentiality legislation. This exemption, together with other exemptions in the FPA, to the constitutional right of access to official information was transferred into a separate ordinary act in 1937. This Act, the Secrecy Act of 1937, prescribed absolute tax secrecy for a period of 20 years. Absolute secrecy in tax matters with its time limit of 20 years has remained throughout the new Secrecy Act of 1980, which succeeded the Secrecy Act of 1937, and the current PAISA, though a reverse requirement was proposed during the drafting of the Secrecy Act of 1980.

Rules governing tax secrecy have not included confidentiality of the results of tax assessment, though the need for such a rule was raised on occasions. However, the issue revolved around a prohibition on publication of the taxpayer’s taxable income and the result of tax assessment, not the actual disclosure of the documents.

In the United States tax confidentiality provisions were first enacted in 1862, as amendments to the United States’ first federal income tax legislation, the Civil War income tax from 1861. This legislation provided that all returns should be open to examination. Between this legislation 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 at various times. First with the Revenue Act of 1870 stating that income returns were confidential and then in 1909, when Congress imposed a federal income tax on corporations, it provided that the returns “shall constitute public records and be open to inspection as such”. 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. Under the Revenue Act of 1924 the taxpayer’s name and address and the amount of tax paid was open to the public. Changes were made in 1926 so that only the name and address but not the amount of tax was made public.

The next change came with the so-called Pink Slip Requirement, enacted by the Revenue Act of 1934, with the provision that taxpayers must supplement their tax returns with a pink sheet of paper which contained the

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726 Ds Ju 1977:11 Del 1 (n 373) 57.
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 open to public scrutiny. The Revenue Act of 1934 was repealed in 1936 after substantial debate over the propriety of the pink slip provisions. Due to concerns regarding the misuse of returns and return information, including misuse by the Nixon Administration, Congress enacted the Tax Reform Act of 1976, which contain a general provision against the disclosure of information compiled by the IRS. This basic statutory scheme established in 1976 remains in place today.

Comparing the development of tax confidentiality legislation in Sweden and the United States, it can be said that in Sweden it developed from a position of being very open to one of slightly less open, since it was possible under constitutional law (FPA § 2 para 4) to obtain a copy of a tax return up until 1903, when a rule prescribing confidentiality of tax information on individual taxpayers was enacted by the FPA. Tax confidentiality, however, has not included confidentiality of the results of tax assessment. Tax confidentiality in the United States on the other hand, has fluctuated widely. It has provided great transparency at certain times while at other times has prescribed a high level of confidentiality.

The point at which the legislation of the two countries has similar consequences is when the Pink Slip was employed in the United States. The Pink Slip could be said to have revealed similar information to that publicly available in Sweden. That is, information such as name and address, total gross income, and tax liability is public information both in Sweden and in the United States (under the Pink Slip regime). Deductions, however, are not public information in Sweden unless contained in a publicly accessible tax decision, while included in the public information in 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 income tax was first introduced to the extensive restrictions on public disclosure that are in effect today, the content of tax secrecy legislation in Sweden has, by and large, been static since its first appearance. One reason for this difference might 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 gain access to almost all documents relating to the administration of justice and public administration, and to publish such documents at will. The tradition of open government is not as strong in the United States. FOIA, which provides the public with a statutory right of
access to government documents, was introduced in 1966, 200 years after such a right was first incorporated into the Swedish constitution.

Another difference between tax confidentiality legislation in Sweden and the United States regarding its historical development is that tax confidentiality in the United States has never been constitutional. From its first introduction in 1862 up until the present day, it is found in statutory law. Tax confidentiality in Sweden, on the other hand, was constitutional because it was a part of the FPA. In 1937 confidentiality rules were transferred from the FPA to ordinary law, the Secrecy Act of 1937.

5.3 General Legal Framework

This subsection aims at answering research question 4: What is the general legal framework regarding transparency/confidentiality of tax information in Sweden/the United States? This is done by comparing and analyzing the general legal framework (the basis for tax confidentiality) in both countries.

Swedish tax secrecy legislation is governed by the FPA and PAISA. 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. PAISA contains rules on these possible restrictions – that is, rules on secrecy. Tax secrecy falls under the exemption to the right of public access to official documents in FPA Chapter 2 § 2 item 6, which prescribes that the personal or economic circumstances of individuals can be protected by restricting access to official documents containing such information. The specific tax secrecy provisions are found in PAISA Chapter 27.

On tax confidentiality legislation in the United States, there are three separate statutory regimes relevant to determining whether Federal tax returns and return information are confidential, whether such information may (or must) be disclosed and, if it is subject to disclosure, the rules applicable to such disclosure. These are: 1) the FOIA, 2) the IRC, and 3) the Privacy Act.

The FOIA stipulates access to government documents, while providing for certain exemptions that legitimate confidentiality. Tax confidentiality falls under FOIA exemption 3, which authorizes confidentiality under the IRC.

The IRC contains two basic provisions of interest for this thesis that control the disclosure of returns and return information. These are §§ 6103 and 6110.
The Privacy Act provides a way for the taxpayer to obtain his own records. Since this thesis deals with the possibilities open to the public to gain access to information held by the tax administration, this issue is of limited interest. Hence, the Privacy Act is not further considered.\(^{728}\)

Swedish tax secrecy is thus governed by first, the FPA, providing the constitutional right of public access to official documents, and second, PAISA, containing the rules on secrecy. This is where one difference between Sweden and the United States concerning the general legal framework for tax confidentiality legislation is found. As indicated 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 are constitutional. This undoubtedly provides 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 secrecy legislation offers a more transparent tax administration than the US tax confidentiality regime. This is further dealt with in subsequent subsections.

Though the US FOIA is not enshrined in the constitution, it resembles the Swedish FPA in its structure. Just as the FPA provides the public with a right of access to official documents and enumerates certain (seven) exemptions to that right, FOIA provides a right of access to information from the Federal government and enumerates certain (nine) exemptions to that right. Tax confidentiality comes under FOIA exemption three in the United States and under exemption six in the Swedish FPA. The Swedish exemption is more specific than the US, since it states that secrecy may apply to information on an individual’s personal or economic circumstances while the FOIA exemption is much broader in that it permits confidentiality laid down in statutes.

The specific provisions on tax confidentiality are found in separate laws, both in Sweden and the United States. In Sweden the rules on tax confidentiality are found in PAISA Chapter 27, that is, they are contained in a special law on confidentiality. In the United States, rules on tax confidentiality are in the IRC, which contains the Federal statutory tax law. The tax confidentiality rules are thus found in connection with tax law in the United States, and in the context of other secrecy rules in Sweden.

One observation to be made is that when comparing PAISA and the IRC the IRC explicitly prescribes confidentiality of tax returns, 6103(a), while

\(^{728}\) See subsection 4.4.1.
confidentiality as expressed in PAISA regards information (not documents); PAISA Chapter 27 § 1 states that confidentiality applies to *information* on personal or economic circumstances of individuals. But this has not always been the case. The Secrecy Act of 1937 contained an enumeration of documents (*inter alia* tax returns) that were to be considered secret. Secrecy today only protects the information in a tax return and not the tax return *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.\(^{729}\)

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 § 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, or tax payments, any part of a written determination, APAs, and closing agreements. In this sense the IRC is both more distinct and clear than PAISA, since no such definition is found in the latter. Nor do the Swedish preparatory works provide any detailed guidance on this phrase at general level because no analysis of its meaning is provided therein. It is merely stated that personal circumstances must be defined according to everyday usage, mentioning the conditions of residential address, medical conditions and private economy.\(^{730}\) However, the phrase could be said to be further demarcated when placed in a tax secrecy context. This is because preparatory works mention certain types of information that is more or less of a sensitive nature. 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.\(^{731}\) Furthermore, confidentiality in respect of information obtained during an audit should be preserved as far as possible.\(^{732}\) Moreover, information on membership of registered religious communities and trade union membership has been considered to be particularly sensitive.\(^{733}\) Information deemed less sensitive includes, for instance, details on registration number, name, company name and legal form, registration of the obligation to de-

\(^{729}\) See subsections 3.4.1 and 3.4.8.

\(^{730}\) Prop 1979/80:2 Del A (n 114) 84.

\(^{731}\) Ibid 259.

\(^{732}\) Ibid.

\(^{733}\) Prop 2005/06:169 (n 384) 82.
duct tax or pay payroll taxes, types of business activities and liquidation or bankruptcy orders.\textsuperscript{734} Subsequently, Swedish preparatory works specify certain types of information explicitly 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 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 of interpretations in individual cases with regard to what information should and should not be protected. This might, however, be considered to lack legal certainty, since it could be difficult to predict whether or not certain information is secret.

As with PAISA the IRC contains exceptions to the general non-disclosure rule, in PAISA called secrecy-breaking rules. This applies, for instance, in terms of transfer of confidential information to other authorities (PAISA Chapter 10 and §§ 6103(d) and 6103(h) of the IRC). However, these secrecy-breaking rules are kept more general in PAISA than those of the IRC. The exceptions to confidentiality in the IRC appear to be more detailed than those in PAISA, as some of the IRC sections containing exceptions to the general non-disclosure rule are several pages in length.\textsuperscript{735} One explanation for this could be that most of the secrecy-breaking rules in 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 in Chapter 3, secrecy-breaking rules in PAISA that apply only to tax information. But these are not at all as detailed as the IRC exceptions. This corresponds to the observation that overall the IRC contains more details than PAISA. This might simply be 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. This might in turn relate to the following reason for differences concerning how detailed legislation is. For instance, Michael Bogdan asserts that how law is interpreted in a particular country can affect the wording of statutes. A country where judges interpret statutes more restrictively in accordance with the exact literal meaning of the words, such as Anglo-American countries, probably end up with more detailed statutes than continental European countries, where the wording of the law is interpreted more flexibly.\textsuperscript{736}

\textsuperscript{734} Ibid.

\textsuperscript{735} For instance § 6103(i) which is approximately five pages and § 6103(l) which is about seven pages long.

\textsuperscript{736} Bogdan (n 52) 34.
5.4 The Reasons behind Tax Confidentiality

Another issue to address when comparing tax confidentiality legislation in Sweden and the United States is the reason (or reasons) behind the level of confidentiality employed by the two jurisdictions. This subsection deals with this matter, aiming at answering research question 5: What is the reason (or reasons) behind the tax confidentiality regime in Sweden/the United States?

The main ground 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 secrecy as an exception to this right is based on the interest of protecting taxpayer privacy, which also is the main reason justifying the high level of tax confidentiality in the United States.

Though the purpose 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. Subsequently, restrictions on the principle of public access to information are made very carefully. The aim is to avoid any form of secrecy for safety’s sake.737

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 non-disclosure rule and that the exceptions to this are very detailed and therefore narrower than the Swedish exceptions. 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 United States legislation in 1966 through the FOIA. Furthermore, privacy is expressed as “a core American value”738 and that “protecting taxpayer privacy lies at the core of America’s tax system.”739

737 See subsection 3.4.1.
739 Ibid.
Additionally, in the United States taxpayer compliance is an explicit basis for the provisions which provides a high level of tax confidentiality. It is assumed that a high level of confidentiality supports voluntary compliance, holding that if taxpayers are to comply they need to know that the information they reveal to the IRS remain confidential. To my knowledge, taxpayer compliance has not been considered in the drafting of tax secrecy legislation in Sweden or in any other document related to secrecy legislation. With this thesis this might change, so that the issue on compliance in relation to tax secrecy can be placed on the agenda and thoroughly discussed at different levels – not only the academic.

5.5 Main Content of Confidentiality Provisions

As the heading suggests, this subsection aims at answering research question 6: What is the main content of the provisions on tax transparency/confidentiality in Sweden/the United States? As held previously, this is achieved by addressing the most prominent features of each country’s tax confidentiality legislation concerning public opportunities to gain access to information held by the tax administration.

The Swedish rules on tax secrecy provide a high level of secrecy (semi-absolute secrecy) with regard to information in, inter alia, tax returns, PAISA Chapter 27 § 1. Such a high level of confidentiality is also prescribed on certain information in specific matters enumerated in § 2 (such as special matters on audits, tax refunds, and matters on cash register). The two main exceptions to the semi-absolute secrecy afforded by this section, is the transparency of tax administration decisions in § 6 and the straight requirement of damage with regard to tax information in court proceedings in § 4 (together with the provisions in PAISA Chapter 43 § 8). These exceptions to the high level of secrecy in § 1 make the Swedish tax administration clearly transparent. Another deviation from the high levels of secrecy is found in § 2 para 2, holding a reverse requirement of damage for a certain type of Tax Agency undertakings. Because such a requirement of damage presumes secrecy to be the main rule, it does not have the same impact as §§ 4 and 6 on the overall level of secrecy provided by the Swedish tax secrecy legislation.

The US tax confidentiality regime also affords a high level of confidentiality of tax returns and return information. Section 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 section 6103.
The US exceptions to the general non-disclosure rule in § 6103 authorize disclosure in particular circumstances. These exceptions allow for tax information to be disclosed in certain specified situations, but often require taxpayer-identifying information to be redacted prior to disclosure in situations where the public may gain access to information held by the tax administration. For instance, section 6110 makes the text of any written determination issued by the IRS available for public inspection. A written determination is any ruling, determination letter, technical advice memorandum, or Chief Counsel Advice. Prior to disclosure, section 6110 requires the IRS to delete specific categories of information, such as the taxpayer’s name.

Swedish rules also provides for possibilities of redaction of taxpayer-identifying information. Section 6 item 1 prescribes secrecy 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. Section 2 para 2 and § 4 also make room for redaction, since they contain requirements of damage enabling confidentiality of certain information that is considered to cause harm on disclosure. Nonetheless, the possibilities available for redacting taxpayer-identifying information are not quite as extensive as in the United States, since Swedish rules contain provisions explicitly prescribing full transparency and that a requirement of damage does not demand redaction but makes it possible. The US tax confidentiality regime thus affords a far higher level of tax confidentiality than the Swedish one.

It is stated above that the Swedish and the US 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) information in tax returns. There appears to be consistency regarding the fact that all of the information in tax returns might not be of a highly sensitive nature and therefore should be confidential, but that they contain so many details concerning the individual taxpayer that there is a predominant interest in keeping return information confidential. For instance, in Swedish preparatory works it is stated that most taxpayers would consider it a violation of privacy for information in their tax return to be made public, though some of this information would be fairly unremarkable in itself.\footnote{Prop 1979/80:2 Del A (n 114) 256.} In Johnson v Sawyer the court stated that

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.\textsuperscript{741}

Another reason for this high level of confidentiality in terms of tax returns (though not explicitly expressed either in Sweden or the United States) could be that tax returns do not reveal any information on how the tax administration carries out its duties. They rather display only raw tax information submitted by taxpayers. The purpose behind a right of access to government information is to gain insight into government activities. Because tax returns do not provide such insight there is no great defence in having transparent tax returns.\textsuperscript{742}

Apart from the high level of confidentiality in terms of tax returns both regimes afford a high level of transparency with regard to tax information in court proceedings. Transparency in such proceedings is held to be vital in both Sweden and the United States. As asserted repeatedly, transparency is one of the basic principles of public administration in Sweden. Citizens, businesses, etc are thus provided with considerable opportunities for gaining insight into the work of public authorities. Openness of government activities provides scope for quality control of authorities. The principle of public access to information is expressed in various ways. The most prominent is the right of public access to official documents. Another facet 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\textsuperscript{743} – public court hearings are held to increase and consolidate respect for the law and confidence in the power vested in the courts.\textsuperscript{744} Transparency regarding the work of the courts is strengthened by the rules on the right of public access to official documents, by which judgements are considered publicly accessible documents. Transparency is further emphasized by PAISA Chapter 43 § 8 stating that secrecy ceases to apply to information included in a court judgement.

In the United States numerous court decisions centre on the public nature of court proceedings. For instance, in Rodgers v Hyatt the court stated

\textsuperscript{741} \textit{Johnson v Sawyer} (n 651).

\textsuperscript{742} For a more detailed discussion on the confidentiality of tax returns, see subsection 6.2.

\textsuperscript{743} SOU 2001:3 Offentlighetsprincipen och den nya tekniken. Delbetänkande av Offentlighets- och sekretesskommittén 51.

\textsuperscript{744} Lagutskottets betänkanden 1823 nr 27 95.
that “[i]t is [...] well established that what transpires in open court is a matter of public record.”745 In Rice v US the court held that “[l]ike it or not, a trial is a public event.”746 Reasons justifying access are, inter alia, to ensure that individual judicial proceedings are conducted fairly,747 that the discussion and criticism of governmental affairs and government officials is an informed one,748 to contribute to public understanding of and confidence in the legal system and its function,749 and to permit the public the opportunity of monitoring the judicial process.750 Subsequently, the reasons behind a high level of transparency regarding court proceedings are similar in Sweden and the United States and explain this similarity concerning tax matters in court in both jurisdictions.

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 its source – confidentiality depends on whether the information is contained in a tax return, a tax decision or ruling of the court. However, the two jurisdictions differ in terms of the level at which such information may be disclosed.

As stated, both the Swedish and the US tax confidentiality regimes allow a high level of confidentiality with regard to tax returns, which means that information contained in a tax return may be publicly disclosed neither in Sweden nor the United States. Both countries recognize (though in different ways) the value of greater transparency in respect of tax information in court proceedings. This has the consequence that confidential tax information contained in a tax return may be disclosed if that information exists in court records. Sweden has an explicit 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 open to the court of deciding that the confidentiality provisions shall continue to apply). The US regime does not have an explicit statutory rule. Case law, however, contends that though no provision of the IRC explicitly authorizes disclosure of returns or return information contained in a public record, disclosure of tax information may constitute

745 Rodgers v Hyatt (n 661).
746 Rice v US (n 666) 1092; See also Craig v Harney 331 US 367 [67 S Ct 1249, 91 L.Ed. 1546] 1254.
748 Globe Newspapaer Co v Superior Court (n 747).
749 Richmond Newspaper, Inc. v Virginia (n 747).
750 Globe Newspapaer Co v Superior Court (n 747).
a breach of § 6103 if the disclosed information is retrieved from the IRS, while disclosure of the same information is not a violation of § 6103 if the information is retrieved from a public court record. Return information that would otherwise be confidential may thus be publicly accessible if contained in a public court record.  

This constitutes a vivid example of the source-based approach where information is kept confidential at one authority (the IRS) but not at another (the court). This is to be compared to Swedish case law, RÅ 1990 not 286, where the court ruled that since much of the requested information was contained in another public decision it could be disclosed (with the redaction of one sentence) despite the fact that the court considered disclosure of such information would cause damage or harm to the individual.

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 non-disclosure rule because it comes under the term ‘return information’. All information relating to audits, investigations, settlements, etc are thus protected under § 6103.

One reason for having a source-based approach, that is, to have confidential tax returns but public court decisions, concerns the amount of matters. The burden on the tax administration is heavier than the courts because not every tax return or tax assessment is appealed to the court. If tax returns were to be public, in total or after a damage assessment, this would therefore increase the workload of the tax administration.

Another approach, instead of source-based, 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 that once public, always public.

When speaking of a source-based approach there is reason to return to what is held previously concerning the adjustment of the Swedish secrecy rules to being information-oriented rather than document-oriented. It

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751 See subsection 4.4.4.2.
752 See subsection 3.4.5.
753 Prop 1979/80:2 Del A (n 114) 252–253.
754 Such a solution is elaborated on in subsection 6.9.
755 See subsection 3.4.2.
was noted in preparatory works that with the implementation of ADP at the tax administration the law applicable at that time resulting in secrecy being dependent on the source of information. That is, if information existed in one of the (in legislation) enumerated documents the information was secret. If the same information instead existed in a tax record (deemed an official document), because the information in tax returns was registered in the data base, it was public. From such a perspective a source-based approach might 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 accessible at court, is based on the level of transparency that could and/or should be expected at different authorities. That is, transparency in court proceedings (as maintained above) is considered to be of great value both in Sweden and the United States, which leads to tax information in court proceedings being more transparent than at the tax administration. The other type of source-based approach concerns the fact that information could be confidential or public at the same authority, depending on its source. This type of source-based approach is more difficult to justify, which is also noted in Swedish preparatory works.

Though it might be held that certain types of information is more likely to cause damage in one situation while not in another and therefore to some point defend a difference in confidentiality levels within one and the same authority regarding particular information, 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.

This latter type of source-based approach could be held to be manifested in PAISA Chapter 27 § 6, which prescribes disclosure of tax administration decisions. It might be argued that this leads to confidentiality concerning a particular type of information being dependent on whether it is found in a tax return or in a tax decision. However, it should not be the case that the particular information is kept secret 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 holding it should therefore be open to

756 The Secrecy Act of 1937
757 Prop 1979/80:2 Del A (n 114) 252.
758 See ibid 251–252.
possible disclosure 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 § 1, but information that is contained in a tax decision should be disclosed since such information is public under § 6. 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, and why the decision could be disclosed with the redaction of only one sentence.\footnote{759} 

This might appear contradictory in reference to the discussion on and division of different source-based approaches, where I have contended 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. Why that is, is further elaborated in Chapter 6, but my standpoint could in short be described as being based on the following conclusion: the closer a final decision, the more important is transparency. 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.\footnote{760} 

Another similarity apart from the source-based approach concerns advance rulings. Both regimes provide transparency as to advance rulings, but only in redacted form, PAISA Chapter 27 § item 1 cf IRC § 6110. 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 might reveal highly sensitive details on business activities etc. Swedish preparatory works stress that the interests of confidentiality protection is particularly strong concerning advance rulings.\footnote{761} This is strengthened by the case law of the Supreme Administrative Court in terms of 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.\footnote{762} In the

\footnote{759} See subsection 3.4.5. \footnote{760} This discussion refers only to the difference in secrecy level between tax administration decisions and tax returns. A reason for confidentiality concerning tax returns alone has been provided above, holding that since the purpose behind a right of access to government information is to gain insight into government activities there is no great defense in having transparent tax returns because tax returns do not afford such insight. This is more thoroughly discussed in subsection 6.2. \footnote{761} Prop 1979/80:2 Del A (n 114) 256; SOU 2003:99 (n 372) 759. \footnote{762} See subsection 3.4.6.
United States, Congress has noted that private rulings should be made public because this is the only that all taxpayers can be assured of access to the ruling positions of the IRS, and that this will tend to increase public confidence the fair and equitable operation of the tax system.\textsuperscript{763}

On redaction of advance rulings a feature similar to that of the Swedish requirements of damage are found in US tax confidentiality law. The IRS must delete information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, § 6110(c)(5). Such a clearly unwarranted potential invasion of personal privacy exists if the potential harm caused by the disclosure of personal information outweighs any public interest purpose. Presumably this weighing test is applied with the recognition that the taxpayer is to remain unidentified, Reg § 301.6110-3(a)(5).\textsuperscript{764}

One major difference between Sweden and the United States concerns the possibility open to the taxpayer of entering into agreements with the tax administration concerning personal tax liability. The general rule is that the Swedish tax regime provides for no such agreements. However, there is one limited opportunity of entering into an agreement with the Tax Agency, which has been mentioned in Chapter 3. This concerns 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 has been held, the law is not entirely clear with regard to the level of secrecy concerning these agreements. Preparatory works state that they 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 these agreements are not tax decisions it is my contention that a party statement is a type of decision, and the reason why these agreements could be embraced by full disclosure under § 2 para 3 item 1 instead of the reverse requirement of damage in § 2 para 2.\textsuperscript{765}

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 op-

\textsuperscript{763} Senate Report No 938, 94th Cong, 2d Sess’ (n 619) 305–306.

\textsuperscript{764} Galotto, La Puma and Pai (n 623) 146.

\textsuperscript{765} See subsection 4.4.3.2.
portunity 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.766

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 the United States. Information in court decisions is public in both countries, though the Swedish rule provides 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,767 public in its entirety – a feature not found in the US tax confidentiality regime. Again, the difference in approaches towards confidentiality legislation shines through, since the US regime provides a much higher level of privacy protection than in Sweden, leaning on the right of public access to official documents.

5.6 The Achievement of the Benchmarks

The second chapter of this thesis provides a theoretical framework, which is to be used in the evaluation process. This evaluation is based on the criteria of effectiveness, defined in the European Commission Impact Assessment Guidelines as ‘the extent to which options achieve the objectives of the proposals.’768 The criteria chosen to perform this evaluation are tax compliance, administrative costs, and taxpayer privacy.

In setting the benchmark on tax compliance769 it is shown that deterrence, social norms, trust and fairness are the factors among the most important drivers behind the taxpayer’s choice to comply or not with the tax laws that are of interest for the issues dealt with in this thesis. Briefly, tax compliance increases with the perception that most taxpayers comply and that those who do not are caught and punished. If taxpayers perceive that tax evasion is widespread and that their tax administration operates in an unfair manner, this might lead people to justify tax evasion and tax non-compliance could thus increase. Transparency helps nurture taxpayer trust in the tax administration (assuming that transparency reveals a trustworthy

767 Most of the decisions made by the Swedish Tax Agency are public, but not all of them, see subsection 3.4.4.
769 See subsection 2.3.
administration) because if taxpayers are able to take part in the administration’s procedures they can decide for themselves whether or not it treats taxpayers fairly and equally. It is concluded that rules on tax confidentiality (or tax transparency) should be used in order not to (only) evoke deterrence, but rather create trust and promote strong social norms in favour of compliance.

Concerning the second benchmark – administrative costs – four steps, each involving costs for the tax administration, have been identified, in what I term “the disclosure chain”. Costs are incurred for (1) search,\(^{770}\) (2) review, (3) reproduction, and (4) disclosure. The second step is the most costly because this might require the personal attention of highly skilled officers for long periods.

The third benchmark embraces perhaps the most prominent interest discussed in tax confidentiality/tax transparency contexts – the protection of taxpayer privacy. The right to privacy is not an absolute right, which means that the individual might have to tolerate violations of privacy to a certain extent. It is concluded that an invasion of privacy occurs upon the mere disclosure of personal information to a third party. The scope of the breach of privacy – the way the information is disclosed, and the consequences of disclosure – can then determine whether or not such interference is legitimate.

Both Swedish and US tax confidentiality legislation have rules affording full confidentiality with regard to tax returns (or, more specifically, information in tax returns in Sweden), PAISA Chapter 27 § 1 and IRC § 6103(a).\(^{771}\) Such rules can be held not to promote tax compliance since they do not open the way for public access to information. However, transparent tax returns do not to any great extent provide insight into tax administration activities, which is the main purpose behind the right of public access to information. Transparent tax returns rather reveal only raw tax information disclosed by the taxpayer to the tax administration. It does not show how the tax administration carries out its duties with regard, for instance, to tax assessment. For this reason, the high levels of confidentiality in terms of tax returns afforded by both the Swedish and US tax confidentiality regimes should not bear any particular costs with regard to tax compliance, in that access to information on government activities is not obstructed.

\(^{770}\) This step is delimited from any further analysis.

\(^{771}\) As previously held, the Swedish tax secrecy legislation provides secrecy with regard to information in a tax return and not to the tax return itself.
However, § 6103(a) does not cover only the tax return but also return information, a term encompassing almost every information on taxpayers held by the IRS, that is, information is protected by confidentiality regardless of the level of finality. This means that information that in Sweden may be disclosed under § 6 because it is part of a public Tax Agency decision is protected by confidentiality under § 6103(a) and the term ‘return information’. It has been argued that such information might reveal more information on how the tax administration undertakes its duties compared with the raw tax information in a tax return. This is why such confidentiality should bear costs with regard to tax compliance, since the opportunities open to the public to scrutinize government activities thus decrease. The notion that the tax administration conducts its work properly and fairly is held to be decisive for the taxpayer’s choice on whether or not to comply, since trust is of significant value concerning (tax) compliance. Limited possibilities open to individuals to take part in information that might strengthen or create such a notion might thus have impacts on levels of tax compliance. The Swedish regime thus should provide greater chances of tax compliance than the US, based on the public nature of decisions in § 6 (increasing access to information) and the high level of confidentiality prescribed on return information in § 6103(a) (to a great extent limiting access to such information that might be of great interest to the public).

The US tax legislation provides a taxpayer with the possibility of entering into agreements on personal tax liability with the IRS through closing agreements, an option not (in principle) found in Sweden. The only opportunity in Sweden to enter into an agreement with the Tax Agency concerns a taxpayer’s liability to pay taxes owed by a legal entity. While the Swedish legislation is not entirely clear as to the secrecy level regarding these agreements (if they fall under a reverse requirement of damage or full disclosure), the IRC affords total confidentiality with regard to closing agreements. As previously argued, such agreements afford a basis for a perception of the tax laws being unequally applied. Such a notion might be strengthened by the high level of confidentiality protection given, since confidentiality impedes public opportunity to monitor tax administration activities. This jeopardizes taxpayer trust in the tax administration, which is an important factor for tax compliance. The US tax confidentiality regime thus entails rules that could bear costs in terms of tax. Since it is not clear which secrecy rule applies to the Swedish type of agreement, similar costs might also occur in Sweden.

772 See subsections 3.4.4 and 4.5.2.
The evaluation of the different jurisdictions’ tax confidentiality legislation appears to end with the conclusion that because the Swedish tax secrecy regime affords a higher level of transparency it promotes compliance to a greater extent than US rules. However, surveys and statistics show that the tax gap is not remarkably different in the United States compared with Sweden. The voluntary compliance rate in the United States is estimated at roughly 83 percent,\(^{773}\) while the tax gap in Sweden is estimated at about 10 percent.\(^{774}\) The intention of this thesis is not to exhaustively discuss the topic of tax compliance or to closely study and compare the data on the tax gap. Other factors influence (tax) compliance than those studied in this thesis.\(^{775}\) Furthermore, the aspects chosen for this study are seen only in the light of confidentiality legislation. Because this thesis is intended to show how tax confidentiality legislation might relate to tax compliance, the fact that compliance is relatively high in both countries does not invalidate the research conclusions of this study.

Unquestionably, the US tax confidentiality regime affords higher protection in terms of taxpayer privacy compared with the Swedish rules because the former provides a wider scope of confidential information owing to what is encompassed by the terms ‘tax return’ and ‘return information’ and employs measures such as redaction of identifying information to a great extent. This is while the Swedish regime allows a high level of transparency with regard to information contained in tax administration decisions and less requirements for redaction of sensitive information. Again, this might be explained by the different approaches to confidentiality legislation. In Sweden confidentiality is seen as the exception to the right of public access to official documents (which is the starting point of secrecy legislation), while in the US confidentiality is more centred on protecting privacy.

However, it appears (for the purpose of protecting privacy) that the US confidentiality legislation creates an administrative burden on the IRS and thus increases financial costs. First, the rule holding a requirement for the so-called general purpose consent places strict requirements on how such consent may be acquired. Though it is the taxpayer that needs to provide the information and fill in the required form, the IRS still needs to request such a form from the taxpayer in order to be able to disclose the infor-


\(^{775}\) See subsection 2.3.2.1.
mation. Second, as held, the US tax confidentiality regime provides provisions on redaction of taxpayer-identifying information to a greater extent than under Swedish tax secrecy legislation. Almost every exception to the general non-disclosure rule in the IRC making public access possible, requires redaction of certain information prior to disclosure to ensure that taxpayer privacy is adequately protected, in that the information in question may not be attributable to a specific taxpayer. Redaction procedures are costs-increasing as they are both time- and personnel consuming. In Sweden redaction of information in matters on disclosure of tax information is more limited. The decisions of the Tax Agency are embraced by full transparency and no redactions are possible. Redaction of information is afforded by a requirement of damage. For example, PAISA Chapter 27 § 4 provides a straight requirement of damage in terms of disclosure of tax information in court proceedings. Disclosure of advance rulings also requires redaction of taxpayer-identifying information.

On privacy protection and levels of confidentiality in court proceedings and judgments, the following conclusions can be made. Adhering to the current position that information loses its confidentiality protection under IRC § 6103 when contained in public court records, the US tax confidentiality regime affords lower privacy protection at this level than the Swedish rules, since PAISA provides a requirement of damage, enabling the court to decide that certain information may be kept secret. Though the main rule is that confidentiality provisions cease to apply when information is included in a court judgment, the court has the possibility open to it of deciding on continued confidentiality. That is, the court may decide that the confidentiality under PAISA Chapter 27 shall continue to apply to information in the judgment. The Swedish tax secrecy regime thus provides a somewhat stronger protection of privacy in this regard.

Another issue related to the level of transparency involves the different ways an individual may obtain public information from the tax administration. On this issue there is a clear difference between the Swedish and US tax confidentiality regimes. According to the US rules the request must be in writing, which is not required under Swedish rules. The requirement of formal written requests could form an obstacle to those wishing to obtain information merely out of curiosity, which may not be provided by rules affording access by a simple telephone call. As requests and subsequent disclosure might be lesser in a regime employing such inertia in the system,
the US regime thus affords a greater limitation as to the scope of privacy violations. It might, on the other hand, have a distorting effect on public access. Rules on access to public information that are too formal or complicated (or both) could prevent people from exercising their rights.

5.7 Conclusions

This subsection contains a summary of the conclusions reached in the foregoing subsections in relation to research questions 3-7.

On the historical development of tax confidentiality legislation in Sweden and in the United States the difference is 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 this it was possible to obtain a copy of a tax return. The content of the rules governing tax confidentiality has remained mostly the same since its introduction: tax returns – later changed to information in tax returns – have been protected by secrecy, while tax secrecy 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 widely 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 placed on the right of access to official documents in Sweden and its part in constitutional law – providing a point of reference in the drafting of every new piece of secrecy legislation.

On the general legal framework for tax confidentiality legislation in Sweden and the United States, the main difference recognized in this chapter is that Swedish tax secrecy legislation is governed by both constitutional law and ordinary law (the FPA, providing the right of public access to official documents, and PAISA), while none of the laws governing disclosure of Federal tax returns or return information in the United States is constitutional. Nevertheless, certain similarities have been observed. Both FOIA and PAISA provide the public with the right of access to government information and then enumerates certain exemptions to that right. Tax confidentiality falls under one of these exemptions in both countries. A difference recognized in relation to the specific confidentiality rules is that in Sweden the tax secrecy rules are found in a specific secrecy act together with other secrecy provisions, while US 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 secrecy protects only infor-
mation (not documents). In Sweden a tax return is considered an official document under the rules in FPA Chapter 2.

The reason behind the rules providing tax confidentiality appear to be the same in both Sweden and 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 of tax confidentiality legislation. In Sweden the right of public access to official documents, found in constitutional law from 1766 and deeply rooted in Swedish culture, is explicitly the starting point of Swedish secrecy legislation. Hence, secrecy is the exception rather than the rule. The above explains the high level of confidentiality concerning tax returns both in Sweden and the United States, but also the high level of transparency regarding tax decisions in Sweden.

In terms of the high level of confidentiality of tax returns (or information in tax returns), both countries stress the importance of keeping information confidential, because most of the information in a tax return might be highly sensitive. Though not explicitly expressed either in Sweden or the United States, a reason for this emphasis on keeping tax returns (or information in them) 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 raw tax information submitted by the taxpayer. Because the purpose behind a right of access to government information is to gain insight into government activities, there is no great defence in having transparent tax returns.777

Another similarity besides the high level of confidentiality in terms of tax returns is that both regimes afford a high level of transparency with regard to tax information in court proceedings. This might be explained by the fact that Sweden and the United States appear to argue similar reasons in favour 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 ensures that judicial proceedings are seen to be conducted fairly. Openness increases and consolidates the public’s knowledge of, respect for, and confidence in the law, the legal system and its enforcement.

Subsequently, disclosure of information could be said to be source-based both in Sweden and the United States, that is to say, whether or not the information may be disclosed depends on its source. If information is con-

777 For a more detailed discussion on the confidentiality of tax returns, see subsection 6.2.
tained in a tax return then it 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, in principle, are public in Sweden but 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 being the starting point of confidentiality legislation.

On the benchmarks, Sweden provides a more transparent tax administration than the United States, because of the public nature of tax decisions, which afford the public great insight into the Tax Agency activities. It is suggested that such transparency increases the prospects of taxpayers complying with tax laws. As for the second benchmark, it is concluded that the US tax confidentiality regime induces more costs on the tax administration than the Swedish regime. This is because the rules in the IRC, to a greater extent than those in PAISA, require actions to be taken prior to disclosure, such as redaction of taxpayer-identifying information. With regard to the benchmark on taxpayer privacy there is no doubt that the US tax confidentiality regime provides greater protection for taxpayers than the Swedish model. This is mostly due to the public nature of tax decisions in Sweden, which provide low protection of taxpayer privacy, and the frequently employed measure in the IRC of redaction of taxpayer-identifying information.
PART III

Option Comparison
6 Evaluation of Legislative Options

6.1 Introduction

As previously stated, the comparative study in this thesis has two functions. It consists of a country comparison on the one hand and an option comparison on the other. This means, first, that there is a comparison with regard to the rules in co-operation and second, that there is a comparison of rules extracted from their context. To further clarify the difference between the country and the option comparison, the following is asserted.

I hold that the country comparison first and foremost contains a comparison of rules in co-operation. For example, the Swedish rule on semi-absolute secrecy on information in tax returns is compensated by rules providing high levels of transparency with regard to Tax Agency decisions and court proceedings and decisions. The evaluation in the country comparison focuses on the outcomes of this balance. In the option comparison a deeper analysis is provided regarding rules on confidential tax returns with no consideration as to rules that might compensate such a high level of confidentiality – that is, no consideration to exceptions to full confidentiality (or total transparency) that might balance the consequences of such rules.

The foregoing part (Chapters 3-5) contained the country comparison, while this part (Chapters 6 and 7) contains the second function of the comparative study, namely the option comparison. In this part, the aim is to answer research questions 2a-c, that is, 2) how do different rules on tax confidentiality achieve the objective of a) promoting taxpayer compliance, b) minimizing administrative costs, and c) protecting taxpayer privacy?

For the fulfilment of the option comparison, the country comparison functions as an aid in the identifying phase. This means that the option comparison builds on the findings in the country comparison, as rules found in the Swedish and the US tax confidentiality regimes are extracted from their context. Because Swedish and US tax confidentiality legislation do not always contain a rule on the issues identified and dealt with in this chapter and because the recommendation when applying IA is to identify as many possible options as possible, the methodology makes room for other options. This is why rules from Sweden and the United States are sometimes supplemented with those from other jurisdictions, which illuminate the issue at hand.778 The choice of including options from other juris-

778 As for the selection of rules, see subsection 1.3.4.
dictions and using not only the Swedish and US regimes as examples, apart from the above, is based on the view that such an approach widens the basis for the analysis and prevents it from being too repetitive in relation to the country comparison. As previously maintained, the choice of jurisdictions to include in this chapter is not intended to provide an exhaustive list of options on the topic at hand, but merely to give illuminative examples.

The options are then evaluated against the benchmarks. The evaluation is based on the criteria of effectiveness, defined in the European Commission Impact Assessment Guidelines as “the extent to which options achieve the objectives of the proposals”. This activity focuses on the performance of the options, or, as transferred to this thesis, the extent to which the options achieve the interests embraced by the selected benchmarks. In other words, this chapter evaluates the degree to which different rules on tax confidentiality meet the objectives embraced by the benchmarks. 779

The evaluation in this chapter is conducted by extracting the different rules from the country study, supplemented by other possible rules. The different rules, or parts of them, create their own subsections depending on which issue the rules govern. As far as possible, each subsection begins with a short introduction and examples of rules, which set the framework for that particular subsection. In some cases one rule is included in several subsections. This is because one and the same rule may govern different issues. When a rule as a whole is not evaluated in a subsection but rather only a part of it, that part is emphasized in the cited rule.

Adjustments of these rules is sometimes needed – or preferred – because extracting a rule from its context could deprive it of some of its content. Additionally, not every detail in a provision is needed in order to illuminate an issue. In some cases too many details get in the way. Hence, adjusting a rule sometimes makes the issue clearer. This might not be a conventional method when analysing legislative texts in the field of legal science. However, since the aim of this thesis is not focused on analysing the law as it stands as in its exact content and application but rather to examine the consequences of different levels of confidentiality in relation to the selected benchmarks, there is no great loss in adjusting the examined rules.

The common denominator of subsections 6.2-6.9 is the scope of accessible information. These subsections contain an examination of rules that in different ways determine which information may be accessible in which situation, for example, information in tax returns, decisions, advance rulings and agreements. Subsection 6.10 concerns the scope of accessibility, that is to say, rules that determine different ways of gaining access to pub-

779 See subsection 1.3.3.
lic information. Examples of this are rules on access through written requests and Internet access. Subsections 6.11-6.13 entail rules that could be said to be related to the scope of accessibility, namely time limits, notifying taxpayers about disclosure, and the charging of fees for gaining access.

Portions of the analysis in this chapter are found elsewhere in this thesis, which might appear to be repetitive. However, the intention here has been to further elaborate the discussions, since it has been kept rather short in previous parts of the research. This furthermore facilitates the possibility of reading the country comparison and the option comparison separately.

6.2 The Confidentiality of Tax Returns

The issue at hand in this and the following seven subsections concern, as held in the introduction above, the information itself, that is, rules determining the scope of accessible tax information. In this particular subsection, the issue of confidential tax returns is explored.

Issues as to the scope of accessible information involve questions on which information, if any, may be public and which information should be public, and which information may be confidential and which information should be confidential. With regard to what extent tax returns should be public, it is difficult to argue that all of the information in a tax return should under all circumstances be public, or should always be confidential, since the content of the tax return differs depending on what constitutes taxable events within the different jurisdictions’ tax systems. Not being able to go into details with regard to the specific information in tax returns does not hinder addressing the issue of the extent of confidentiality in respect of tax returns on a more overall level.

The evaluation in this subsection revolves around the rules from Sweden and the United States given below, which prescribe a high level of tax confidentiality, and their opposite, total transparency of tax returns. The possible options to employ with regard to the level of confidentiality of tax returns might not only include either total confidentiality or full confidentiality, as might be implied here. There are other possible options to employ which balance the costs and the benefits discussed in this subsection. However, evaluations as to other means are provided in subsequent subsections. This accords with the purpose of the option comparison, that is, to evaluate rules out of their context/legal system.
Secrecy applies to information about an individual’s personal or financial circumstances in activities relating to the determination of tax or establishing the basis for determining the tax, and to information in activities relating to assessment for taxes on real property. PAISA Chapter 27 § 1\textsuperscript{780}

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Returns and return information shall be confidential, [...] except as authorized by this title. IRC § 6103(a)

When the above cited rules, separated from their context and their cooperation with complementing rules, are put in the tax compliance perspective there are some issues that appear notable. The conclusion previously drawn is that tax transparency boosts tax compliance.\textsuperscript{781} In that perspective, rules providing total confidentiality bear large costs. Individuals are not provided with the means to be reassured that others comply with the tax laws and that the tax administration is conducting its work properly. Total confidentiality thus supports neither vertical nor horizontal trust. Low trust, both regarding interpersonal trust and trust between the individual and the tax authority, in turn decreases tax compliance. Consequently, rules on total confidentiality of tax returns should afford negative impacts with regard to tax compliance. Furthermore, recognizing the negative impacts of a high level of tax confidentiality with regard to taxpayer compliance implies that tax transparency, as being the antagonist of tax confidentiality, ought to be beneficial from a tax compliance perspective. The conclusions with regard to taxpayer compliance suggest that tax transparency enhances taxpayer trust in the tax administration (assuming the tax administration is trustworthy, transparency thus not revealing a malfunctioning administration) helps create and uphold a compliance norm, hence enhancing tax compliance. Based on these conclusions, tax returns ought to be transparent.

Even so, there are other considerations to be made which alter this conclusion. Aspects that require further considerations concern the underlying justification for transparency, the content of the tax return and its contribution to the fulfilment of the purpose behind a right to information.

It is concluded in Chapter 2 that the probability of detection has a general, though small, positive effect on compliance. The tax administration has by nature the immediate responsibility of monitoring taxpayer compliance with the law. Rules on tax confidentiality – or rather rules in favour

\textsuperscript{780} Author’s translation.

\textsuperscript{781} See subsection 2.3.
of tax transparency – should offer not first and foremost an opportunity for the public to monitor their fellow taxpayers’ compliance with the tax laws, but that of monitoring the tax administration and its activities. If the focus is placed on giving everyone the opportunity of supervising one another with regard to compliance – when tax transparency is regarded as a deterrent factor to increase the detection probability function – a more deterrence-oriented system is the result. Such a view on the benefits of tax transparency suggests that others are not trustworthy and therefore need monitoring. Research indicates that “[t]rust between people, that is, social capital, is not increased or enhanced in an informant society”. 782 A risk of having a system with open returns based on enhancing the deterrent factor leads to a possible increase in the public’s perception of such an informant society. If everyone is able to obtain another individual’s tax return and all of its information on the basis of enhancing the detection risk, this might result in mutual mistrust. If individuals perceive others to be dishonest, that in turn decreases the possibility of their complying with the law. Tax transparency should not primarily be a means of enhancing the chances of detecting non-compliance – that is, increasing the deterrent factor – as the conclusion suggests that deterrence should be used as a means of reinforcing norms. 783

Furthermore, it could be argued that open returns, giving the public the opportunity of discovering cheats not detected by the tax administration, works in favour of an efficient and effective tax administration, since it removes some of the monitoring burden from the administration. Nevertheless, putting a detection function onto the public might indicate that the tax administration cannot meet its duties with regard to uncovering cheats, which may lead to a decrease in taxpayer trust in the administration. This could have a negative impact in decreasing tax compliance.

Consequently, there are considerations to be made as to the basis for rules providing transparent tax returns, since the basis may affect the impacts of the rules. That is to say, if the basis for transparency is to increase the detection probability (increasing the deterrent function) the risk of costs in respect of tax compliance should be higher than if the basis for transparent tax returns is to provide insight into the tax administration’s activities.

This last statement leads to the next issue concerning the content of tax returns and its contribution to the public’s insight into tax administration activities. In the following I argue that a tax return as such does not pro-

782 Skatteverket, ‘Right from the Start’ (n 157) 51.
783 See subsection 2.6
vide any guidance on tax administration activities and subsequently affords no sound basis for transparency.

Tax returns often contain much information about taxpayers. A tax return contains raw tax information submitted to the tax administration by the taxpayer. However, this information does not reveal how the tax administration applies the tax laws. Returning to the purpose of a right to information, such a right should first and foremost be a right of access to information on government activities, not a right to gain access to personal information. As a tax return does not reveal any information concerning the tax administration’s activities it could be questioned to what extent open returns facilitate the fulfilment of the purpose behind a right of access to information. Tax return information does not reveal whether or not the tax administration is trustworthy, but rather the trustworthiness of other taxpayers. However, firm conclusions on the trustworthiness of other taxpayers is scarcely drawn based on raw tax information in a tax return, since open returns provide limitations as to the scope of the public’s monitoring opportunities. The returns usually reveal little information about the underlying validity of the specific items in the tax return. Because of this the tax administration is authorized to request taxpayers to provide additional information if the government needs to examine a particular return item. This is a necessity in order for the government to understand the legal justification for many of the return items. However, this investigative power is reserved for the tax administration, not an opportunity for the public. Transparent tax returns limit the public’s opportunity to scrutinize returns to the mere studying of raw information on each return, information that in the lack of underlying justifications could be subject to easy misinterpretation. Hence, open returns pose limitations as to the scope of the public’s monitoring opportunities.784

So far, there are several reasons for defending the confidentiality of tax returns: open tax returns do not provide a particularly sound basis for the public to monitor either the tax administration or other taxpayers, but might increase both horizontal and vertical mistrust. Consequently, confidential tax returns should be preferable.

A provision providing total confidentiality has benefits with regard to administrative costs. Rules such as the two above (with no consideration to potential exceptions to the high level of confidentiality provided) do not give rise to costs other than, simply put, the tax administration being obliged (depending on the design of the regime) to send a notification on

the refusal to disclose the requested information. Another factor of having rules affording total confidentiality of tax returns is that such rules might decrease the volume of requests, because there is no use in requesting information that is protected by total confidentiality and thus will not, under any circumstances, be disclosed.

Rules on total confidentiality of tax returns provide benefits not only with regard to tax compliance and administrative costs, but also in relation to taxpayer privacy because such rules afford a very high level of privacy protection. Simply put: no disclosure, no violation of privacy.

Both of the rules given in the beginning of this subsection recognize that a tax return may consist of both economic information on an individual as well as personal information, information generally recognized as being more sensitive than that of an economic nature. They are thus both quite broad in their scope with regard to the type of information protected under the rules. Total confidentiality of tax returns provides high protection of information, both economic and personal. Consequently, rules providing for full transparency with regard to tax returns impose too large a threat to taxpayer privacy, since all the information (whether economic or personal) may be disclosed.

To summarize: first, the general conclusion in respect of tax compliance is that confidentiality provides no insight into the tax administration’s activities, thus decreasing taxpayer trust in the administration, which in turn decreases tax compliance. However, as tax returns provide little information on how the tax administration actually undertakes its duties, but rather provides raw tax information revealed by the taxpayer, disclosure of tax returns has limitations as to the benefits of transparency. Furthermore, it has been concluded that open returns risk enhancing an informant society, leading to negative impacts on tax compliance. Second, rules on total tax confidentiality have benefits with regard to administrative costs, as no disclosure is provided and thus no costs are induced in the different steps of the disclosure chain. Third, as rules on total confidentiality of tax returns afford a very high level of protection of taxpayer privacy, such rules have great benefits for taxpayer privacy.

6.3 Public Decisions

In the foregoing subsection the issue of transparent or confidential tax return is discussed with the conclusion reached that confidential tax returns have greater benefits with regard to the benchmarks than transparent tax returns. This conclusion is based, *inter alia*, on the fact that tax returns do not provide insight into the tax administration’s activities since they
contain raw tax information (with few possibilities open to the public to validate) submitted to the tax administration for the determination of tax. The following four subsections deal with tax information in other stages of the tax administration’s activities relating to the determination of tax. This subsection deals with the issue of public decisions and the impacts that rules providing for transparent decisions might have on the benchmarks. The discussion centres on the following Swedish rule prescribing total transparency in terms of tax administration decisions.

Secrecy in accordance with §§ 1 and 3 does not apply to decisions on the determination of tax or pensionable income or decisions on establishing the basis for the determination of tax. PAISA Chapter 27 § 6.

Transparent decisions as in this cited rule include the decision as a whole, that is, it includes the justification for the decision. However, a decision may vary with regard to its content. A decision whereby a taxpayer’s tax return is approved without an audit may consist of nothing more than taxable income and taxes owed. An audit might, however, result in a decision revealing far more information than mere figures. This subsection concerns the latter kind of decisions. Disclosure of the former kind of information is dealt with in subsection 6.8.

The conflict of interests that the issue of public decisions carries includes the taxpayer’s interest in having a thorough justification for the decision in order to ensure that his or her assessment is correct, that the tax laws are applied correctly. The OECD example Taxpayers’ Charter states an obligation for the tax administration to explain to the taxpayer the reasons for decisions made by the administration concerning the taxpayer’s affairs. It places an obligation on the tax administration at the conclusion of an investigation to send the taxpayer the relevant minutes or a written advice of the result of such investigation and the reasons for the decisions taken by it. Moreover, Article 41 of the EU Charter of Fundamental Rights, holding the right to good administration includes, *inter alia*, the obligation on administrations to give reasons for its decisions. As shown, Swedish law requires public authorities to justify their decisions. The issue of whether or not there should be an obligation to provide reasons for a decision at all is a question that (though interesting) falls outside the scope of this thesis. It is not necessary to discuss a current or non-current obligation for giving

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785 Author’s translation.

786 OECD, Taxpayers’ Rights and Obligations (n 153) 8.

787 See subsection 3.4.4.
reasons for a decision in order to study the costs and benefits of rules governing the extent of confidentiality of the justification for a decision.

Access to decisions, including the reasons for them, is not only of interest for the individual to whom the decision pertains, that is to say, the taxpayer’s interest in having a thorough justification for any decision in order to ensure that his or her assessment is correct. It goes further. Public decisions provide people with the opportunity of scrutinizing the work of the administration. Public decisions, including the rationale, to a great degree facilitate insight into how the assessment work is carried out. People are able to examine for themselves whether or not the tax administration has applied the tax laws correctly and equably.

The importance of equal treatment of taxpayers for taxpayer trust in the tax administration has been shown in subsection 2.3.2.4. If taxpayers believe that the tax administration treats taxpayers equally, then this increases their trust in the administration. A high level of trust in turn increases the prospects for voluntary tax compliance.

Hence, public decisions may increase taxpayer trust in the tax administration by enabling individuals to gain insight into the actual assessment work to see that the tax administration applies the tax laws correctly and treats people equally, which could enhance voluntary compliance. However, if decisions show that the tax administration does not apply the laws correctly and/or equally then public decisions may correspondingly decrease compliance. Confidentiality with regard to decisions may thus facilitate hiding a malfunctioning tax administration in order to increase the level of compliance. However, hiding mistakes in such a way appears mischievous. Focus should be set on improving the tax administration’s work in order to form a solid ground to gain long-term taxpayer trust.

Another aspect that affects taxpayer compliance is norms. Norms involve reciprocity, that is, the taxpayer repays the behaviour of others. Public decisions including the reasons for the decision might reveal non-compliant taxpayers. People requesting disclosure of decisions on the basis of a rule prescribing public decisions could thus gain knowledge of taxpayers cheating on their taxes. The knowledge of the non-compliant behaviour of others could create a picture of widespread cheating, thus creating (possibly) the perception of a norm that says: “Cheating is OK”. If non-compliance is the norm, then the risk is that more taxpayers adhere to that norm and therefore cheat on their taxes. However, a decision showing non-compliance most probably also includes the fact that the tax administration has detected the non-compliant behaviour and, moreover, corrected the information in the taxpayer’s tax return, making the non-compliant taxpayer pay the right amount of taxes (and perhaps penalty fees). Though
the decision shows that a taxpayer has cheated, which could create or enhance a non-compliance norm, the fact that the tax administration has detected the fraud and taken measures to correct it, weighs up the risk of the formation of the non-compliance norm and instead increases the chance of the taxpayer complying with the tax laws. This refers to the norm-reinforcing function of deterrence, holding that detection and punishment can work hand-in-hand with the fostering of compliance norms. Enforcement may strengthen the individual’s perception that compliance is the right thing, resulting in the individual generally complying.\textsuperscript{788}

Regarding the benchmark on administrative costs and their impacts, the following might be asserted. The second step in the chain of identified administrative costs where the tax administration needs to review the information to determine whether any of the information falls under any rule exempting it from disclosure, does not impose high costs on the tax administration by a rule on transparent decisions. There is no assessment of damage to be done, no procedure of redacting certain information or giving the requester some sort of notification as to why the information may not be disclosed. However, disclosing a decision induces costs within the third and fourth steps, that is, with regard to reproducing and actually disclosing the decision. How high the costs are depends on the amount of copies and in what form the decision is disclosed (for instance, paper or electronic disclosure).

As to the third benchmark – taxpayer privacy protection – a rule such as the one above, providing for total transparency of tax administration decisions unquestionably provides a remarkably low protection of taxpayer privacy. While it affords a low protection of taxpayer privacy, it does not provide as low a privacy protection as a rule on full transparency of tax returns, since a decision (in accordance with Swedish tax secrecy law) does not include every detail in the tax return. However, a rule on public decisions provides that information that otherwise may be protected by confidentiality may be made public. For instance, transparent decisions might reveal any deduction including the reasons for the deduction, the source of an income such as the name of the employer, employment status, disability status, associations and club memberships, religious affiliation, mortgage costs, marital status, child support and alimony, and the amount and size of gifts to family members and others. Much of this information is of a type that reveals highly personal details. The decision might also, to a certain point, contain more information than the tax return, as the tax administration might have required more information to be submitted by the

\textsuperscript{788} See subsection 2.3.2.3.
taxpayer during the audit than originally submitted. Transparent decisions to a great extent thus threaten taxpayer privacy.

Due to the fact that a rule on transparent decisions poses a large threat to taxpayer privacy, great responsibility is put on tax officers when writing their decisions. Great care is required so as not to insert any excess information into the justification.

To summarize: first, public decisions should have benefits with regard to tax compliance. Such a regime offers a great deal of insight into the tax administration’s assessment activities, thus forming a sound basis for monitoring. Assuming this transparency reveals a trustworthy tax administration and complying taxpayers, it promotes tax compliance in that it enhances both vertical and horizontal trust. Second, administrative costs are not severe because costs are primarily induced in the third and fourth steps of the disclosure chain – that is, in reproducing and disclosing the information. Third, full transparency of tax administration decisions bears costs with regard to taxpayer privacy as such a regime provides low protection of individual tax information.

6.4 Advance Rulings

The foregoing subsection concerns the level of transparency with regard to information contained in tax administration decisions on executed transactions (hereinafter judicial tax decisions). This subsection concerns decisions on planned, yet not executed, transactions: advance rulings. The discussion takes its starting point in the two following rules extracted from Swedish and US tax confidentiality legislation.

<table>
<thead>
<tr>
<th>Secrecy in accordance with §§ 1 and 3 does not apply to decisions on the determination of tax or pensionable income or decisions on establishing the basis for the determination of tax. However, confidentiality applies if the decision concerns</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Advance ruling of tax assessment or tax matter. PAISA Chapter 27 § 6789</td>
</tr>
</tbody>
</table>

* *** *

Except as otherwise provided in this section, the text of any written determination and any background file document relating to such written determination shall be open to public inspection at such place as the Secretary may by regulations prescribe. IRC § 6110(a) |

789 Author’s translation.
These two provisions appear to provide opposing views on the transparency of advance rulings because the first states that confidentiality applies to advance rulings and the second rule provides transparency. However, with regard to the first rule above, it should be noted that since Swedish tax secrecy in § 1 applies to information, the above rule leads to the position that only information identifying an individual (whether a company or a private individual) is secret and not the entire advance ruling. The legal conclusion held in the ruling is not confidential unless it reveals information that identifies whom the ruling concerns. In practice this means that advance rulings are disclosed anonymously. If the circumstances make it possible to identify to whom it pertains even if the disclosure is anonymous, the entire ruling may be kept confidential. On the second rule above, names, addresses, and other identifying details of the person to whom a written determination pertains are deleted. Thus, the result of these (at first sight) opposing provisions is quite similar: the rulings are subject to disclosure except information that identifies the taxpayer.

Prior to proceeding with the analysis of the costs and benefit of transparent and confidential advance rulings, it is necessary to define the concept of the advance ruling.

Tax laws are often very complex. Uncertainties as to the interpretation and application of the laws are thus common. In order to clarify the tax consequences of a certain planned transaction an individual may seek an advance tax ruling. The legal effect of advance rulings is generally similar, in that the taxpayer to whom the ruling pertains can rely on the ruling, that is, an advance ruling that has become final is generally binding on the tax administration in relation to the requesting taxpayer.

An advance ruling typically includes a summary of the facts, recitation of the relevant law, and an application of the law to the facts. Consequently, advance rulings may involve detailed information on a taxpayer’s personal and economic life. One particular example of an advance ruling entailing details of personal information of a sensitive nature concerns a private letter ruling where a taxpayer suffering from AIDS with a poor prognosis asked for guidance on the tax consequences of selling a life insurance contract. Advance rulings pertaining to private individuals might concern tort settlements and emigration. An advance ruling might furthermore contain sensitive business information, as a company may request guidance on the tax consequences of a transaction involving ownership changes, the

790 Skatteverket, Offentligt eller hemligt (n 404) 169.
791 Thuronyi (n 58) 211–212.
792 ‘Private Letter Ruling 94-43-020 (July 22, 1994)’.
exploitation of patents, new forms of marketing, etc. Consequently, there are reasons for arguing that advance rulings should be protected by confidentiality.\footnote{Prop 1979/80:2 Del B (n 380) 425.}

However, since an advance ruling consists of information on interpretation of the tax laws, it provides a way of determining the extent of substantive rights and liabilities. It could be argued that such information is vital for the general public and should therefore not be kept confidential. Confidential advance rulings might generate suspicion that the tax laws are not being applied even-handedly. Advance rulings should be publicly accessible because in this way all taxpayers can be assured of access to the ruling positions of the tax administration. This in turn increases the public’s confidence that the tax system operates fairly and impartially.\footnote{‘Senate Report No 938, 94th Cong, 2d Sess’ (n 619) 305–306.}

Taxpayer trust in the tax administration, as repeatedly held, is of great importance in terms of whether or not taxpayers choose to comply with the tax laws. The core conclusion of the literature on procedural justice is that an authority acting in ways that citizens perceive to be fair is essential for creating trust. This is because if the procedures are perceived to be just and fair, the authority concerned will be viewed accordingly. Individuals’ perception of procedural fairness in their dealings with decision makers has a positive impact on compliance with legal obligations.

As implied, it is not only the reality that is of importance for taxpayer compliance, but the taxpayer’s \textit{perception} of that reality.\footnote{See subsection 2.3.2.4.} Taxpayers are more likely to increase voluntary compliance when they believe that the tax administration behaves fairly and reasonably. In the context of advance rulings it may thus be argued that if the public perceives that confidential advance rulings withhold important information that might reveal unequal treatment, this could lower taxpayer trust in the tax administration – while, in fact, there is no unequal treatment. Conversely, if the tax administration is perceived to be unfair or unjust, then voluntary compliance might not be enhanced. Transparent advance rulings could on this basis be argued to be preferable because they afford public insight into the application of tax laws.

For the purpose of the right to information it is of great interest to provide the public with the opportunity of scrutinizing tax administration activities. Both advance rulings and final judicial tax decisions provide insight into how the tax administration applies the tax laws. However, while an advance ruling might be final in that it is binding on the tax ad-
administration, it differs in its finality with regard to judicial tax decisions. An advance ruling may well constitute the last word prior to a transaction, but as the ruling does not guarantee that the transaction actually takes place it differs from judicial tax decisions that constitute the final word after a transaction.796 It is of greater importance to provide opportunities for the public to scrutinize final judicial decisions, as these provide insight into the tax administration’s enforcement of the tax laws to transactions that actually have taken place. Moreover, as held, advance rulings might entail information of a sensitive nature, the disclosure of which could cause harm to the taxpayer to whom the ruling pertains. An advance ruling often involves detailed information about a company’s business, because such information might be necessary for the tax administration to provide an adequate ruling on the tax consequences of any planned transaction.

Both of the rules given in the beginning of this subsection provide transparency on the legal conclusion of a ruling, but confidentiality as to information identifying the taxpayer to whom the ruling pertains. Redaction of taxpayer-specific information, that is, information that directly and/or indirectly identifies the taxpayer to whom the ruling pertains, has the advantage of making information accessible that otherwise would have been kept confidential in its entirety. The issue of redaction of information is addressed in subsection 6.6. This is not further elaborated on in this subsection other than stating the above and the fact that redaction might lead to the position that the ruling in the end does not provide guidance to anyone as too many details are exempted from it to make it have any sense. Based on this, it could be argued that there is no need to provide transparency for advance rulings, since after redaction they provide no guidance. Though this might be true for some rulings, it does not necessarily apply to all. Some rulings (perhaps the majority) might not lose their information value upon redaction and could thus still provide guidance on the interpretation of tax laws. Holding that advance rulings should be confidential based on the fact that they might not provide any guidance due to extensive redaction of information, affords too high a level of confidentiality. Efforts should instead be made to keep redaction to a minimum, employing it only when deemed absolutely necessary to protect taxpayer privacy interests.

The difference in character between advance rulings and judicial tax decisions could be argued as a basis for justifying confidentiality of advance rulings to a greater extent with regard to them than final judicial tax decisions.

796 See Ring (n 720) 208–209 where it is argued that advance rulings represent a final stage similar to judicial tax decisions.
sions. Disclosure of redacted information in advance rulings, as the rules above provide, might ensure consistency in the treatment of taxpayers and contribute to a sense of fair play and openness in the tax system.797

As held in subsection 6.3 on public decisions, rules providing disclosure induce costs on the tax administration. Depending on the design of a rule on the level of transparency for advance rulings, the costs vary, especially within the second step in the chain of identified administrative costs, where the tax administration needs to review the information to determine whether or not any of the information falls under any rule exempting it from disclosure. As argued in terms of public decisions, full transparency of advance rulings does not induce high costs as no assessment of damage or redaction of information is to be conducted. Rules providing such measures to be taken prior to disclosure induce higher costs. Disclosing an advance ruling induces costs within the third and fourth steps, that is, with regard to reproducing and actually disclosing the ruling. How high the costs are depends on the amount of copies and in what form the decision is disclosed (for instance, electronic or paper copies).

To summarize: first, confidential advance rulings might decrease taxpayer trust in terms of the tax administration treating taxpayers equally, which in turn might decrease tax compliance. Advance rulings should in that regard be publicly accessible. However, as it is mostly the legal conclusion of an advance ruling that is of importance, identifying information could be redacted without its losing its information value. Second, as rules providing disclosure of information induce costs in the different steps of the disclosure chain, so does a rule providing disclosure of advance rulings. How high the costs will be depends on whether a ruling is disclosed in its entirety or if redaction is required, since measures of the latter kind induce more costs in the second step (reviewing the information). Third, fully transparent advance rulings constitute a threat to taxpayer privacy because they could reveal information such as illnesses and detailed trade secrets. Rules such as those given in the beginning of this subsection providing access to only the legal conclusion of the advance ruling afford a higher level of privacy protection. Distinguishing the taxpayer-specific information from the legal conclusion in the advance ruling provides the public with access to information on how the tax laws are applied while at the same time protecting taxpayer privacy. The purpose of an advance ruling – to provide guidance on the application of the tax laws – is open to public view when providing transparency with regard to the legal conclusion. Nevertheless, “over-redaction” of information to protect taxpayer privacy

797 Ibid 205.
might deprive the ruling of its information value, and render it incomprehensible. The risk that some rulings might not be disclosed or might not provide any guidance because too much information required redaction to protect taxpayer privacy, could be compensated through transparency with regard to judicial tax decisions.\footnote{See subsection 6.3.}

6.5 Agreements Between a Taxpayer and the Tax Administration

In this subsection confidentiality concerning another form of decision is addressed, namely agreements between a taxpayer and the tax administration. Agreements may be of various kinds. The US tax regime, for example, provides two different kinds of agreement: the closing agreement and the offer-in-compromise. Concerning the former, the US tax regime provides an opportunity for a taxpayer to enter into a closing agreement with the IRS relating to the liability of such person in respect of any internal revenue tax for any taxable period. A closing agreement is a final, binding agreement between the IRS and the taxpayer relating to the taxpayer’s tax liability for one or more years.\footnote{See subsection 4.4.3.3.} The second type of agreement – the offer-in-compromise – is an agreement between the taxpayer and the IRS that settles a tax debt for less than the full amount owed.\footnote{See subsection 4.4.2.2.} The Swedish tax regime offers one limited possibility for agreements between a taxpayer and the tax administration that is similar to the US offer-in-compromise. This concerns the possibility open to a natural person liable for the payment of taxes of a legal entity to enter into an agreement with the Swedish Tax Agency on adjustment of that tax. The Swedish tax secrecy legislation is not clear as to the secrecy level of such agreements. The agreements might be subject to a reverse requirement of damage or that of disclosure. This is already discussed from a national perspective in subsection 3.4.4 and in the country comparison in subsection 5.5.

This subsection centres essentially on agreements holding deviations from tax law, though what is argued in this subsection as to such agreements might be correspondingly applied to agreements settling a tax debt, because both types of agreement contain deviations from what certain circumstances originally would result in. In other words, both types of agreement might be considered inequitable, since compromising a determined tax debt for some people but not for others might be as unequal as

\footnote{See subsection 6.3.}
\footnote{See subsection 4.4.3.3.}
\footnote{See subsection 4.4.2.2.}
compromising an assessment of liability for some but not for others. It is, however, my view that agreements holding compromises on how to interpret actual tax law (that is, rules that determine tax liability) are more severe from an equal treatment of taxpayer perspective than agreements settling the debt for less than the full amount owed. There might be legitimate reasons for settling a tax debt, but less so regarding altering the interpretation as to the rules determining tax liability, since this might result in uncertainty with regard to the content of tax law and how it is applied.

The existence of the possibility open to taxpayers of entering into agreements with the tax administration might be questioned. As held by Eleonor Kristoffersson and Pasquale Pistone, the mere existence of an opportunity to agree settlements or make deals of various kinds with the tax administration can be questioned both from a constitutional and a competition law point of view. Nevertheless, Eleonor Kristoffersson and Pasquale Pistone recognize that agreements with the tax administration are efficient from a socio-economic perspective and often well rooted in the county’s tax system. Though interesting, the topic regarding the existence of agreements is beyond the scope of this thesis, since it focuses on the consequences of confidentiality and transparency. Hence, this subsection concerns itself with the issue of the impacts of confidentiality and transparency with regard to agreements.

Agreements between a taxpayer and the tax administrations give rise to certain concerns on tax confidentiality. One such issue concerns equal treatment of taxpayers, an aspect that in Chapter 2 has been held to influence taxpayer trust in the tax administration, which in turn has impacts on tax compliance. This subsection primarily concerns those impacts, that is, the focus is primarily on impacts of transparent or confidential agreements with regard to tax compliance. This is because an agreement constitutes a sort of tax decision, and why the impacts of transparency and/or confidential-

\[801\] One reason might be that compromising a tax debt so that the taxpayer does not have to pay the full amount owed might help the taxpayer to avoid being dependent on the social safety net, thus leading to decreased government expenditure. In other words, though tax revenue decreases with such a compromise, in situations where expenditure in terms of social benefits etc. exceeds tax collection the society might benefit from a compromise since expenditure might decrease because the taxpayer is not as economically vulnerable owing to the compromise, see Shu-Yi Oei, ‘Getting More by Asking Less: Justifying and Reforming Tax Law’s Offer-in-Compromise Procedure’ (2011) 160 University of Pennsylvanian Law Review 1071, 1026–027.

\[802\] Kristoffersson and Pistone (n 120) 31.
tiality with regard to the benchmarks on administrative costs and taxpayer privacy to a great extent are similar to those held in subsection 6.3 on public decisions. The consequences of agreements in relation to these benchmarks are therefore only briefly stated.

The discussion in this subsection takes its starting point in the following two rules. This is the first time in this chapter where a jurisdiction other than that of Sweden or the United States is used as a source for options – the second rule is Hungarian. The first rule governing the level of transparency with regard to agreements between a taxpayer and the tax administration is extracted from the US tax confidentiality regime, referred to in the beginning of this subsection. Hungary shows another example of how confidentiality of agreements might be regulated. In Hungary, a binding ruling regime called “conditional tax assessment”, allowing certain deviations from the tax law, is provided. This prescribes (as the US rule) confidentiality with regard to these agreements.

<table>
<thead>
<tr>
<th>Returns and return information shall be confidential. Return information means any agreement under section 7121 [closing agreement] and similar agreements. IRC §§ 6103(a) and 6103(b)(2)(D)</th>
</tr>
</thead>
<tbody>
<tr>
<td>All tax-related facts, data, circumstances, resolutions, rulings, certificates and other documents shall be deemed confidential information. Act XCII of 2003 on the Rules of Taxation § 53 (1)</td>
</tr>
</tbody>
</table>

As held in the foregoing subsection on advance rulings, confidential advance rulings could generate suspicion that the tax laws are not being applied even-handedly. By making advance rulings publicly accessible, whether or not with the possibility of redaction of identifying information, taxpayers can be assured of access to the ruling positions of the tax administration. This in turn increases public confidence in the fair and impartial operation of the tax system. The same applies to agreements.

It is argued that information in advance rulings might enjoy confidentiality protection to a greater extent than judicial tax decisions. They differ in their finality and thus also in their importance as a monitoring/scrutinizing medium. An agreement resembles the finality of tax decisions more than advance rulings, in that an agreement settles tax liabilities, including perhaps penalties, additions, and interest. Hence, it is important to aim at the fullest possible transparency to a greater extent than the case

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803 See subsection 6.3.
with advance rulings. The basis for this is further elaborated on in the following.

Agreements between the taxpayer and the tax administration risk setting aside the principle of equal treatment in the sense of horizontal fairness, that is to say, taxpayers under equal circumstances should be equally treated. This is because an agreement, as such, might (as mentioned) settle a tax liability, that is, a taxpayer’s tax debt is adjusted not because some error as to the basis of the liability but due to a compromise on the actual amount to be paid. An agreement might also involve deviations from tax law. So, not only is the tax liability compromised in terms of the amount to be paid, but the basis for the liability might be compromised. In other words, actual substantive tax rules are compromised. If such agreements were to be confidential, that could decrease taxpayer trust in the tax administration, in that taxpayer A cannot be reassured that taxpayer B, who is under equal circumstances as taxpayer A, does not gain an advantage due to the agreement, an advantage deprived taxpayer A because he or she has not entered into such an agreement.

Taxpayer trust in the tax administration increases the chances of taxpayers complying with tax laws. Consequently, allowing agreements between the taxpayer and the tax administration to remain confidential constitutes a threat to tax compliance. A rule allowing for deviations from the tax law therefore needs to be accompanied by a certain degree of transparency. It is important that the reasons for a decision on deviation from the law are made visible and accessible, not only because confidentiality could enhance mistrust and non-compliance, but also because the reasons for any deviation might actually appear appropriate to the public and therefore fair.

Since the aim of this subsection concentrates on the transparency of agreements between a taxpayer and the tax administration and not on the existence of agreements, no considerations are made as to the financial benefits of employing the possibility of entering into agreements. Instead, the focus is on the financial costs of either transparent or confidential agreements. Because an agreement can be regarded as a decision, reference to the conclusions held in subsection 6.3 on public decisions can be made. Rules on disclosure of tax information in forms other than disclosure over the Internet induce costs in at least the third and fourth step (reproducing and disclosing information). How high the costs are in the sec-

804 See subsection 2.3.2.4.
805 A short discussion on benefits of agreements is given in Kristoffersson and Pistone (n 120) 31.
ond step (reviewing the information) depends on the design of the rule and whether it requires any measures to be taken such as redaction of information, perhaps preceded by a damage assessment, or whether the settlement may be disclosed in its entirety. If the settlement may be disclosed without any action taken prior to disclosure then fewer costs are induced than if action is required.

Moreover, as public decisions provide a weak protection of taxpayer privacy, assuming a decision is to be transparent in its entirety with no information such as name and address redacted, a fully transparent agreement likewise entails a threat to taxpayer privacy.

To summarize: first, confidential agreements might have negative impacts with regard to tax compliance, since they jeopardize the principle of equal treatment and thus might decrease taxpayer trust in the tax administration. Second, administrative costs are induced upon disclosure, but to what extent depends on the design of the disclosure procedure. Third, full transparency of agreements provides weak protection for taxpayer privacy. However, it should be noted that transparent agreements, while not providing a high level of privacy protection, help limit the negative impacts on tax compliance.

6.6 Redaction of Information

The two foregoing subsections have touched upon the issue of redaction of taxpayer identifying information, or what could be called partial confidentiality. That is, certain information may be kept confidential, though the main rule is disclosure. In the present subsection, this issue is further elaborated.

Confidentiality with regard to taxes is a valid consideration, since the disclosure of information attributable to an individual might cause personal harm – that is, constitute a non-legitimate violation of privacy. Consequently, if information is not directly attributable to an individual disclosure does not cause any personal harm, hence the reason for confidentiality ceases. Considering this, information may be removed or replaced with more general, non-identifying language in order not to create non-legitimate invasions of taxpayer privacy. Redaction of information thus constitutes a means for limiting the negative impacts of disclosing sensitive information.

806 See subsection 6.3.
807 Prop 1979/80:2 Del B (n 380) 432; Collste (n 308) 803.
As mentioned, the issue of redaction of information has been touched upon in previous subsections. This subsection provides further discussion and evaluation with regard to such anonymous disclosure, taking its departure in the following two rules from the US and Hungarian tax confidentiality regimes.  

\footnote{808 The Swedish tax secrecy regime also affords the possibility of redacting taxpayer-identifying information due, for instance, to the straight requirement of damage in PAISA Chapter 27 § 4. This rule, however, does not state redaction as explicitly as the US rules above, and is why only the US rule is cited here.}

\begin{quote}
Before making any written determination or background file document open or available to public inspection under subsection (a), the Secretary shall delete, (1) the names, addresses, and other identifying information details of the person to whom the written determination pertains [emphasis added] and of any other person, other than a person with respect to whom a notation is made under subsection (d)(1), identified in the written determination or any background file document. *IRC § 6110(c)(1)*

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Of the data specified in Subsection (1) above, the data specified in Subsection (3) of Section 16 in the case of civil society organizations, public information from court records, and data that may be requested from the body operating the court register of civil society organizations, and any data that may not be tied to the person to whom it pertains (taxpayer or taxable person) shall not be treated as confidential tax information [emphasis added]. *Act XCII of 2003 on the Rules of Taxation § 53 (5)*
\end{quote}

The fact that some information in a document is confidential should not in itself prevent disclosure of the rest of the document or record. Such a solution would substantially limit a right to information and thus the benefits of transparency will decrease. Redacting information facilitates disclosing a document or record that otherwise would be kept confidential in its entirety. As held above, redacted information does not constitute a threat to privacy, since the information cannot be attributable to a specific taxpayer.

Redacting identifying information and any other data that might be tied to the person to whom the decision, advance ruling, etc pertains prior to disclosure, might prevent requests made merely out of curiosity, since curiosity is often linked to a certain person (as in wanting to know a neighbour’s income) and not so much linked to the central purpose of access to information – to scrutinize government activities.
Redacting identifying information in documents prior to disclosure undoubtedly decreases privacy invasion. However, even if information such as name, address and identification number is removed from or replaced with more general, non-identifying language it might still be possible to link the information to a specific person by virtue of the information itself. The document might contain other facts that could identify the person to whom the information pertains.

If protection were to be provided only on information consisting of data about an individual that is identifiable to that individual, then redaction of information that could identify the taxpayer would suffice and rules providing for total confidentiality to all of the information would be excessive. If the information disclosed cannot be linked to a specific taxpayer, then no breach of privacy has occurred because no disclosure has taken place of information attributable to a specific taxpayer.

The information that needs to be redacted is preferably determined both at a general, objective level and on a case-by-case basis. Information such as name, address, identity number, and other such objectively identifying information may in the majority of cases be redacted. In some situations there is no need to have the name etc of the taxpayer – information which in other situations is vital. For example, if a person wishes to make an investigation into how the tax administration applies tax rules on a specific type of deduction, the need for identifying information might be less than when an official person, such as a politician, is investigated in order to scrutinize suitability for occupying a leading position in society. In other cases, more information than name, identification number, address, etc might need to be redacted. Suppose the document contains information that reveals business occupation and area of residence. In such a case information on aggregate might constitute identifying information. An assessment is consequently required as to how much information needs be redacted for the taxpayer not to be identified.

To summarize: first, redaction of taxpayer-specific information may facilitate disclosure of information that would otherwise be kept confidential. In that sense, redaction increases transparency, which in turn enhances the level of tax compliance. Careful considerations, however, must be made so that “over-redaction” does not deprive the information of its value in contributing to the purpose of the right to information laws – that is, to allow the public insight into government (tax administration) activities. Second, manual redaction of information increases administrative costs, in that it is both time and personnel consuming. Third, the possibility to redact certain information sensitive to the taxpayer prior to disclosure, enhances taxpayer privacy protection.
6.7 A Requirement of Damage

The rule that the discussion in this subsection centres on involves the issue of partial confidentiality dealt with in the foregoing subsection. This rule provides neither total confidentiality nor full transparency. Instead, it provides a case-by-case balancing act by which information may be confidential or disclosed. The rule is the Swedish one on transparency of tax information in court proceedings, entailing a requirement of damage.

Secrecy under §§ 1-3 applies to information in court proceedings, if it can be assumed that disclosure of the information would cause damage to the individual.\textsuperscript{809} PAISA Chapter 27 § 4

This particular rule entails what is called a straight requirement of damage, holding disclosure as the main rule but confidentiality is possible if disclosure harms the taxpayer. Another requirement of damage employed in Swedish secrecy legislation is the reverse requirement of damage, which presumes secrecy to be the main rule but the information may be disclosed if the disclosure is considered to cause no harm. Despite this difference in design, the common denominator of these requirements is that they are constructed so that in order for secrecy to apply, a damage assessment is conducted showing the likelihood of damage occurring upon disclosure. As such, a requirement of damage delimits the scope of secrecy, which is beneficial from a transparency perspective.\textsuperscript{810} In what follows this and other aspects of importance to consider with regard to a requirement of damage is developed. Though the rule above governs the level of confidentiality on tax information in court proceedings, the discussion in this subsection focuses on the requirement of damage as such.

As stated, a requirement of damage involves a damage assessment by which possible harm upon disclosure is examined. In order to conduct the most well-balanced assessment upon disclosure the requester would need to provide the reasons for the request. The COE Recommendation establishes a number of specific standards, \textit{inter alia}, that applicants should not have to provide reasons for their requests.\textsuperscript{811} Furthermore, according to the UN Standards, the exercise of the right to information should not require the individuals to provide a specific interest in the requested infor-

\textsuperscript{809} Author’s translation.

\textsuperscript{810} The straight requirement of damage and the reverse requirement of damage are more thoroughly described in subsection 3.4.2.

\textsuperscript{811} Mendel and Unesco (n 2) 37.
Adhering to these recommendations a requirement of damage should not include an obligation for the requester to provide reasons for the request. However, it should be noted that considerations made as to the reasons for a request is integral to both sides of the confidentiality – access equation. The value of access to certain records might not be fully revealed without considering how the information in them would be used once released. It might thus lie in the interest of the requester to provide the reasons for the request, even though not obliged to do so.

Requiring officials to make the threshold decisions that a damage assessment entails includes a risk, since it might open up the way for abuse. As held in the foregoing subsection, rules providing redaction of taxpayer-specific information prior to disclosure for the benefit of taxpayer privacy protection affords the risk of “over-redaction”. A requirement of damage entailing the possibility of redacting information carries the risk of too much information being kept confidential so that it loses its value and militates against the purpose of the public right to information, which is to provide an insight into government activities to check arbitrary government action, corruption, and so on. A requirement of damage could be misused to make more information inaccessible by claiming harm upon disclosure, thus hindering the realization of the principle of access to public information. It may also be the case that an official just for safety’s sake chooses to keep information confidential, which could well be disclosed without causing harm. This might also have a distorting effect on the right to information.

A requirement of damage furthermore evokes the issue of the tax administration’s obligation to justify a refusal to disclose. Though desirable, as far as possible, to provide the requester with an adequate justification for a denial to disclose, it might be impossible to give reasons justifying the need for confidentiality because the reasons for non-disclosure might reveal the content of the document, thereby depriving the exception of its purpose.

A regime employing a requirement of damage might extend the scope of accessible information because a damage assessment is conducted case-by-

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812 UN Special Rapporteur on Freedom of Opinion and Expression (n 117) 57.
814 Fenster (n 7) 923–924.
815 UN Special Rapporteur on Freedom of Opinion and Expression (n 117) 57.
case considering both positive as well as negative effects of disclosure, hence recognizing interests in favour of both transparency and confidentiality. Accessibility would be limited only when disclosure affords substantial costs, primarily with regard to taxpayer privacy, since this is the main reason for tax confidentiality. A requirement of damage may thus broaden the scope of accessible information, thus extending transparency and the right of access to information. Since transparency, used in creating or upholding a compliance norm, strengthens the taxpayer’s will to comply with the tax laws, a requirement of damage should have benefits for tax compliance.

An obvious drawback of a requirement of damage is that by its nature it requires more resources on time spent handling requests on disclosure as well as subsequent costs for adequate training for personnel making such assessments. A requirement of damage subsequently has negative impacts on the administrative cost perspective.

On the subject of taxpayer privacy protection it is not necessary to consider the nature of the information disclosed or the consequences of disclosure when determining whether or not there has been a violation of the right to privacy, since mere disclosure affords it. However, only the scope of the breach of privacy may determine whether or not the interference is legitimate. In order to conclude whether the violation of privacy is legitimate, consideration therefore needs to be taken in respect of the nature of the information and the consequences of its disclosure.\(^{817}\) This underpins the use of a requirement of damage because it makes it possible to assess the requested information and the possible consequences of its disclosure in a specific situation – that is, to perform a proportionality test case-by-case.

Provision for a damage assessment prior to disclosure might allow an opportunity for the tax officer contacting the taxpayer during the assessment. This might be conducted not primarily in order to offer the taxpayer the chance of disallowing a disclosure (though this might be a possibility) but as a means for the tax officer to fully comprehend the possible privacy infringements of a disclosure, since it may give the tax officer insight into the nature of the information. For instance, information might at first sight appear harmless to the tax officer, but might in fact reveal sensitive information such as trade secrets, the disclosure of which could cause great harm to the taxpayer.\(^ {818}\) This is beneficial from a privacy perspective because information that otherwise might have been disclosed remains confidential.

\(^{817}\) See subsection 2.5

\(^{818}\) Prop 1979/80:2 Del B (n 380) 118.
To summarize: first, a requirement of damage has benefits for tax compliance, since it might broaden the scope of accessible information, thus providing greater transparency. Second, while a requirement of damage here has such a benefit, its drawbacks should not be ignored. Applying a requirement of damage calls for much knowledge when assessing possible damage on disclosure because of the delicate trade-offs it includes. Furthermore, making a damage assessment is time consuming. From an administrative costs perspective a requirement of damage is thus not beneficial. Third, though a requirement of damage might widen transparency and thus afford less protection of taxpayer privacy than other rules providing a higher level of confidentiality, in the damage assessment considerations are made to the adverse impacts on taxpayer privacy that a disclosure might entail. The assessment might well lead to a decision on confidentiality if the impacts show far-reaching invasions of privacy not outweighed by the benefits of disclosure.

6.8 Transparency of Certain Specified Information

Subsections 6.6 (and to a certain extent 6.7) considers the issue of redaction of taxpayer-identifying information – in other words, partial confidentiality. That is, the discussion involves rules holding exemptions from transparency. The present subsection could be said rather to deliberate on the issue of partial transparency. The difference is basically that partial confidentiality is an exception from transparency, while partial transparency affords an exemption to confidentiality. That is to say, instead of having provisions providing, for instance, fully transparent or totally confidential decisions, the possibility is there to allow certain specific information to be transparent, exempted from perhaps an otherwise high level of confidentiality. This subsection explores such an option and its costs and benefits with regard to the benchmarks, taking its starting point in the two rules given below.

Neither the Swedish nor the US tax confidentiality legislation holds rules that clearly show the option of such partial transparency. Though a discussion on this topic might be pursued despite this, the issue in my view is further illuminated with an example. This is why solutions from jurisdictions other than Sweden and the United States are provided in this subsection.

The first (Finnish) rule holds that certain information, explicitly listed, is to be considered public information. Such information reveals taxable income, taxes withheld and taxes owed, that is, information of an economic nature. The second (Hungarian) rule set out below is another example of a
measure allowing for transparency of certain specified information. This rule grants an exception from an otherwise high level of tax confidentiality by providing publication of a list on the Internet\textsuperscript{819} of individual taxpayers who have tax debts exceeding HUF 10 million (approx. EUR 34,500). The list contains home address, tax number, address of permanent establishment and the amount of unpaid tax. The discussion in this subsection on the costs and benefits of transparency of certain specified information concentrates on these two rules. It revolves around information of the same finality degree as judicial tax decisions dealt with in subsection 6.3.

\begin{quote}

Public income tax information in the annual taxation is the taxpayer’s name, year of birth and the municipal domicile […]. Public information is furthermore

1) the taxable earned income under State taxation,

2) the taxable capital income under State taxation,

3) the taxable income under municipal taxation;

4) the income and net wealth tax, municipal tax and the total amount of taxes and charges imposed,

5) the total amount of withholding tax,

6) the amount to be debited or refunded in the final assessment of the tax year. \textit{Act on the Public Disclosure and Confidentiality of Tax Information} § 5 \textsuperscript{820} \\

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The state tax authority shall publish on its official website quarterly, within thirty days following the quarter, the name (corporate name), home address, registered office, place of business and tax number of any taxpayer with outstanding tax debts owed to the tax authority according to its records for 180 consecutive days in excess of 100 million forints on the aggregate, less any overpayment, or net 10 million forints, less any overpayment, for private individuals. \textit{Act XCII of 2003 on the Rules on Taxation} § 55 (5)\textsuperscript{821}
\end{quote}

\textsuperscript{819} The issue of how public information is accessible is dealt with in subsection 6.10.

\textsuperscript{820} Laki verotustietojen julkisuudesta ja salassapidosta. Author’s translation.


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Transparency with regard to information on taxable income and tax liability affords insight into a tax system’s tax distribution and might furthermore increase the individual’s understanding of the tax system. While taxable income and tax liability sometimes might not provide a complete picture of the economic circumstances, the information could form an adequate basis for public control of the administration of the tax system. In this perspective, disclosure of this kind of information might hold benefits for taxpayer trust in the tax administration, thus increasing tax compliance.

One important feature of the rules above is that they include disclosure of information that identifies the taxpayer. A benefit from such a regime is that the knowledge that anyone can gain access to information on another’s income might deter taxpayers from underreporting income, because the information might reveal a lack of correspondence with the perception of the way a particular taxpayer lives. Having said that, I wish to return to the issue of transparency in its bolstering an informant society discussed in subsection 6.2 on the confidentiality of tax returns.

In subsection 6.2 it is held that rules in favour of tax transparency might imply a shifting of the tax administration’s monitoring obligation onto each individual, that is to say, offering the opportunity for individuals to monitor fellow taxpayer compliance with the tax laws. If everyone is able to obtain the tax return of another and all of its information on the basis of enhancing the detection risk, this might lead to people mistrusting one another. If it is perceived that others are dishonest, this in turn decreases the probability of their complying with the law. To connect this conclusion to the issue at hand in this subsection, a rule allowing access to information on income and taxes owed in combination with identifying information such as the taxpayer’s name, provides the possibility for individuals to monitor their fellow taxpayers. For instance, a taxpayer who receives information on a neighbour’s income and for some reason does not perceive that income to correspond to that neighbour’s way of life might easily gain the perception of a non-compliant neighbour. Since a rule providing

FPlOr16Sua-_UKRy1CUSfo-t7SKg&sig2=CJ31A9SawoUECNN_0IkFNg&bvm=bv.58187178,d.Yms cross-checked by Katalin Capannini Kelemen, senior lecturer Örebro University.

822 Finansdepartementet, Prop 116 LS (2010-2011) 2 Endringar i reglane om offentlege skattelister 2011 pt 2.4.3.

823 See Joel Slemrod, Thor Olav Thoresen and Erlend Eide Bø, ‘Taxes on the Internet: Deterrence Effects of Public Disclosure’ [2013] Leibniz Information Centre for Economics in which an increase in income tax reporting was recognized upon a higher level of disclosure of tax information.
access to such limited information does not afford any possibility for the public to investigate the validity of these figures, it has limitations as to the degree to which individuals might monitor one another.  

Subsequently, rules permitting access to specific information such as those given in the beginning of this subsection afford limited possibilities for the public to monitor the tax administration, since they do not to the same extent as rules on transparent decisions provide individuals with the opportunity of monitoring the tax administration’s activities, but rather reveal only figures and no information on their validity. Though such information might be accessible under a regime employing a rule on public decisions (for example, a Swedish decision on taxable income made on an automatic basis, thus not further investigating the items in the tax return, consists of such figures) the rules cited above are narrower than that, since they only permit disclosure of the enumerated information. This is while a rule such as the Swedish one on public decisions widens the scope of accessible information, since it allows access to a decision on audits including its justification. They furthermore have limitations on the degree to which individuals might monitor one another because there is no opportunity to assess the validity of such figures. Access to such information might, as implied, enhance the risk of facilitating an informant society, thus decreasing trust between taxpayers, which subsequently might decrease tax compliance. This is especially the case with the second rule, where the purpose is to serve as a kind of deterrent and sanction for those who have not complied with some of their tax obligations. Again, consideration must be given with regard to the basis for having this type of transparency.

The administrative costs of partial transparency afforded by rules such as those above depend to some extent on how information is held by the tax administration and the possibilities of extracting it. Computerized systems might offer fewer costs than document filing, because a computerized system to a greater extent could facilitate access to specific information, while document filing requires physical redaction of information and the personal attention of an officer. Despite the fact that the issue of the keeping of documents is delineated from this thesis, this aspect is noted because keeping documents in physical archives might induce higher costs in the

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824 It has been questioned in Swedish preparatory works what value mere figures on an individual’s income have from a transparency perspective, SOU 1987:31 (n 4) 124.  
825 See subsection 6.2.  
second step compared with information kept in computerized systems, as the latter might have a function that automatically offers only the information that is public.

A rule such as the first one cited above induces costs in the third and fourth step (reproducing and disclosing). The extent of costs induced in the third and fourth steps depend on the amount of copies and in what form the information is disclosed. The second rule does not provide such costs, since the information is disclosed over the Internet. 827

As held previously, all the information in these provisions, except for name, date of birth, and place of domicile, is information of an economic nature. This information does not reveal any details of a more personal type, such as health and other sensitive facts. In that sense, rules such as those above provide greater protection for taxpayer privacy than does the previous rule examined on public decisions.

To summarize: first, disclosure of information on taxable income and taxes owed and/or paid including identifying information, might afford both costs and benefits with regard to tax compliance. It might enhance taxpayer trust in the tax administration, consequently boosting tax compliance, if perceived as being a means of monitoring the tax administration’s activities. However, if perceived as a means of monitoring fellow taxpayers, transparency of this kind of information might increase mistrust between taxpayers, in turn decreasing tax compliance. Nonetheless, the opportunity for monitoring tax administration activity and compliance of fellow taxpayers is considered limited based on this kind of information. Second, disclosure of information on taxable income and taxes owed and/or paid including identifying information induce administrative costs on the tax administration in all of the steps identified in the disclosure chain. Third, rules such as the two given above constitute violation of privacy, since they allow for disclosure of information pertaining to an individual taxpayer. Because rules such as those above does not provide information that is regarded as more sensitive than those of an economic nature, they afford greater protection of taxpayer privacy than a rule on transparent decisions, but less protection than a rule on total confidentiality.

6.9 Once Public, Always Public

It is maintained that those issues to the scope of accessible information involve questions on what information, if any, may be public and what

827 For more on Internet disclosure, see subsection 6.10 on the different ways on gaining access to public information.
information *should* be public, and what information *may* be confidential and what information *should* be confidential. On the extent to which tax returns should be public, it is difficult to argue that all of the information in a tax return could and should under all circumstances be public, or could and should always be confidential, since the contents of the tax return differ depending on what constitutes taxable events within the tax systems of different jurisdictions. Another aspect to be considered is that it might be difficult to conclude that certain information should always be public because one piece of it might in one context be harmless while in another the same information could cause severe harm to the individual concerned. The previous subsection provides rules to the contrary, that is, that certain information may be deemed to be public in any situation. The present subsection builds on that topic by way of a discussion on the following idea: *once public, always public.*

The rules dealt with in subsections 6.2, 6.3 and 6.8 are clear in their design concerning the scope of confidentiality in that they explicitly state the information embraced by the rule, whether covered by total confidentiality or full transparency. The rules given in this subsection are different in that they (though they may to some extent seem clear) serve as an example of the idea or principle of *once public, always public.* *Once public, always public* holds the view that once information is disclosed in public, no matter how limited or narrow the disclosure, the information can no longer remain private. The two rules below (the first from Sweden and the second from the United States) in different ways relate to the issue encompassed by the heading of this subsection – that of *once public, always public.*

Secrecy under §§ 1-3 applies to information in court proceedings, if it can be assumed that disclosure of the information would cause damage to the individual. [...] If the court in a case receives information from another authority and if that information is not relevant to the case, secrecy in accordance with §§ 1-3 applies to the information at the court as well. PAISA Chapter 27 § 4

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A return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only, (A) if the taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer’s civil or criminal liabil-

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828 See subsection 6.2.

829 Author’s translation.
ity, or the collection of such civil liability, in respect of any tax imposed under this title;
(B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding;
(C) if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding.

IRC § 6103(h)(4)

The first rule cited above might at first sight not reveal any link to the topic of this subsection. However, in practice, this rule means that if confidentiality applies it only does so in relation to the information relevant to the particular case. In order to be relevant to the case the information must relate to a matter that is subject to judicial review. The situation in which a tax assessment is under appeal, for instance because a claim in a tax return regarding deductions has not been observed, does not mean that all information in the tax return is subject to the transparency prevailing in tax proceedings. Information that is not relevant to the case and is obtained from an authority other than the court, where the information is confidential, retains the confidentiality level it had at the disclosing authority. Consequently, the fact that confidentiality has ceased to apply to certain information in a tax return due to tax court proceedings does not mean that confidentiality ceases with regard to that information at the transferring authority, for example, the tax administration. Thus, this rule does not support the idea of once public, always public, but recognizes that information that is transparent in one situation may well be confidential in another.

As to the second rule given above, the exception to the general non-disclosure rule set forth in IRC § 6103(h)(4), permits disclosure of returns and return information in judicial and administrative tax proceedings. This rule has generated discussion on the issue that in short may be described as revolving around the issue of once public, always public, because the law does not clearly state whether tax information revealed in tax court proceedings and therefore contained in public court records, consequently loses all protection under the general non-disclosure rule. The prevailing view appears to be that when information is contained in a public court record it loses confidentiality protection and may thus be disclosed in any

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830 See subsection 3.4.5.
831 Prop 1979/80:2 Del B (n 380) 258.
manner. However, it is only information held in public court records that loses its protection under the general non-disclosure rule, that is, the information contained in public court records may not be disclosed if it is retrieved from a tax return.\textsuperscript{832}

The two rules are in the end much the same, because both jurisdictions (but on different foundations) conclude that information in court proceedings is open to public disclosure but that the same information remains confidential at the tax administration. Hence, these rules do not govern the idea of \textit{once public, always public} but rather provide the opposite. A rule that governs the idea of \textit{once public, always public}, by which information once made public loses any possibility of confidentiality protection, is the one cited in subsection 6.7, since it provides transparency of certain specified information that is transparent in all circumstances.

The primary impacts are found within the benchmark that concerns taxpayer privacy protection. However, before proceeding on the impacts on taxpayer privacy protection, the costs and benefits on the other two benchmarks are explored.

Impacts of rules as to taxpayer compliance with tax laws occur upon rules that in different ways set out restrictions on the range of transparency. In other words, rules on the scope of transparency have impacts on tax compliance in that rules increasing transparency providing a compliance norm have benefits with regard to taxpayer compliance with tax laws, since more taxpayers tend to comply with tax laws if they perceive that compliance is the norm and that others are seen to be submitting to that norm. Correspondingly, rules that place restrictions on norm-reinforcing transparency have negative impacts because this decreases tax compliance. A rule governing the idea of \textit{once public, always public} undoubtedly enhances the level of transparency. It should thus (assuming transparency strengthens a compliance norm) have benefits with regard to tax compliance, since it might result in more taxpayers complying with the tax laws.

A rule governing the idea of \textit{once public, always public} might induce higher costs on the tax administration but might also be cost-reducing. A principle of \textit{once public, always public} requires the tax administration to keep track of whether or not information has been disclosed. That is to say, in order not to wrongfully deny disclosure of information that has been disclosed in another situation (for instance, in tax court proceedings) and therefore under the idea of \textit{once public, always public} should also be transparent at the tax administration, the tax administration must keep track of whether or not information has been disclosed. This induces ad-

\textsuperscript{832} See subsection 4.4.4.
ministrative costs for the tax administration. The cost reducing aspect of once public, always public is found in combination with some sort of requirement of damage, since information once disclosed need no longer undergo a damage assessment prior to disclosure.

As held by Daniel Solove “there is a considerable loss of privacy by plucking inaccessible facts buried in some obscure document and broadcasting them to the world on the evening news”.\textsuperscript{833} Though making a vivid point by this statement, the issue could be seen as being narrower than the digging up of information in archives for the purpose of publicizing it in an extravagant way in a commercial newspaper. From a privacy perspective, privacy is threatened not only by such extreme measures, but also by more limited disclosures.

Adhering to the view that once information is made public it can no longer claim any confidentiality protection makes for a world such as the present (where individuals disclose much of their tax information to parties other than the tax administration, such as banks, mortgage brokers, and financial aid officers) where tax confidentiality has no place. This does not, however, justify total transparency of individual tax transparency, mostly with reference to the issue of aggregated information. If information upon disclosure loses every possibility of confidentiality protection, those who wish could much easier gather bits and pieces of information about an individual thus creating a detailed portrait of that person. In a digitalized age it may be impossible to prevent information being misused in such ways. Nonetheless, confidentiality legislation might help limit such misuse in providing measures that put obstacles in the way of acquiring aggregated information for adverse use.\textsuperscript{834}

Moreover, a violation of privacy occurs on the mere disclosure of information.\textsuperscript{835} The disclosure of information that is considered to be of a sensitive nature thus constitutes a violation of privacy on the first, second, and every subsequent occasion it is revealed.\textsuperscript{836} Disclosure, despite being recognized as a breach of privacy, might be legitimate in one situation yet not in another. A rule governing once public, always public does not sufficiently


\textsuperscript{834} Examples of this are further discussed in subsection 6.10 on ways of accessing public information.

\textsuperscript{835} See subsection 2.5.

\textsuperscript{836} SOU 1997:39 (n 136) 792.
recognize this because it allows disclosure of information only on the basis of previous disclosure with no regard to the situation at hand.\textsuperscript{837}

To summarize: first, \textit{once public, always public} increases transparency and could consequently increase the level of tax compliance (assuming transparency is employed in its norm-reinforcing function). Second, administrative costs occur as the tax administration needs to keep track of what information has been disclosed in other situations. Third, \textit{once public, always public} entails large threats with regard to taxpayer privacy, as it does not recognize that a violation of privacy may be legitimate in one situation but not in another.

\section*{6.10 Access to Public Tax Information}

Hitherto the discussion has concerned itself with the scope of confidential information, that is, rules concerning what information could be made public or could be kept confidential. The remaining subsections of this chapter deal with other important features of a tax confidentiality regime: rules that in different ways could be said to relate to the scope of accessibility. The present subsection deals with rules that provide different ways in which public tax information is accessible, that is, rules that demarcate the ambit of accessibility.

The rules set out below offer different methods for citizens to gain access to public tax information. The first, retrieved from the United States, provides for disclosure to be made upon written request. Such access might be compared with another form of access – the Internet. Such a rule, that is, a legislative rule explicitly prescribing Internet disclosure, is found neither in Sweden nor the United States. The second rule – an example of a rule that provides access to public information on the Internet – is therefore retrieved from another jurisdiction: Norway. The third rule, also from the United States, offers yet another means of gaining access to information explored in this subsection, namely that of keeping information in printed form at specially designated locations, for instance, at the tax administration’s offices.\textsuperscript{838}

Different rules providing various ways of gaining access to public tax information could be divided into separate subsections. Nevertheless, the rules are dealt with under the same heading because they are closely related

\textsuperscript{837} Cf Case C-73/07 Tietosuojavalttuutettu v Satakunnan Makkinapörssit Oy and Satamedia Oy [2008] ECLI:EU:C:2008:266, Opinion of AG Kokott (n 312) [115–122].

\textsuperscript{838} The Norwegian tax secrecy regime previously provided for public tax lists to be accessible by printed lists at a tax administration’s office.
in that they all govern how the public can obtain access to public tax information. Treating them under the same subsection facilitates a thorough evaluation of the matter and of the impacts of the rules with regard to the benchmarks.

One of the issues delineated from this thesis is that of the tax administration’s duty to publish information on how it functions and the rules and policies it is obliged to follow because the definition of transparency as used in this thesis involves the disclosure of information containing data not solely on the tax administration but on individual taxpayers as well. The second (Norwegian) rule given below provides an obligation to publish certain tax information, thus constituting a legal obligation to publish tax information concerning individuals. While not involving an in-depth discussion on an obligation to publish information per se, this subsection concentrates on the issue of how information is disclosed – or, rather, obtained – through publication on the Internet.

A reproduction or certified reproduction of a return shall, upon written request [emphasis added], be furnished to any person to whom disclosure or inspection of such return is authorized under this section. IRC § 6103(p)(2)(A)

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When the tax assessment is completed, a compiled list of all individuals subject to tax determination is produced. Access to the list and printing of information from the list may be granted insofar required by this provision.

The tax list is made available by the Tax Authority on the Internet [emphasis added] for public inspection.

Complete tax lists may be distributed electronically to the press. The tax list may however only be disclosed on the conclusion of an agreement between the individual editorial and the Tax Authority not to publish all or part of the received tax list [emphasis added] on the internet or pass it on to others. Act on the Tax Administration § 8-8

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Except as otherwise provided in this section, the text of any written determination and any background file document relating to such written deter-

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839 The principle of the obligation to publish information can be found in UN Special Rapporteur on Freedom of Opinion and Expression (n 117) 58. This encompasses, inter alia, operational information, information on types of information held by the public body.

Pushing information out is increasingly being recognized as one of the more effective ways of enhancing access to information held by public bodies.\textsuperscript{841} Publishing public tax information inevitably promotes tax transparency and the right to information in that it makes public information easily accessible. The conclusion held in this thesis is that transparency supports tax compliance.\textsuperscript{842} Rules that provide easy access to information that form or uphold (or both) a compliance norm should therefore have benefits for tax compliance, since transparency increases under such rules. Rules that provide easy access to information that enhance the deterrent factor (enhancing the risk of an informant society) correspondingly should bear costs for tax compliance.

Furthermore, publication and access over the Internet has benefits for administrative costs. Written requests require the personal attention of a tax officer, which induces time-consuming labour costs plus further costs for the reproduction and disclosure of the requested details. Access to information over the Internet lowers the administrative costs on the tax administration in that it serves as a means of reducing the number of requests for information that has to be dealt with personally by an officer.\textsuperscript{843} Publication of public tax information over the Internet affords online requests, which result in minimized costs in all of the steps in the chain of disclosing information. Consequently, requests requiring the personal attention of a tax officer induce higher administrative costs on the tax administration than if the information were available on the Internet. However, the costs incurred on the formation, implementation and maintenance of a data system providing this service cannot be ignored.

Technology can thus make access to information faster and cheaper and consequently widen the right to information. Despite the benefits of easily accessible information, subjects of considerable concern could arise - chiefly the right to privacy. Adhering to the conclusions on violation of privacy, which hold that a breach occurs upon the mere disclosure of information,\textsuperscript{844} the publication of tax lists, or any other public information pertaining to an individual taxpayer, in and of itself constitutes an invasion of privacy. It is clear that disclosure of public tax information over the

\begin{itemize}
  \item\textsuperscript{841} Mendel and Unesco (n 2) 5, 146.
  \item\textsuperscript{842} See subsection 2.3.
  \item\textsuperscript{843} Mendel and Unesco (n 2) 147.
  \item\textsuperscript{844} See subsection 2.5.3.
\end{itemize}
Internet raises serious concerns for taxpayer privacy. Electronic disclosure of tax information facilitates the creation of aggregated information containing many details gathered and combined with the information retrieved from the tax administration. This threatens taxpayer privacy since aggregated lists can provide a comprehensive picture of a person’s life and behaviour. According to the second rule above, individual tax information in the form of complete tax lists, is published on the tax administration’s website. The experience of that rule is that publication and access to complete tax lists on different websites has resulted in such things as bullying among children. Such access can also assist criminals. Further examples are applications that connect tax list information to persons on Facebook and the sale of tax list information through an SMS service.⁸⁴⁵

The second rule above might at first sight appear to be a great violation of taxpayer privacy in that it seems to provide unlimited access to public tax information. However, on closer study the rule in fact entails certain restrictions, not explicitly stated in the legislative text as to the accessibility of (public) tax information. First, a person wishing to obtain information must log on to the tax administration’s website. Merely visiting the website does not imply access to the information; explicit log in is required.⁸⁴⁶ Second, log in does not allow full access to the list, because the number of views is limited to five hundred per month.⁸⁴⁷ Restrictions on accessibility, such as the Norwegian model, prevent mass downloads and other forms of misuse of the service that threaten taxpayer privacy.

An example of a rule resembling the Norwegian one above was previously in force in Italy. In 2008 the tax administration published specific and individual tax information on the Internet, on the basis of the Code of Digital Administration. Contrary to the Norwegian rule this publication of

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⁸⁴⁵ Finansdepartementet Prop 116 LS (2010-2011) 2 Endringar i reglene om offentlege skattelister (n 822) 13–14.


⁸⁴⁷ There is only a limit as to views, not searches. This is because a hit list is shown when searching for a specific person. A click on a specific person on this list, which shows the information on that person, counts as a view. Skatteetaten, ‘Vanlige spørsmål om skattelister - Hvor mange søk kan jeg gjøre i skattelistene?’ (24 October 2012) <http://www.skatteetaten.no/no/Person/Skatteoppgjor/Sok-iskattelistene/Om-skattelister-for-inntektsare?id=chapter=5008#kapitteltekst> accessed 28 February 2014.
lists of taxpayers on the Internet contained no restrictions as to the degree of accessibility. Everybody everywhere could obtain access to this information without time limit. After vigorous debate this law was amended so that access to taxpayer lists required a specific, qualified interest.848

Another means of access to public tax information is by providing printed lists available at a tax administration office. Such a provision strengthens the right to information in that it makes it easy to obtain (providing one has access to a tax administration’s office, which might not always be the case in every community). However, it enhances the risk that the information is used for mass collection of information through photographing and scanning, etc.849 Furthermore it induces administrative costs on the tax administration in producing printed lists, which might be comprehensive depending on the range of content of the list.

Though printed lists might be considered to facilitate the right to information in making it easily accessible, disclosure rules requiring a person to physically visit a tax administration’s office for manual search or rules requiring written requests provide a greater barrier to access than information accessible on the Internet. Information surrounded by complicated procedures for access might result in fewer people acquire it. Hence, such rules have benefits with regard to the protection of taxpayer privacy, since they decrease the amount of information disclosed. However, complex measures for securing information could consequently have a distorting effect on the right to it because people would tend not to exploit that right. Additionally, written requests could prove difficult for the illiterate and disabled. A requirement for written requests therefore calls for procedures to ensure assistance for such categories.850 Correspondingly, if access to information requires a physical visit to a tax administration office then steps need to be taken to ensure help is provided for those unable to make such journeys. Otherwise, the right to information is put at risk of distortion.

Another way for the public to gain access to information is through the media. Media access to public information is held to be a cornerstone in any democratic society because to a great extent it facilitates the control of public functions. This thesis does not involve a discussion on the latter issue, and thus this subsection rather examines the provision in the above


849 Finansdepartementet Prop 116 LS (2010-2011) 2 Endringar i reglane om offentlege skattelister (n 822) 21.

850 Mendel and Unesco (n 2) 144.
Norwegian rule that holds a restriction as to the publication of individual tax information by the press in relation to privacy protection. This restriction was enacted in 2011 as a means of enhancing taxpayer privacy protection and decreasing the misuse of information in the tax list.\textsuperscript{851} It chiefly constitutes a limitation on the publication of tax information, though it also serves as a limitation on the accessibility of public tax information because it narrows the means by which individuals might gain access to public information. Provisions such as this (which provide for publication of tax information solely by the tax administration) unquestionably restrict the scope of the right to information on the one hand but might on the other be regarded as necessary in order to adequately protect taxpayer privacy.

To summarize: first, rules providing easy access to public information should, on the basis of the conclusion that transparency supports tax compliance, provide benefits in respect of taxpayer compliance with tax laws (assuming that the information forms or upholds a compliance norm, or both). Second, as has been stated, requests requiring the personal attention of a tax officer induce higher administrative costs on the tax administration than would be the case if the information were to be available on the Internet. Hence, the latter means is preferable from an administrative costs perspective. Third, a rule that provides online publication of tax information must be supplemented by provisions that provide limitations to accessibility in order to narrow the extent of privacy violations. Such limitations, as those provided for by the Norwegian rule above which limits publication to the tax administration’s own website and requires log in and limits the amount of searches possible, afford inertia within the system that functions as a safeguard in respect of protection of privacy. Though a rule providing online access to an individual’s tax information increases the risk of spreading and misusing it, limitations on the scope of accessibility make it more difficult and time consuming to create lists of aggregated information in the adverse forms experienced in Norway. Making public information accessible over the Internet, together with limitations on easy online access, represent a means of adapting the principle of public access to information to rapid technology development, holding adequate measures in place to protect privacy interests. A rule that provides for publication of tax information on the tax administration’s website, in combination with restrictions on how to search, limits not only the possibility of

\textsuperscript{851} Finansdepartementet Prop 116 LS (2010-2011) 2 Endringar i reglane om offentlege skattelister (n 822) 15.
mass downloads for commercial use, but may also serve as barriers that decrease frivolous searches made out of curiosity.

6.11 Time Limits
In this subsection rules on time limits with regard to tax confidentiality are dealt with. Time limits may be used in order to demarcate the scope of accessibility by either limiting confidentiality, as in the first (Swedish) rule above, or in order to limit the transparency of information, as in the second (Norwegian) provision.

With regard to information in an official document, secrecy applies for a maximum of 20 years. With regard to information on fees under the law on fee to registered religious community, secrecy applies for a maximum of 70 years.852 PAISA Chapter 27 § 1

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The tax list is accessible on the tax administration’s website until the tax list for the next year is published.853

Setting time limits for confidentiality is a means of not making it more extensive than necessary. In general, the risk of harm occurring on disclosure, originally justifying a limitation of disclosure, disappears or decreases over time, and this is why time limits might be justified. If they are to be employed they should state a maximum time period for limitations on access.854 Determining the scope of such a confidentiality period, however, is a delicate matter, since the nature of information varies in sensitivity. Economic information, such as that on a person’s income and taxes owed, might after a certain time be no longer sensitive and may therefore be disclosed without harm. Information on an individual’s income might be of a sensitive nature at a particular time. For example, someone with a high income might suffer the risk of being a crime target if details of income were revealed. Disclosing information about that person’s income 20 years ago might no longer pose any great threat. Time limits on withholding information thus help to ensure that ‘stale’ harms do not serve to keep information confidential indefinitely.855

852 Author’s translation.
853 Finansdepartementet Prop 116 LS (2010-2011) 2 Endringar i reglene om offent-lege skattelister (n 822) 20; Skatteetaten (n 845).
854 Council of Europe (n 283) 5 and 15.
855 Mendel and Unesco (n 2) 36.
 Nonetheless, the tax administration does not only hold information on an individual’s economic circumstances. Depending on the tax regime applied in a jurisdiction the tax administration might hold information regarding the taxpayer’s personal circumstances. Such information might consist of information on a taxpayer’s health, such as illnesses (physical or mental, or both), disability, medication, and religious affiliation. Information on personal circumstances is often regarded as being of a more sensitive nature than details on an individual’s economic circumstances. The harm incurred upon disclosure of information on a taxpayer’s health might not decrease to the same extent as that on income, since an illness might well be permanent. Consequently, information on personal circumstances might well require protection for longer periods of time than that on economic circumstances.

Rules on time limits are those that affect the scope of transparency, either by limiting confidentiality or by limiting transparency. As asserted in previous subsections, rules on the scope of transparency have impacts on tax compliance. Rules that increase transparency provide a compliance norm that benefits taxpayer compliance with tax laws, since more taxpayers tend to comply with tax laws if they perceive that compliance is the norm and that others are submitting to it. As a result, rules that place restrictions on norm-reinforcing transparency have negative impacts because they decrease tax compliance. Consequently, rules on time limits might bear costs with regard to tax compliance if they narrow accessibility too much, and could provide benefits if increasing transparency that reinforces or upholds (or both) a compliance norm.

Time limits restricting the scope of confidentiality induce no administrative costs as such; it is rather what the provision on time limits is combined with that defines such financial impacts. The Swedish tax secrecy regime offers a rule providing semi-absolute secrecy complemented by a provision on a time limit for such confidentiality. A provision that puts a time limit on confidentiality prior to which the information concerned is embraced by total confidentiality, and after which by total transparency, creates larger financial costs for the tax administration than if there were no time limit restricting the scope of confidentiality – that is, if confidentiality were to be indefinite. A time limit to confidentiality extends the scope of transparency, making previously confidential information accessible, thus affording the costs connected with the procedure of disclosing information.856

Setting a time limit on a requirement of damage, however, should primarily decrease costs, since it sets a limit to the expensive procedure of a

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856 See subsection 2.4.2.
damage assessment. Nevertheless, a requirement of damage with an extensive time limit continues to put financial costs on the tax administration in having to undergo (in many cases) the lengthy procedure of damage assessment for a longer period of time.

If the time limit in practice functions as a maximum, a time limit to a requirement of damage enables disclosure prior to the end of the confidentiality period if the damage assessment shows no damage upon disclosure. This might enable longer confidentiality periods, thus providing a higher level of taxpayer privacy protection. However, lengthy confidentiality periods require that the time limit truly functions as a maximum and does not hinder the disclosure of information prior to the end of that period so as not to impose unnecessary restrictions on accessibility of information – thus forfeiting the benefits of transparency.

Concerning the second rule at the beginning of this subsection, it has previously been held that the right to obtain access to information is a type of right that is of current interest at the time the applicant exercises it. This might be particularly true with regard to information on taxable income and taxes owed or paid. The topicality of such information decreases over time. This is why the information is of most interest and value at the time, when it is also the most sensitive. A rule that provides information to be most transparent when it is most sensitive and limits access to it as its sensitivity and value decreases appears in that sense peculiar. The peculiarity lies not within its transparency when it is the most sensitive, since the information is of its most value at that time thus justifying a high level of transparency, but rather within the limitation on access as sensitivity decreases. Such a rule does not provide such large privacy benefits that outweigh the importance of transparency and the right to information. However, having more accessible information might induce higher administrative costs for the tax administration, and could on that perspective be tenable.

To summarize: first, rules entailing time limits for restrictions on access to information provide that confidentiality does not apply indefinitely and thus facilitates the benefits of transparency on tax compliance. Second, time limits restricting the scope of confidentiality induce no administrative costs per se. However, when the confidentiality period ends, costs will be incurred as information previously confidential now may be disclosed. Correspondingly, time limits restricting transparency reduce administrative costs when information previously public no longer may be disclosed. Third, time limits restricting confidentiality inevitably threaten taxpayer

\[857\] Subsection 2.4.5.
privacy in that information loses its protection and may be disclosed. Deciding the range of the confidentiality period is a delicate matter. A time limit that too early ends an otherwise high level of confidentiality, which affords strong taxpayer privacy protection, consequently jeopardizes the protection of privacy prompting the high level of confidentiality. On the other hand, too long a confidentiality period securing the protection of privacy risks losing the benefits of transparency.

6.12 Inform Taxpayer about Disclosure

The issue at hand in this subsection is the examination of rules requiring the tax administration to inform the individual concerned about an information request. In order to adequately examine the impacts of such rules with regard to the benchmarks, several aspects must be considered. Rules on informing the individual taxpayer on a request for information pertaining to him or her, might have a mere informational function but could also include an opportunity for the individual to disallow the disclosure, to correct any inaccurate information, and to appeal a decision on disclosure. Another aspect concerns whether the notification includes information identifying the requester. A rule of the former kind is the following (Norwegian).

The tax list is made available by the Tax Authority on the Internet for public inspection. [...] The individual taxpayer shall have access to information on searches undertaken on one’s own person [emphasis added]. Act on the Tax Administration § 8-8\textsuperscript{858}

The above rule has an informational function, in that it affords the individual taxpayer access to information on searches concerning him or her. The rule does not require the tax administration to send out a notification to the taxpayer, but provides for access through log in on the tax administration’s website. According to the proposal the information on searches made, provided by log in on the tax administration’s website, includes information identifying those performing the searches. In the following, this rule as well as rules including requirements such as those mentioned above, are examined.

As previously noted, impacts of rules as to taxpayer compliance with tax laws have been identified with regard to rules that in different ways set

\textsuperscript{858} Proposal for new legislation on the Act on the Tax Administration § 8-8 third item Finansdepartementet, Høringsnotat om innstramninger i reglene om offentlige skattelister 2014 [Saksnr 13/4660] 16.
forth restrictions on the scope of transparency. Primarily, notifications to the taxpayer upon disclosure might decrease the amount of disclosures made since requesters know that the taxpayer will be informed about the request and therefore might refrain from requesting disclosure. A rule such as the above therefore does not limit the range of accessible information, that is, it does not limit transparency as such. Rather, it might limit the number of requests made because it could well function as a barrier for requests made merely out of curiosity or other requests not of urgent need-to-know type. On this basis no specific costs or benefits have been recognized on rules providing an obligation to inform a taxpayer upon disclosure in relation to tax compliance. The evaluation therefore continues with the impacts on the other two benchmarks, administrative costs and taxpayer privacy.

As held above, the rule provided at the beginning of this subsection does not require the tax administration to send out a notification to the taxpayer about requests on disclosure of information pertaining to him or her. This rule therefore induces less administrative costs than a rule that requires a notification to be sent to the taxpayer who is to be informed about a request.

A rule requiring the tax administration to inform a taxpayer upon disclosure of personal tax information may include a requirement that the taxpayer needs to consent to such disclosure. Within such a requirement lies the possibility for the taxpayer to object to the disclosure. Additionally, as mentioned, a rule may include the opportunity for the individual to correct any inaccuracies or appeal a decision on disclosure. All of these options increase the financial burden on the tax administration in that they extend the communication burden on the tax administration and lengthen the disclosure procedure. It has previously been stated that simple and less formal procedures facilitate the efficiency and speed of procedures. A rule requiring taxpayer consent to disclosure, or a rule affording a certain amount of time during which the taxpayer may appeal the disclosure of information, inevitably provides longer handling procedures and thus increases costs.859

Notifying the individual concerned about an information request being made and requiring the taxpayer’s consent to disclosure has the advantage of giving the individual the chance of having a subjective say in what is considered to be private information and the disclosure of it. The benefits of privacy further increase if the taxpayer is able to disallow disclosure or appeal a decision on it. However, most people would probably like to re-

859 See SOU 1987:31 (n 4) 125.
ceive more information than they are willing to disclose. Most would likely respond to the notification that someone had requested information on his or her tax issues negatively – that is, they will object to disclosure. This lengthens the procedures, which induce more costs on the tax administration.

Information on searches in accordance with the rule at the beginning of this subsection includes details that identify the searcher. Such a notification has privacy benefits in that it provides the individual with knowledge of the person to whom his or her tax information is disclosed. However, this in turn raises privacy concerns in respect of the requester and questions could be raised as to the consequences of a requirement of identity in order to exercise any right to information.

Additionally, the right of access to information is a type of right that is of current interest at the time the applicant exercises it. Lengthy procedures could completely annul the meaning of such a right, as information obtained after a certain period does not possess the same value as current information. Consequently, if the taxpayer objects to disclosure or appeals a decision on it and thus lengthens the procedure, this might not only induce higher costs on the tax administration but might also distort the right to information.

To summarize: first, no specific costs or benefits have been identified on the first benchmark, tax compliance. Second, with regard to the benchmark on administrative costs, the rules dealt with in this subsection may be ranked in the following order, from the least costly to the rule inducing the highest administrative costs:

1. Access by the taxpayer to information on requests/searches made.
2. Notification to the taxpayer about a disclosure.
3. Notification to the taxpayer about a disclosure, including requiring the taxpayer’s consent, a right to correct any inaccuracies, and/or a right to appeal a decision on disclosure.

Third, certain benefits of notifying a taxpayer about a request on disclosure on taxpayer privacy have been identified. A potential requester may refrain from requesting disclosure of certain information because that person knows that the taxpayer concerned will be informed about the disclosure. Consequently, less information is disclosed and thus there is less violation of privacy. Another privacy benefit lies in notification to the taxpayer about disclosure that provides the individual with knowledge of the

860 See subsection 2.4.5.
person to whom personal tax information is disclosed. However, the privacy benefits of giving taxpayers prior notice and/or control over the disclosure would need to be weighed against the administrative costs induced by such procedures.

6.13 Charging of Fees for Gaining Access

The charging of fees for obtaining information involves shifting the costs from the tax administration onto the requester to allow the tax administration to recoup some of the costs induced by disclosure. It is concluded that rules authorizing the tax administration to recoup some of the costs are legitimate. However, it is noted that high fees might distort the right to information, because they could prevent people enjoying that right.\textsuperscript{861}

It is not within the scope of this thesis to consider the subjects of calculating whether fees are at an acceptable level (thus allowing the tax administration to recoup some of its costs but at the same time do not have an adverse impact on the right to information). Therefore, only a brief consideration is given to issues that decide the level of fees.

Both Swedish and United States legislation contain provisions on the possibility of charging fees for gaining access to public information.

An official document to which the public has access shall be made available on request forthwith, or as soon as possible, at the place where it is held, and free of charge, to any person wishing to examine it, in such form that it can be read, listened to, or otherwise comprehended. \textit{FPA Chapter 2 § 12}

A person who wishes to examine an official document is also entitled to obtain a transcript or copy of the document, or such part thereof as may be released, in return for a fixed fee. \textit{FPA Chapter 2 § 13}

A reproduction or certified 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. A reasonable fee may be prescribed for furnishing such reproduction or certified reproduction. \textit{IRC § 6103(p)(2)(A)}

The first rule above provides that no fees may be charged when an official document is merely made accessible upon request. Fees are permitted, as seen in the second rule, when the requester wishes to have a transcript or copy of the information. This is also the situation in the third – US – rule above. A rule such as the first provides no possibility for the tax ad-

\textsuperscript{861} See subsection 2.4.5.
ministration to charge a fee for costs for searching and providing the requested information at the place it is held. There is thus no opportunity open to the tax administration to recoup such costs. The third rule is more open in that way, making it possible not only to charge a fee for the actual copies but also for furnishing reproductions, such as costs for search, duplications and review.  

Employing a rule that gives the requester an obligation to pay all or a portion of the administration’s costs can help to limit disclosure by excluding some of the requesters who are motivated by no more than idle curiosity to include only those who have a “need to know”. It is held that price is the only device for restricting the service in the absence of any “need to know” requirement.  

The charging of fees may in this way decrease the tax administration’s work-load. However, for the principle of access to public information to work in accordance with its intentions, the price cannot be set too high. High fees might prevent not only the curious from requesting information but also those who have a genuine need to know but cannot afford the fees. Fees that are set too high could thus interfere with the right of access to information.

To avoid the risk of such a restriction on the right to information waivers for the poor could be provided, as was done in South Africa where a specific income level was established below which no charges could be levied.

6.14 Conclusions

In this chapter the theoretical framework is applied in order to evaluate rules that in different ways relate to tax confidentiality. The rules, extracted out of their context, that is to say, extracted out of the system they belong to and their co-operation with other rules in that system, are set against the benchmarks of tax compliance, administrative costs, and taxpayer privacy. The purpose is to answer research questions 2a-c, that is, 2) how do different rules on tax confidentiality achieve the objective of a) promoting taxpayer compliance, b) minimizing administrative costs, and c) protecting taxpayer privacy?

To draw any summarizing conclusions as to tax compliance, it could be held that rules prescribing a high level of transparency benefit tax compliance. This is, however, under the premise that transparency affords insight
into the tax administration’s activities and that disclosure display a trustworthy tax administration. For instance, disclosure of tax returns does not reveal any information on how the tax administration carries out its duties, but rather shows raw tax information submitted to the tax administration by the taxpayer. Consequently, transparency in terms of tax returns does not contribute to enhancing tax compliance. Confidentiality (in terms of tax returns) should correspondingly not bear any particular costs on tax compliance. This could be compared with transparency concerning tax decisions. A tax decision provides great possibilities of insight into how the tax administration undertakes its duties (for example, how it applies the tax laws). This might enhance taxpayer trust in the tax administration (assuming that transparency reveals a tax administration that conducts its duties in a trustworthy and equable manner) – which in turn increases the prospects of taxpayer compliance.

On administrative costs it is shown that rules that prescribe disclosure inevitably induce costs on the tax administration. The height of such costs depends largely on the second step in the disclosure chain – review of information – which is held to be the most cost-inducing step. A rule that requires action to be taken prior to disclosure, such as a damage assessment and/or redaction of information, increases the costs compared with a rule prescribing disclosure without any such action, for instance rules on full disclosure of decisions. Furthermore, disclosure requiring minimal intervention of a tax officer, such as automatic Internet disclosure, helps to keep costs low.

On taxpayer privacy protection, the general conclusion is that rules prescribing a high level of confidentiality indeed afford higher privacy protection than those prescribing disclosure. However, rules allowing for partial disclosure, such as those on redaction of taxpayer-identifying information, also provide a high level of protection for taxpayer privacy while at the same time (to a greater or lesser extent) provide insight into tax administration activities.
7 A Preferred Option – a Requirement of Damage

7.1 Introduction

This chapter submits a preferred option, namely a requirement of damage. It takes into account both the benefits and the costs of tax confidentiality, since it considers the consequences associated with disclosure rules on tax compliance, administrative costs, and taxpayer privacy concerns.

At the beginning of this thesis it was held that there is no possibility of finding a universally applicable level of tax confidentiality because of differences in societies and cultures. For instance, holding that public decisions do not seem to substantially increase criminal actions and thus should be employed universally because they promote the principle of maximum disclosure based on the fact that it works well in Sweden is naïve. While Sweden is not immune or spared from crimes against the wealthy, having transparent tax administration decisions does not seem to imply any great threats in that direction. However, because it appears to work in Sweden does not mean that a similar regime would function at the same positive degree in another country, as cultural and societal differences cannot be ignored. This refers to the issue of legal transplants, meaning that rules from one system transplanted into the legal system of another country will lead to different effects from those prevailing in the system of origin due to differences in culture and society.865 The intention of this thesis has therefore been to illuminate impacts that different rules might have and not to state with certainty that all of such impacts will occur. It is left to each jurisdiction to make the final balancing of interests and weighing the impacts as to their probability of occurrence in the country concerned. The proposed preferred option submitted in this chapter in fact affords such a balancing of interests, and is further explained in what follows.

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865 See, for instance, the following articles in which the issue of legal transplants is discussed. Legrand argues that legal transplants never happen as the meaning of the rule changes within its ‘new’ system and thus the rule itself changes, which limits the possibility of effective legal transplant. Watson recognizes that a rule once transplanted is different in its new system but that does not nullify legal transplants or their contribution to legal development. Pierre Legrand, ‘The Impossibility of “Legal Transplants”’ (1997) 4 Maastricht Journal of European and Comparative Law 111; Alan Watson, ‘Legal Transplants and European Private Law’ [2000] vol 4.4 Electronic Journal of Comparative Law <http://www.ejcl.org/44/art44-2.html> accessed 10 June 2014.
The here proposed preferred option – a requirement of damage – affords not a static level of confidentiality but rather a uniform, standardized regulation. Its application is to be based on the principle of maximum disclosure. Differences in application might be permitted on the basis that the decision on whether or not to disclose information is founded on an assessment in each individual case, thus taking into consideration the different factors in the particular case that might lead to damage upon disclosure – which then might outweigh disclosure. It corresponds to what is held by Kristoffersson and Pistone that “tax information is not per se to be kept as confidential, but should be protected from becoming publicly available information when there are good reasons to do so”\textsuperscript{866} and that the “roadmap to building up a worldwide convergence on a common standard could be along the lines of a categorization that takes into account the potential damage that can arise from disclosure of tax information”.\textsuperscript{867}

7.2 A Requirement of Damage

7.2.1 Structure
As indicated by the heading of this chapter and held above, the proposed preferred legislative option on tax confidentiality is a requirement of damage. In the following the reasons for this (based on the findings in the foregoing chapters) are provided. It starts by demarcating the basis for and content of a requirement of damage. It then proceeds to more specific costs and benefits in relation to the theoretical framework. The next subsection provides considerations as to when a requirement of damage is preferably to be applied. The possible negative outcomes are dealt with, followed by supplementary recommendations. It ends with a subsection containing the main conclusions.

7.2.2 Access to Information
The right to information is indisputably a vital part of a properly functioning democracy. Access to information is held to be a crucial factor in keeping public authorities “clean”. The purpose of a right to information, however, should not primarily entail a right for individuals to obtain personal, sensitive, information pertaining to individuals, but to grant the public the means of ensuring that transparency is clearly there in relation to government activities. This encompasses the central issue of this thesis, since

\textsuperscript{866} Kristoffersson and Pistone (n 120) 5.
\textsuperscript{867} Ibid 6.
transparency as the aim of this thesis concerns access to information entailing not only information on tax administration activities but also that pertaining to individual taxpayers. For instance, as previously asserted, a rule on public tax decisions including the justification for such decisions, to a great extent facilitates insight into how the tax administration carries out its duties on, for instance, tax assessment activities than on transparency with regard to merely raw tax return information. Consequently, information that to a high degree provides transparency in relation to tax administration activities at the same time provides it on individual taxpayers.

It is concluded that tax transparency promotes tax compliance, assuming that transparency is based on creating or upholding (or both) a compliance norm, showing a tax administration in which taxpayers can trust because it applies the tax laws correctly and equably. However, governments cannot operate with total transparency because complete access would invade the privacy interests of individuals who by law are required to disclose personal information to the government. Taxpayers are obliged to disclose much detailed information, sometimes of a highly personal nature, to the tax administration for it to execute the duties imposed upon it by the state. Nevertheless, it is contended that maximum disclosure should be the guiding principle with regard to the right to information laws.

Though transparency should be the objective, other interests such as privacy protection may impose legitimate restrictions on the right to information. Hence, information may be protected from disclosure by provisions on confidentiality. Confidentiality in turn has been described as a degree of accessibility, that is to say, to a greater or lesser extent it sets up limitations on accessibility. Success lies in providing a workable formula which encompasses, balances, and protects all interests – yet places emphasis on the fullest responsible disclosure.

The conclusion with regard to the above is that a requirement of damage allows for the degree of accessibility based on the principle of maximum disclosure to be the governing determinant. This is because a damage assessment facilitates public access to information but at the same time recognizes that full disclosure in every situation may not be appropriate due, for instance, to the interests of protecting taxpayer privacy. A requirement of damage founded on the principle of maximum disclosure provides the opportunity for disclosing valuable information facilitating the public’s knowledge on the tax administration’s activities, yet at the same time affords protection of taxpayer privacy when necessary.

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868 See subsections 6.2 and 6.3.
869 ‘Senate Report No 813, 89th Cong, 1st Sess’ (n 625) 3.
7.2.3 The Scope of Accessible Information

This subsection addresses the issue of the scope of accessible information (that is, which information may be accessible and in which situation) in relation to a requirement of damage. In other words, this subsection concentrates on the features of a requirement of damage that affects the range of accessible information. The discussion builds on the conclusion in the foregoing subsection, that is, that the degree of accessibility based on the principle of maximum disclosure should be the governing determinant with regard to matters on (tax) disclosure and that a requirement of damage affords such an approach.

For the discussion on the scope of accessible information in relation to a requirement of damage there is reason to differentiate between measures that relate to the scope of accessible information from those that limit the scope of accessibility. An example of this is the Norwegian rules on Internet disclosure, dealt with in subsection 6.10. It is recognized that Norway has experienced some drawbacks due to the public nature of tax lists entailing information that identifies taxpayers. However, instead of limiting the sphere of accessible information by enacting rules providing confidentiality on identifying information, Norway chose to limit the means in which information is accessible by limiting its publication solely to the tax administration’s own website, requiring log in to on the site to gain access to information and limiting the amount of searches (or rather views). Subsequently, these measures rather limit the scope of accessibility instead of the scope of accessible information since no restrictions\textsuperscript{870} were set up on which information is publicly accessible but only as to the ways by which it is accessible.

A requirement of damage does not impose any restrictions on the reach of accessibility, since it does not govern how information is made available but rather what information may be obtained. Therefore it rather concerns the ambit of accessible information. A requirement of damage might from one perspective be argued to limit the scope of accessible information, in that such a requirement concerns what information may be disclosed and that which needs to be kept confidential. However, from another perspective a requirement of damage might be considered to extend the orbit of accessible information. This is further elaborated in what follows.

\textsuperscript{870} “No restrictions” should not be interpreted in the sense that Norway does not have any restrictions on which information is public. Norway does have rules specifying the information that is to be disclosed. It should rather be interpreted in the sense that the negative impacts that Norway has experienced, did not lead to restrictions on the scope of information, but rather restrictions as to its accessibility.
Drawing general lines as to what information may be disclosed and that which needs to remain confidential, might lead to either too much transparency or perhaps too high a level of confidentiality, including an unnecessary amount of tax information. A damage assessment conducted on a case-by-case basis opens the way for considerations as to the positive as well as negative effects of disclosure in each individual case. A requirement of damage thus recognizes interests in favour of both transparency and confidentiality. Accessibility would be limited only when disclosure affords substantial costs, primarily on taxpayer privacy, in relation to the benefits of disclosure. As the final balancing is conducted on a case-by-case basis more information might be included in the scope of its being accessible. That is, instead of deciding beforehand that certain information should always be kept confidential due to the fact that in most cases such information is considered to cause damage to the taxpayer to whom it relates, a requirement of damage such as the one here suggested makes room for a starting point where all of the requested information is subject to possible disclosure. A requirement of damage might thus broaden the scope of accessible information, extending transparency and the right of access to information.

7.2.4 The “Happy Medium”

A requirement of damage could be described as the “happy medium”, since it affords considerations to be made on each individual case on both the transparency interest and that of protecting taxpayer privacy. It facilitates insight into government activities, yet recognizes situations where disclosure of personal information would not contribute to that purpose and where it would cause illegitimate privacy violations.

Accordingly, a requirement of damage in itself contains a balancing of interests. This final trade-off is left to each jurisdiction, since cultural and societal differences together with the circumstances in the individual case make it difficult, perhaps impossible, to draw any definite conclusions on where to draw the line between what information should be disclosed in a particular situation and which information should enjoy confidentiality protection. It requires considerations as to possible harmful effects of disclosure when weighing the individual interest in confidentiality and the potential benefits of disclosure when considering the public interest of public access. Consequently, a requirement of damage including an assessment of damage provides an appropriate balance between the transparency interest and that of protecting privacy.
7.2.5 A Requirement of Damage and the Benchmarks

This subsection discusses the proposed requirement of damage in relation to the theoretical framework. In other words, it revolves around costs and benefits associated with a requirement of damage in relation to tax compliance, administrative costs, and taxpayer privacy.

The reasons advanced above for submitting a requirement of damage as a preferred option suggests that the benefits of transparency prevail over the benefits of protecting taxpayer privacy, since the proposal asserts maximum disclosure to be the guiding principle. The proposal that the basis for a requirement of damage should be the principle of maximum disclosure is based on the conclusion that transparency promotes tax compliance. It is shown in setting the benchmark on tax compliance that deterrence, social norms, trust and fairness are the factors that have an impact on a taxpayer’s choice to comply (or not) with the tax laws. Briefly, tax compliance increases with the perception that most taxpayers comply and that those who do not are caught and punished. Transparency helps nurture taxpayer trust in the tax administration (assuming that transparency reveals a trustworthy administration) because if taxpayers are able to take part in the administration’s procedures they can decide for themselves whether or not the tax administration treats taxpayers fairly and equally. Subsequently, tax transparency should have large benefits with regard to tax compliance. The principle of maximum disclosure should therefore be the basis for tax confidentiality legislation and a requirement of damage affords that.

On the second benchmark – administrative costs – the proposal might appear to assert that effective and efficient tax administration is of subordinate importance. However, since tax transparency is held to promote tax compliance, the fact that effective tax administration seems to come last in this priority of interests is compensated by the conclusion that tax transparency promotes tax compliance and thus nurtures high tax revenue collection – that is, an effective tax administration. This, of course, relies on the premise that effectiveness is defined as high tax revenue collection and does not take into account other aspects such as time spent on such matters – that is, how fast the tax administration works.

This latter aspect should, however, not be disregarded when discussing the proposed option in an administrative costs context. It has been repeatedly held that rules requiring actions to be taken prior to disclosure induce administrative costs on the tax administration in applying these requirements. If, for instance, public decisions were accessible without any dam-

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871 See subsection 2.3.
age assessment and additionally available through a public database, the workload on the tax administration is minimized. Hence, an obvious drawback of a requirement of damage is that by its nature it requires more resources on time spent on handling requests on disclosure as well as the costs associated with training personnel who make the assessments. Furthermore, as a damage assessment requires personal attention on a case-by-case basis, no routine publication facilitating easy access over the Internet appears possible. From an administrative cost perspective, a requirement of damage is therefore not the most efficient option.

The issue of disclosure over the Internet is discussed in subsection 6.10. It is held that such a solution on accessibility affords benefits in that it facilitates the right to information in making access easy. Moreover, it is cost-reducing with regard to administrative costs put on the tax administration, since the search for and access to information over the Internet is done by the individual and disclosure thus requires minimum interference from the tax administration. Adapting a requirement of damage to achieve these benefits of Internet disclosure could be made as follows.

Redacting taxpayer-identifying information, which is considered to require an individual assessment prior to disclosure, enables (as previously asserted) more accessible information (extension of the scope of accessible information). Such an assessment, however, is no easy task even when the officer concerned is provided with all the details of the request, such as the reasons for it and how it is intended to be used. Lacking such information might make the assessment on what information to redact more difficult, thus running the risk of over-redaction. This is the case concerning Internet disclosure. That is to say, if information were to be accessed online (perhaps in line with the Norwegian solution) more information might initially require redaction in order to prevent extensive privacy violations and other misuse. This might, however, to a certain extent function well, since not all requests for information require all details in order to achieve its intention. For instance, as maintained in subsection 6.6 on redaction of information, in order to investigate how the tax administration applies tax rules concerning a specific type of deduction, the need for identifying information might be less than in situations where a person seeks a leading part in society and is being investigated to establish suitability for that role. It is also stressed in Swedish preparatory works that it might not always be necessary to have identifying information in order to control whether or taxpayers are treated equally.872

872 SOU 1987:31 (n 4) 124.
Nevertheless, if the law provides a requester with the opportunity to request redacted information, the risks of negative impacts by over redacting might be reduced. That is, the individual may as first resource obtain (redacted) information online. If the requester is not satisfied with how much information is revealed, he or she may then request disclosure – full or partial – of the redacted information.

The amount of work that would be required in redacting information prior to providing access over the Internet would be rather extensive, thus inducing high administrative costs on the tax administration.\(^{873}\) Such costs might be reduced if such redaction could be automated. This in turn, however, requires a determination of what information should always be protected by initial confidentiality, which might be difficult to make. The costs for initial redaction for Internet disclosure must furthermore be considered in relation to the additional costs of a tax officer’s assessment regarding any subsequent disclosure requests concerning initially redacted information.

Concerning the benchmark on taxpayer privacy it was held at the beginning of this subsection that the proposal suggests that transparency prevails over taxpayer privacy. However, this does not extend to the notion that privacy does not matter. The balancing provided with the damage assessment inherent in a requirement of damage involves considerations concerning the position that some information in certain circumstances might need to be protected by confidentiality. No general line is drawn as to what information needs to be confidential – this is decided in each individual case.

A requirement of damage, moreover, affords considerations on the fact that disclosure of one piece of information might be harmless in one situation but might cause damage in other circumstances either as a unit of information or aggregated with other details. This is because the damage assessment includes a possibility to thoroughly examine all details of the request, such as the reasons for it and how it is expected to be used.

In opposition to opening up for an examination the reasons for a request are the standards established by the COE and the UN that (as held previously) include the view that applicants should not have to provide reasons for requests\(^{874}\) and that the exercise of the right to information should not require individuals to provide a specific interest in the requested information.\(^{875}\) Adhering to these recommendations, the conclusion is that a

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874 Mendel and Unesco (n 2) 37.
875 UN Special Rapporteur on Freedom of Opinion and Expression (n 117) 57.
requirement of damage should not include an obligation for the requester to provide reasons for such request. However, it is not argued here that the requirement of damage of necessity needs to include an obligation for the requester to provide such information. Neither does it need to include an obligation for a tax officer to investigate the reasons for the request and the intended use of it – it might only afford such a possibility. It is for the officer to decide whether disclosure is possible without such information. If not, it is then up to the requester to make the decision on if submitting information on the reasons for the request and how he or she intend using it, is worthwhile obtaining it. As noted, considerations made on the reasons for a request are integral to both sides of the confidentiality/access equation. The value of access to certain records might not be fully revealed without considering how the information would be used once released. 876 It might thus be in the interests of the requester to provide the reasons for the request, though he or she is not obliged to do so, since this might not only be negative for the requester in that the requested information is not released on the basis of this, but also that it might lead to disclosure if the reasons and usage appear legitimate. 877

7.2.6 When to Employ a Requirement of Damage

Though a requirement of damage based on the principle of maximum disclosure provides benefits such as those held in the foregoing paragraphs, it is not necessary to apply it to all tax information held by the tax administration. It has previously been asserted that 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 closer a final judicial decision, the higher the demands to justify confidentiality of information.

Tax returns, for example, do not hold 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 public opportunity to gain insight into tax administration activities. Since the purpose behind the right to information is access to information on government activities, confidential tax returns do not impose unwarranted restrictions on the right to information. Consequently, it is not necessary to apply the proposed requirement of damage to tax returns.

876 Hoefges, Halstuk and Chamberlin (n 813) 7.
877 See subsection 6.7.
A requirement of damage, based on the principle of maximum disclosure, is more appropriate and necessary with regard to information that to a great extent provides insight into how the tax administration conducts its duties. This is the case not only for tax decisions on taxable income and other decisions establishing tax liability, but also concerning advance rulings, since these afford information on how the tax administration interprets and applies tax law. Transparency in this regard, in my view, is even more important with regard to agreements, since they involve deviations from tax law, whether in terms of interpretation/application of substantive tax law or compromises on a tax debt.

Thus the conclusion is that a requirement of damage does not need to be applied to tax returns or other information not providing any insight into tax administration activities. The principle of maximum disclosure as the basis for the application of the requirement of damage is of greater importance the more information on how the tax administration carries out its duties that disclosure reveals and the closer final judicial decision.

7.2.7 Possible Negative Effects
It has been asserted previously that exceptions to the right of access to information must be defined as narrowly and restrictively as possible. It could be held that a requirement of damage is not sufficiently narrow and restrictive, thus being too broad in its scope. A requirement of damage includes the danger of requiring officials to make threshold decisions important in terms of access to information. Too broad a basis for keeping information confidential might open the way for abuse, intentional or otherwise. A requirement of damage might be misused to make more information inaccessible by claiming harm upon disclosure, hence hindering the realization of the right of access to public information. It might also be the case that an official, merely for safety’s sake, might choose to keep information confidential that could well be disclosed without harm. Such concerns were discussed, for example, in Johnson v Sawyer, where the court held that

since much of the information on tax returns does fall within that category, [Congress determined] 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.\textsuperscript{878}

This constitutes possible negative impacts of a requirement of damage which might have a distorting effect on the right to information. A regime employing a requirement of damage would therefore benefit from an overarching scrutinizing entity to ensure that decisions on disclosure or confidentiality meet the demands on the damage assessment and are not made routinely without special consideration to the facts in the individual case.

Considering the potential risks induced by difficulties in application, an extension of confidentiality might appear alluring. However, as held in Swedish preparatory works, problems in application that can arise should be met by training and information, not by more extensive confidentiality.\textsuperscript{879} In order to meet the potential risks there is an option of employing a group of specially designated officials handling disclosure requests. Such a solution might ensure that the handling of matters on disclosure of tax information is done in a proper manner. It can be argued that the tax official handling a particular tax matter is the most suited to deal with disclosure considerations of information pertaining to it, since he or she is probably the most familiar with the information in it. While the tax official concerned is probably well versed in the matter, it might nevertheless be difficult to conduct a damage assessment. An official dealing with disclosure issues daily is most likely to be better skilled at performing a damage assessment. Indeed, the facts differ from case to case, but it does not seem too far-fetched to assume that the “disclosure officials” with experience obtain a certain level of knowledge as to what information in which situation might provide such threats to taxpayer privacy that justifies nondisclosure, thus making a damage assessment as efficient and effective as possible. Moreover, if disclosure officials are authorized to contact taxpayers during the assessment procedure, uncertainties as to the significance of certain information could be resolved. Having a group of officials specially trained and educated in confidentiality issues might be a way of combating the concerns of having complicated legislation that could lead to too much or too little information being disclosed. Additionally, reports for guidance on how to deal with the balancing issues further reduce these risks.

A drawback of the suggested solution of “disclosure officials” is that all requests need to be referred to this group, that is, an ordinary tax official will not have the authority to disclose tax information and is obliged to

\textsuperscript{878} Johnson\textsuperscript{ }v Sawyer (n 651) citing the en banc opinion in Johnson\textsuperscript{ }v Sawyer\textsuperscript{ }47 F3d 716.

\textsuperscript{879} Ds Ju 1977:11 Del 1 (n 373) 112.
refer the request or the requester to this group. However, this time-consuming consequence could be reduced by clear information on how disclosure requests are to be made, thus facilitating a procedure where requests are submitted directly to this designated unit, without inefficient detours.

7.2.8 Supplementary Recommendations

If a jurisdiction reaches the conclusion that the drawbacks above (or others not recognized here) of a requirement of damage are too immense, the following recommendations are noted.

The lack of a requirement of damage should not lead to the position where privacy interests totally outweigh the right to information, considering the benefits of transparency and the right to information. As held, the principle of maximum disclosure should be the premise of any tax confidentiality regime. Transparency based on the notion of increasing both horizontal and vertical trust, creating and/or upholding a compliance norm in order to maximize the chances of taxpayers complying with the tax laws, must be the focal point.

To reduce administrative costs public information should be accessible in a way that requires the minimum interference by a tax officer, for instance, in accordance with the Norwegian model of access over the Internet via individual log in. On the aspect of reducing administrative costs, this recommendation speaks to the contrary compared with the proposed preferred option of a requirement of damage, which induces high administrative costs. However, a requirement has been considered to have benefits that outweigh this negative consequence. Furthermore, an option that might limit the extent of such a negative impact has been proposed. Finally, access to information should be limited in ways that restrict invasion of taxpayer privacy, while at the same time not putting unnecessary limitations on the right to information, thus decreasing the benefits of transparency. Maximum disclosure should always be the guiding principle.

7.3 Conclusions

The submitted preferred option is a requirement of damage. The main reason for this is that a requirement of damage allows for confidentiality seen as a degree of accessibility based on the principle of maximum disclosure to be the governing determinant in matters on tax confidentiality and tax disclosure. A requirement of damage prescribing a damage assessment to be conducted prior to disclosure provides an appropriate balance between the interests of transparency and those of protecting taxpayer priva-
This is because it requires considerations as to any harmful effects of disclosure when weighing the individual interest in confidentiality and the potential beneficial effects of disclosure when weighing the public interest in public access.

Tax transparency, as in insight into tax administration activities, is held to promote tax compliance. A requirement of damage based on the principle of maximum disclosure promotes the realization of these benefits, since it enables the public to take part in information that reveals how the tax administration carries out its duties – though information might be in redacted form.

A requirement of damage does not come without drawbacks. The main ones relate to administrative costs for the tax administration. A requirement of damage is both time and personnel consuming, since a damage assessment takes time to conduct and requires tax officers to have the education and training to make these often difficult trade-offs.

Another drawback is the possible (intentional or not) misuse to which a requirement of damage could be subject. It could be misused to make more information inaccessible by claiming harm upon disclosure, thus frustrating the realization of the principle of access to public information. It may also be the case that an official merely for safety’s sake decides to keep information confidential that could well have been disclosed without harm. This constitutes possible negative impacts of a requirement of damage that could have a distorting effect on the right to information. These potential risks due to difficulties in application, might result in an extension of confidentiality in order to avoid these balancing acts at tax official level. However, problems in application that could arise should be met by education and information, not by more extensive confidentiality.

Though a requirement of damage, based on the principle of maximum disclosure provides an appropriate balance between the interests of transparency and those of protecting taxpayer privacy, it need not be employed to all of the information held by the tax administration. The closer the activity is in terms of government exercise of public authority, that is to say, the closer it is to a final judicial decision, the higher the demands that justify confidentiality. A requirement of damage therefore does not need to be employed with regard, for instance, to tax returns as these do not facilitate opportunities for the public to gain insight into how the tax administration conducts its duties.
PART IV

Conclusions
8 Conclusions

8.1 Introduction

In this final part of the thesis, consisting of one chapter (Chapter 8), the findings are connected to its aim as set forth in Chapter 1.

The overarching question guiding the research has been this: What are the costs and what are the benefits of having a high level of tax transparency versus a high level of tax confidentiality? Such a question involves an evaluation of rules. For this approach a methodology inspired by the theories and methods of law and economics has been applied. This means that the evaluation of tax confidentiality legislation is conducted by employing an IA, involving CBA in weighting the costs and benefits of different options.

An IA is a systematic policy tool used to examine and measure the likely benefits, costs and effects of a new or existing regulation. The procedure of IA affords that various options are weighed against one another to provide a clear picture of the effects the options might have in different areas. This method entails comparative elements, first, in comparing Swedish and US tax confidentiality legislation (the country comparison), and second, in comparing different legislative options (the option comparison) extracted from their context – that is, outside the legal system they belong to with their co-operation with other rules.

The evaluation is based on the criteria of effectiveness, defined in the European Commission Impact Assessment Guidelines as “the extent to which options achieve the objectives of the proposals”. As held, when speaking of efficiency in these terms it requires a determination, because things are not efficient in general; they are efficient depending on what they are supposed to achieve. Determining whether or not something is efficient requires an assessment: one must assess what in a given situation is efficient and what is not. In order to conduct such an assessment, one needs certain criteria of efficiency. In this thesis, for this evaluation of effectiveness, the criteria are tax compliance, administrative costs, and taxpayer privacy protection. I call these criteria benchmarks. They are set out in Chapter 2 and are based on existing research within the different areas that they embrace. They provide a foundation for conducting an assessment in

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880 See subsection 1.3.3.
882 See subsection 2.1.
order to determine the degree of effectiveness of rules on tax confidentiality, in other words, the determination of the degree to which the different rules fulfil the interests embraced by the benchmarks. This in turn provides a basis for the choice of an option (or options), as it makes it possible to compare the costs and the benefits of different options and then to decide which are preferable.

The benchmarks thus could be said to form the broader frames within which the topic of this thesis is explored. Together they form a theoretical framework, used in order to fulfil the purpose of this research, that is, to evaluate rules on tax confidentiality in order to extract their costs and benefits. This framework has been constructed not merely for the accomplishment of the aim of this particular study, but has been designed so that others might use and benefit from it. It is contended that this will not only assist policymakers in their considerations of important factors and competing interests, but also provide them with the means of creating or evaluating tax confidentiality legislation, or both. Furthermore, by providing different significant interests (embraced by the benchmarks) and a thorough analysis of the consequences of different rules within the areas of such interests, this research could also contribute to facilitating the final balancing in the application of the recommendation on the part of the practitioner. Consequently, not only those engaged in drafting legislation might perhaps benefit from the findings of this thesis, but also those legal experts involved in its application.

The selected benchmarks (tax compliance, administrative costs, and taxpayer privacy) are held to represent issues continuous over time. In other words, the benchmarks embrace interests significant not only today but also in the future. It is argued that promoting taxpayer compliance should always be in the interests of the tax administration, since a high level of compliance increases revenue collection. Keeping expenses low is of interest not only for the tax administration but for society as a whole, since considerations as to the best allocation of resources is of high value in any society whose functions are based on the collection of taxes. The right to privacy, which is one of the most prominent issues discussed in tax confidentiality contexts, has been on the agenda for many years and an end to its discourse does not appear imminent, since it is the main reason for confidentiality.

In order to meet the aim of this thesis and answer the broad, overarching research question, the following sub questions are set forth.

1. What are the impacts of tax confidentiality in relation to
   a. tax compliance,
b. administrative costs, and
c. taxpayer privacy, and
2. How do different rules on tax confidentiality achieve the objective of
   a. promoting taxpayer compliance,
   b. minimizing administrative costs, and
   c. protecting taxpayer privacy?
3. How did tax confidentiality legislation in Sweden/the United States develop?
4. What is the general legal framework regarding transparency/confidentiality of tax information in Sweden/the United States?
5. What is the reason (or reasons) behind the tax confidentiality regime in Sweden/the United States?
6. What is the main content of the provisions on tax transparency/confidentiality in Sweden/the United States?
7. How does tax confidentiality legislation in Sweden/the United States achieve the interests set forth in the benchmark? That is, how do the two different regimes achieve the objectives of
   a. promoting taxpayer compliance,
   b. minimizing administrative costs, and
   c. protecting taxpayer privacy?

Questions 1a-c relate to the setting of the benchmarks in Chapter 2. These questions are essential to this thesis because it is necessary to answer them in order to draw any conclusions in terms of the research questions 2a-c (option comparison) and 7a-c (country comparison). In other words, identifying costs and benefits of different tax confidentiality rules requires a study of what the potential benefits and costs are within the chosen fields of interest (that is, the benchmarks). Research questions 1a-c thus help set the theoretical framework and that is why they are of great importance for this work. Research questions 3-6 provide a basis for the country comparison, since they help make clear the similarities and differences between the two jurisdictions.

This chapter is structured in the following way. The conclusions relating to research questions 1)(a)-(c) regarding the benchmarks are set down in subsection 8.2. Conclusions on the country comparison are found in subsection 8.3 where research questions 3-7 are answered. How different rules achieve the objectives embraced by the benchmarks (research questions 2)(a)-(c)) are thoroughly dealt with in Chapter 6. The discussion in that chapter is in subsection 8.4 transferred into a scheme containing the main
costs and benefits of the options explored in Chapter 6. The last subsection, subsection 8.5, entails summary conclusions and final remarks as to the topic of this thesis.

8.2 Benchmark Conclusions

As held previously, the second chapter provides a theoretical framework, which is used in order to evaluate rules on tax confidentiality. The evaluation is based on the criteria of *effectiveness*, defined in the European Commission Impact Assessment Guidelines as “the extent to which options achieve the objectives of the proposals”.

In setting the benchmark on tax compliance it is shown that there are several reasons for such compliance. The most important drivers and motivations behind taxpayers’ choice of compliance or non-compliance are grouped into five main categories – namely deterrence, norms, opportunity, fairness and trust, and economic factors. Among these factors impacting on a person’s choice of complying with the rules or not, it is deterrence, social norms, trust and fairness that are of interest for the issues dealt with in this thesis. These factors imply that while deterrence is of some importance for compliance, deterrent methods such as audits and punishment cannot alone achieve voluntary compliance. This is because social norms are held to have more influence on compliance. The impact of social norms on the individual’s choice to comply (or not) is in the compliance literature explained thus: most people comply with rules, not because they are afraid of being caught and punished for not doing so, but because they regard it as being right and observe that others are doing so. On that latter viewpoint, it implies that compliance is about reciprocity; that is to say, people are generally more likely to pay taxes if they believe that their friends and other citizens pay theirs. Correspondingly, people are more likely to cheat on their taxes if they perceive a weakening in the social norm against cheating.

The predominant conclusion appears to be that deterrence is most effective as a tool for supporting existing social norms in favour of compliance. This norm-reinforcing function of deterrence is shown to have a positive effect on tax compliance. Empirical evidence demonstrates that publicizing information on individual cases showing non-compliant taxpayers being caught and punished has a positive impact on tax compliance because it illustrates that non-compliant taxpayers are detected and punished. This in turn increases the perception of compliance being the norm. In the long

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884 See subsection 2.3.
run, high levels of compliance are achieved preferably by establishing and reinforcing strong norms in favour of compliance.

Trust and fairness are two other factors held to be important in terms of taxpayer compliance. People are more likely to pay their taxes if they perceive that the tax administration operates in a fair manner. Unfair and unequal treatment of taxpayers may lead to a decrease in taxpayer trust in the tax administration, which in turn could have adverse effects on tax compliance. Transparency helps nurture taxpayer trust – that is, vertical trust – in the tax administration because if taxpayers are able to take part in its procedures they can decide for themselves whether or not it treats taxpayers fairly and equitably.

Tax compliance subsequently increases with the perception that most taxpayers are complying and that those who do not are caught and suffer adverse consequences. If taxpayers perceive that tax evasion is widespread and that the tax administration operates unfairly then such notions could cause people to justify tax evasion. Rules on tax confidentiality (or tax transparency) should be used in ways that do not (only) evoke deterrence, but rather create trust and promote strong social norms.

The second benchmark concerns costs incurred on the tax administration due to the application of confidentiality rules. Four steps, each involving costs for the tax administration, have been identified in what I term “the disclosure chain”. Costs are incurred for (1) search,\(^{885}\) (2) review, (3) reproduction, and (4) disclosure. In the first step, the tax administration needs to search for the requested information. In the second, the tax administration needs to review the information to determine whether any of the information falls under any rule exempting it from disclosure. If so, the tax administration might need to make deletions to make such information ready for disclosure or, if the information is confidential in its entirety, give the requester notification as to why it cannot be disclosed. If the information may be disclosed the tax administration needs to reproduce the information, which constitutes the third step in the disclosure chain. Finally, the fourth step involves sending the information to the requester. The second step is the most costly, as this might require the personal attention of highly skilled officers for long periods. The design of the confidentiality rules is in this regard crucial, since complicated rules are time or staff consuming (or both) – that is, they incur higher costs than less complicated rules.

The tax administration should have some means of recouping the costs imposed on it by rules on tax confidentiality. It is worth noting that high

\(^{885}\) This step is delimited from any further analysis.
fees might pose a barrier to access as people might refrain from submitting requests on information disclosure because they cannot afford the fees. On the other hand, the charging of fees might decrease the tax administration’s work-load in that fees could reduce the number of requests in a positive sense by preventing idle requests merely out of curiosity. Fees in that sense act as a device for restricting requests. Nevertheless, excessive fees should not be employed because they risk becoming an obstacle for individuals requesting (and obtaining) information and thus could undermine the principle of public access to information.

The third benchmark embraces what is perhaps the most prominent interest discussed in tax confidentiality/tax transparency contexts – namely that of protection of taxpayer privacy. Though there seems to be a lack of a unified definition on the concept of privacy, a common denominator has been identified. This holds that the right to privacy is a right to a personal sphere, with a right to its protection from violations. Moreover, it is not an absolute right because an individual might in certain circumstances have to tolerate invasions of privacy to a certain degree.

It is concluded that it is not necessary to consider the nature of the information disclosed or the consequences of disclosure in order to determine whether or not a violation of privacy has occurred. This is because a breach of privacy occurs upon the mere disclosure of personal information to a third party. Even so, only the scope of such violation may determine whether or not the interference is legitimate. This means that the type of information, the way it is disclosed, and the consequences of disclosure, might justify a high level of privacy protection.

8.3 Country Comparison Conclusions

The choice of including Sweden and the United States in the country comparison is based on what general approach the particular country has on transparency, how this is reflected in tax confidentiality legislation, to what extent the benchmarks and their costs and benefits are shown, and any interesting legislative solutions to the trade-offs.\textsuperscript{886}

With regard to choice of including Sweden in a comparative study, it is a country noted internationally for its transparency, or the public right to gain access to information. This is hardly surprising. The right of public access to information has been enshrined in the Swedish constitution since 1766, thus rendering the Swedish model of open administration the oldest in the world. During the course of this work I have observed that Swedish tax secrecy is perceived to be very different and startling outside of Swe-

\textsuperscript{886} See subsection 1.3.4.
den. Because of this, I believe there is good reason to include Sweden in the comparative study.

Tax confidentiality legislation has been depicted as that of a balance of interests set on a scale, where at one end there is total confidentiality and at the other complete transparency. Going back to that figure, tax confidentiality legislation in Sweden could be said to be placed rather close to the total transparency end of the scale, while the United States, highlighting the importance of protecting taxpayer privacy through a high level of tax confidentiality, could be said to be placed closer to the other end.

It might well be argued that a comparison including Sweden would be of greater interest if it involved a country placed more at the opposite end of the confidentiality scale than that of the United States, such as Switzerland or Lichtenstein. Nevertheless, tax confidentiality legislation in the United States provides solutions, justifications, and considerations that enrich the discussion and thus make a comparison between these two jurisdictions interesting and contributory.

Given this, both of these jurisdictions offer interesting regimes to examine and use in a comparative study. They illuminate different views on the costs and benefits embraced by the benchmarks and what impacts the legislative solutions might lead to. Together they contribute to this thesis in their constituting excellent examples of the results of the different trade-offs made.

Despite the fact that these two jurisdictions may be placed at different ends of the scale, they still possess certain significant similarities, such as high confidentiality on tax returns, and that confidentiality and disclosure is source-based. These similarities, together with the differences observed in the country study, are elaborated in the remainder of this subsection, referring back to the research questions 3-7.

On the historical development of tax confidentiality (research question 3), public access to individual tax return information in the United States has fluctuated widely over time, ranging from broad accessibility when

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887 Hans Danelius points out that publicly accessible taxations is in other countries perceived to be objectionable, Danelius (n 63) 367.

888 The scale here presented is only illustrative and does not claim to show any exact placing on the scale.
income tax was first introduced in 1862 to the extensive restrictions on public disclosure that are in effect today. This is in contrast to Sweden where by and large the content of tax secrecy legislation has remained static since its first appearance in the early 1900s. Up until that point it was possible in Sweden (under the FPA) to obtain a transcript of a tax return. The changes stem from a proposal for Regulation on Income Tax and included an exemption from public access on, inter alia, information submitted by the taxpayer to the tax administration for the determination of tax.

Concerning the general legal framework for tax confidentiality legislation in Sweden and the United States (research question 4), the main difference is that Swedish tax secrecy legislation is governed, first, by the FPA, providing a constitutional right of access to official documents, and second by PAISA, which contain the specific secrecy provisions (the tax secrecy provisions are found in PAISA Chapter 27), while none of the laws governing disclosure of Federal tax returns or return information in the United States is constitutional.

Despite the difference noted above on the general legal framework the Swedish and US confidentiality regimes afford certain similarities. For instance, both FOIA and PAISA provide the public with a right of access to government information and then enumerates certain exemptions to that right. Tax confidentiality falls under one of these exemptions in both countries. A difference recognized in relation to the specific confidentiality rules is that in Sweden the tax secrecy rules are found in a specific secrecy act – PAISA – together with other secrecy provisions, while US tax confidentiality rules are found in the IRC, which contains the federal statutory tax law.

An additional difference observed in the comparison of the two jurisdictions on the general legal framework for tax confidentiality is that the IRC explicitly prescribes confidentiality of tax returns, 6103(a), while confidentiality is expressed in PAISA with regard to information (that is, not documents). PAISA Chapter 27 § 1 states that confidentiality applies to information on the personal or economic circumstances of individuals.

Another issue addressed in the country comparison relates to the reasons for the level of confidentiality employed by the two jurisdictions (research question 5). The reason for the Swedish rules, providing a high level of transparency, is first and foremost the principle of public access to information in order to promote open and transparent government. However, tax secrecy as an exception to the principle of public access to information is mainly based on protecting taxpayer privacy, which is also the main reason justifying the high level of tax confidentiality in the United States. Moreover, taxpayer compliance is an explicit basis for the high level of confidentiality in the United States. To my knowledge, taxpayer compli-
ance has not been considered in the drafting of tax secrecy legislation in Sweden or in any other document related to secrecy legislation. It is conceivable that this thesis might make a contribution towards change, so that the issue or compliance in relation to tax secrecy can be placed on the agenda and thoroughly discussed at different levels, not just the academic.

Though the justification for tax confidentiality provisions appears to be essentially the same in Sweden and in the United States, that is to say, to protect taxpayer privacy, there is a clear difference in attitude towards confidentiality legislation in general. The starting point of secrecy legislation in Sweden is the principle of public access to information, making confidentiality the exception rather than the rule. In the United States, stronger emphasis is placed on protecting privacy. This difference might be explained through the tradition of open government, which goes further back in Sweden than the United States and is strongly rooted in Swedish culture and society and the emphasis on privacy in the United States.

As for the main content of confidentiality legislation (research question 6), the following conclusions are made. A similarity mentioned above is the high level of confidentiality with regard to tax returns. As held, the US tax confidentiality regime affords a high level of confidentiality of tax information. Section 6103 embodies the policy that returns are confidential, and provides for their non-disclosure except as provided in section 6103. The Swedish rules on tax secrecy also provide a high level of secrecy in respect of information in tax returns (PAISA Chapter 27 § 1). An explanation for this high level of confidentiality concerning tax returns (or information in them) might be that returns do not provide insight into tax administration activities, but rather reveal raw tax information submitted to the tax administration by the taxpayer. This information reveals many details on the individual taxpayer. Hence, a rule on open returns does not facilitate the purpose of a right of access to government information. Therefore, there is no strong defence in having open returns.

PAISA affords two main exceptions to the semi-absolute secrecy provided by PAISA in Chapter 27 § 1. These exceptions are the transparency of tax administration decisions in § 6 and the straight requirement of damage with regard to tax information in court proceedings in § 4. As held, § 6 is the most eye-catching feature of the Swedish tax secrecy regime. Its equivalent is not found in US tax confidentiality legislation. The kind of information that under this Swedish rule is public, is in the United States protected by confidentiality under § 6103(a), since it comes under the term ‘return information’. The public nature of decisions in Sweden is explicitly based on the right of access to official documents because public decisions
are considered to provide a sound basis for public control of government action.

The Swedish exception in § 4, holding a straight requirement of damage with regard to tax information in court proceedings (together with PAISA Chapter 43 § 8, according to which a confidentiality provision that applies to information in a case in a court's judicial or law enforcement activities ceases to be applicable in the case if the information is included in a judgment) could be said to have an equivalent in the US regime - § 6103(h)(4).

Both concern the transfer of confidential tax information in court proceedings. The US rule, contrary to that of Sweden, does not contain any explicit provision on confidentiality of tax information contained in public court records. Case law asserts that tax information lawfully disclosed under § 6103(h)(4) loses its confidentiality protection if contained in public court records. This means that such information may be re-disclosed, but only if retrieved from such public records and not if retrieved from the IRS records. Comparing these two features, Sweden appears to provide a somewhat higher level of confidentiality protection owing to the requirement of damage, which makes it possible to redact sensitive information (and the provision enabling the court to rule on continued secrecy even when the information is contained in a public court judgment).

Another feature enhancing the difference in the level of confidentiality between Sweden and the United States is that most of the US exceptions to the general non-disclosure rule in § 6103 dealt with in this thesis, prescribe redaction of taxpayer-identifying information prior to disclosure. Swedish rules also provide for possibilities of redaction of taxpayer-identifying information. A similarity regarding redaction of information is that both regimes afford redaction of taxpayer-identifying information concerning advance rulings. Both Sweden and the United States seem to recognize that there is a public interest in providing access to the legal conclusion in advance rulings, but that there is a strong need to protect information pertaining to the specific taxpayer, since it could reveal highly sensitive details on business activities etc. Furthermore, Swedish rules containing a requirement of damage (§ 2 para 2 and § 4) make room for redaction, since requirements of damage enable secrecy of certain information that is considered to cause damage on disclosure. Nonetheless, the possibilities for redacting taxpayer-identifying information are not quite as extensive as they are in the United States since the Swedish rules contain provisions explicitly prescribing full transparency and that a requirement of damage does not demand redaction but makes it possible. The US tax confidentiality regime thus affords a higher level of tax confidentiality protecting taxpayer privacy than the Swedish one.
One major difference between Sweden and the United States concerns the opportunities open to the taxpayer to enter into agreements with the tax administration. The Swedish tax regime provides for only one such possibility. In the United States such taxpayer agreements with the IRS are standard. In Sweden the taxpayer cannot enter into personal agreements with the Tax Agency on tax liability. The only option available for an agreement concerns a taxpayer’s liability for payment of taxes of a legal entity. Such an agreement can make adjustment of that tax. The Swedish law is not entirely clear on the level of secrecy concerning these agreements. Previously they were considered to be tax decisions and therefore fell under § 6 providing public access. Recent preparatory works, however, state that such agreements are no longer to be considered tax decisions, but rather party statements. This leads to uncertainty on whether agreements fall under the reverse requirement of damage in § 2 para 2 or if they are embraced by the rule on disclosure in § 2 para 3 item 1.\textsuperscript{889} The IRC, on the other hand, affords the options of offers-in-compromise and closing agreements, that is to say, two different kinds of settlement between a taxpayer and the IRS. The IRC prescribes partial disclosure of offers-in-compromise and total confidentiality in respect of closing agreements.

While major differences exist at the transparency level, a concluding similarity between the two jurisdictions is that disclosure of information is source-based. This means that whether or not the information may be disclosed depends on its source. Both the Swedish and US tax confidentiality regimes afford high levels 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 United States. Both countries recognize greater transparency with regard to tax information in court proceedings. Tax information that is kept confidential if contained in a tax return may thus be disclosed if the information exists in public court records. Sweden has an explicit rule governing tax transparency in court proceedings, while the US regime somewhat struggles with the issue as to whether or not tax information in (public) court records still enjoys the confidentiality protection afforded by the general non-disclosure rule. However, the prevailing interpretation is that tax information otherwise protected by the high level of confidentiality afforded by the general non-disclosure rule loses its confidentiality protection and is thus publicly accessible if contained in public court records.

Despite these similarities in respect of the source-based approach there is a major difference in terms of the level at which information may be dis-

\textsuperscript{889} See subsection 3.4.4.
closed. This major difference is that not only court decisions but also tax administration decisions are included in the wide reach of transparency in Sweden. 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 basis for the transparency of taxable income in Sweden, enabling in principle anyone to obtain information on other people’s earnings. Such information is confidential in the United States, since it comes under ‘return information’ in § 6103. This makes the IRS less transparent than the Swedish Tax Agency. The right of access to official documents is an explicit reason for the public nature of decisions, held to balance the otherwise high level of confidentiality in tax matters. Hence, the Swedish emphasis on the principle of access to information again shines through.

On the issue of how the Swedish and US tax confidentiality regimes achieve the objectives embraced by the benchmarks (research questions 7a-c), the following conclusions are drawn.

The main purpose behind the right of public access to information is insight into public agency information. Transparent tax returns do not to any great extent afford insight into tax administration activities. Transparent tax returns rather reveal only raw tax information disclosed by the taxpayer to the tax administration. It does not show how the tax administration carries out its duties on, for instance, tax assessment. Consequently, even if PAISA Chapter 27 § 1 and IRC § 6103 provide a very high level of confidentiality, they do not bear any particular costs with regard to tax compliance as understood in this thesis.

A feature that could be held to bear costs in terms of tax compliance is the fact that the US tax legislation provides the taxpayer with the opportunity of entering into an agreement with the IRS, an option not found in Sweden except in one limited instance. Agreements between a taxpayer and the tax administration might provide a basis for a perception of the tax laws being unequally applied. This notion could be strengthened by the confidentiality protection afforded, as confidentiality impedes public opportunity for monitoring tax administration activities. Low possibilities in terms of monitoring the tax administration, that is to say, a high level of confidentiality surrounding tax administration activities, might jeopardize taxpayer trust in the administration. Trust in turn is held to be an important factor for tax compliance. The US tax confidentiality regime thus entails rules that might bear costs in terms of tax compliance not found (yet) in Swedish legislation. The future will tell if the agreements possible through Swedish tax legislation will be embraced by a rule presuming se-
crecy (which will risk leading to drawbacks in terms of tax compliance) or a rule on public disclosure.

In addressing the issue of tax compliance, the following caveat is noted. The comparison and evaluation of the tax confidentiality legislation in Sweden and the United States seems to end in the conclusion that since the Swedish tax secrecy regime affords a higher level of transparency, it promotes compliance to a greater extent than US rules. However, surveys and statistics show that the tax gap is not remarkably large in either the United States or Sweden – that is, compliance is rather high in both countries. This may be held to contradict conclusions, based on the comparison of Swedish and US tax confidentiality legislation, asserting that higher transparency increases tax compliance. However, this thesis considers the position of how tax confidentiality legislation might relate to tax compliance. It is not intended to exhaustively discuss the complex issue of compliance. The fact that compliance is relatively high in both countries does not invalidate the conclusions of this thesis in this regard.

On administrative costs, costs for the tax administration induced by rules on tax confidentiality/tax transparency, the following is concluded. A rule requiring certain actions to be taken prior to disclosure induces costs on the tax administration. Redaction procedures, for instance, are cost-increasing as they are both time and personnel-consuming. In this regard, the US tax confidentiality regime induces higher costs on the tax administration as the IRC requires redaction of certain information in order to ensure that taxpayer privacy is adequately protected. In Sweden, redaction of information in matters on disclosure of tax information is more limited. Redaction of information is, besides concerning advance rulings, afforded by a requirement of damage (for example, PAISA Chapter 27 § 4 providing a straight requirement of damage in terms of disclosure of tax information in court proceedings).\(^\text{890}\) Rules containing such a requirement of damage are more costly than the rules on absolute secrecy or full transparency, which do not induce any large costs in the second step (review) of the disclosure chain.

Unquestionably, the US tax confidentiality regime overall affords a higher protection in terms of taxpayer privacy compared with Swedish rules, since the former employs measures such as redaction of identifying information to a great extent while the latter provides a high level of transparency on information contained in tax administration decisions. However,

\(^{890}\) Another example is PAISA Chapter 27 § 2 para 2, providing a reverse requirement of damage with regard to the Tax Agency’s handling of certain creditor information.
on privacy protection and the level of confidentiality in court proceedings, the US tax confidentiality regime affords lower privacy protection at this level than the Swedish rules. This is because PAISA provides a requirement of damage, enabling the court to decide on whether certain information may be kept secret, while information loses its confidentiality protection under IRC § 6103 when contained in public court records (adhering to the general position in the United States).

### 8.4 Option Comparison Conclusions

This subsection provides conclusions with regard to the option comparison in part III. The results are presented in the scheme below, listing the most prominent costs and benefits of the different options explored in Chapter 6. The conclusions are substantially condensed, in order to make it easier to survey the costs and benefits of the rules evaluated. For more details, the reader is referred to the different subsections in Chapter 6.

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<tr>
<td>Transparent tax returns</td>
<td>May increase both horizontal and vertical mistrust, in turn decreasing compliance.</td>
<td>Administrative costs are induced in at least the third and fourth step of the disclosure chain.</td>
<td>Low protection of taxpayer privacy.</td>
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<tr>
<td>Confidential tax returns</td>
<td>Since returns reveal little information on how the tax administration carries out its duties, confidentiality does not limit the benefits of transparency.</td>
<td>Low administrative costs, since no disclosure is made.</td>
<td>High protection of taxpayer privacy.</td>
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<td>Transparent decisions</td>
<td>Provide great insight into tax administration activities, and may thus enhance trust, which in turn increase tax compliance.</td>
<td>Administrative costs are induced in at least the third and fourth step of the disclosure chain.</td>
<td>Low protection of taxpayer privacy.</td>
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<tr>
<td>Confidential decisions</td>
<td>Limits public opportunity to gain insight into how the tax administration carries out its duties.</td>
<td>Low administrative costs, since no disclosure is made.</td>
<td>High protection of taxpayer privacy.</td>
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<td>Transparent advance rulings</td>
<td>Provide great insight into how the tax administration carries out its duties and may thus enhance tax compliance.</td>
<td>Administrative costs are induced in at least the third and fourth step of the disclosure chain.</td>
<td>Low protection of taxpayer privacy.</td>
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<td>Confidential advance rulings</td>
<td>May provide a basis for taxpayer mistrust, in turn decreasing tax compliance.</td>
<td>Low administrative costs, since no disclosure is made.</td>
<td>High protection of taxpayer privacy.</td>
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<td>Transpar-ent agree-agre-ments</td>
<td>Transpar-ent agreements reveal unequal treatment, which in turn may decrease taxpayer trust in the tax administration, subsequently impacting negatively on compliance.</td>
<td>Provide great insight into how the tax administration carries out its duties.</td>
<td>Costs are induced in at least the third and fourth steps of the disclosure chain.</td>
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<tr>
<td>Confidential agree-agre-ments</td>
<td>May provide a basis for taxpayer mistrust, in turn decreasing tax compliance.</td>
<td>Low administrative costs, since no disclosure is made.</td>
<td>High protection of taxpayer privacy.</td>
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<tr>
<td>Redaction of information</td>
<td>Risk of overredaction, leading to information losing its information value, that is, may limit public insight into tax administration activities.</td>
<td>Disclosure of information otherwise was to be kept confidential, increases the public’s monitoring opportunities, which creates a sound basis for enhancing trust, in turn increasing the chances of compli-</td>
<td>Costs are induced in the second, third and fourth step of the disclosure chain.</td>
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<td>A requirement of damage</td>
<td>Risk of misuse by keeping more information confidential than necessary, which leads to limited transparency, which in turn risks decreasing trust and compliance.</td>
<td>If based on the principle of maximum disclosure, it enhances public opportunity to gain insight into tax administration activities, which is held to increase trust, in turn increasing the chances of compliance.</td>
<td>Costs are induced in the second, third and fourth step of the disclosure chain. Costs are high in the second step as it is time and personnel-consuming.</td>
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<tr>
<td>Transparency of certain specified information, such as taxable income together with identifying information</td>
<td>Small monitoring possibilities, both vertical and horizontal. May enhance the risk of an informant society, which may decrease the level of trust and compliance.</td>
<td>Costs are induced in at least the third and fourth steps of the disclosure chain.</td>
<td>Low protection of taxpayer privacy, since taxpayer-identifying information is disclosed.</td>
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<tr>
<td>Once public, always public</td>
<td>Enhances public opportunity to gain insight into how the</td>
<td>Besides inducing costs in at least the third and fourth</td>
<td>Low considerations to the fact that infor-</td>
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Great possibilities for protecting taxpayer privacy.
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<td>Possible costs</td>
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<td>Internet disclosure</td>
<td>Tax administration carries out its duties.</td>
<td>Steps, it induces costs since the tax administration needs to keep track on which information has been disclosed.</td>
<td>Information may in one situation be harmless but in another cause serious harm to the individual taxpayer.</td>
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<tr>
<td>Access to printed lists at certain specific locations</td>
<td>Provides easy access to information, which increases transparency, thus forming a sound basis for trust and compliance.</td>
<td>Low administrative costs, since Internet disclosure requires minimum interference by a tax officer.</td>
<td>Entails large threats in terms of taxpayer privacy, if no adequate safeguards are employed preventing mass downloads and the formation of information in aggregation.</td>
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<td>Provides easy access (under the premise that everyone has access to such a location), thus strengthening the right to gain access to information</td>
<td>Administrative costs are induced in producing the lists.</td>
<td>Increase the risk of mass collection of information through photographic, scanning, etc.</td>
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<td>After the lists are produced, low administrative costs, due to minimum interference by a tax officer.</td>
<td>If individuals need to visit a certain location, this may lead to fewer people exercising the right of access to information, that is, a</td>
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<td>Options</td>
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<td>mation. Increased transparency is held to bolster trust and compliance.</td>
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<td>Time limits restricting access</td>
<td>Excessive time limits restricting access may bear costs in that they prevent the public from gaining insight into tax administration activities.</td>
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<tr>
<td>Time limits restricting confidentiality</td>
<td>Enhance transparency, thus forming a basis for increased trust, which in turn increases the chances of compliance.</td>
<td>Induce administrative costs in at least the third and fourth steps of the disclosure chain, since disclosure is possible once the time limit has ended.</td>
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<tr>
<td>Inform taxpayer about disclosure</td>
<td>Induces administrative costs in administering the notification</td>
<td>Low costs if the notification on disclosure is accessed online.</td>
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<td>Options</td>
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<tr>
<td>Charging of fees</td>
<td>High fees may distort the principle of access to public information, as it may prevent people from exercising the right of access. Less transparency risks decreasing compliance.</td>
<td>Fees make it possible for the tax administration to recoup some of the disclosure costs. Fees may prevent disclosure requests merely out of curiosity, thus lowering the administrative costs on the tax administration.</td>
<td>Fees may prevent disclosure requests merely out of curiosity, which decreases the amount of disclosures and thus also reduces privacy violations.</td>
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The option comparison in this thesis has resulted in a proposed preferred option, namely a requirement of damage. The reasons for this are elaborated in Chapter 7, but the main justification is that a requirement of damage allows for the degree of accessibility based on the principle of maximum disclosure to be the governing determinant. A damage assessment facilitates public access to information, but at the same time recognizes that full disclosure in every situation might not be appropriate in the interests of protecting taxpayer privacy. A requirement of damage based on the principle of maximum disclosure provides the opportunity for disclosing valuable information that facilitates public knowledge on tax administration activities while simultaneously providing protection of taxpayer privacy when necessary. This proposal does not provide a static level of confidentiality, but rather a uniform and standardized regulation, in itself containing a balancing act, since it requires an assessment to be made prior to disclosure thus making it possible to weigh the impacts of disclosure/confidentiality and their probability of occurring in each individual case.

A requirement of damage holds (as argued in Chapter 7 and shown in the scheme above) not only benefits such as those mentioned in the foregoing paragraph. The main drawbacks are found within the benchmark concerning administrative costs, since a requirement of damage requires more resources on time spent on handling disclosure requests as well as the costs of training personnel making such assessments, which in many cases involve difficult trade-offs. However, such drawbacks are considered to be outweighed by the recognized benefits.

Proposing a requirement of damage does not mean that it is necessary with regard to all information held by the tax administration. The demand for disclosure is stronger the closer the activity is in terms of the government exercising its public authority. In other words, the closer to a final judicial decision the higher the demands to justify confidentiality. This means that transparent tax returns appear neither necessary nor appropriate, inter alia, because transparent returns do not facilitate public opportunity to gain insight into tax administration activities. It is therefore not necessary to apply a requirement of damage in terms of tax returns, which are more appropriately kept confidential.

**8.5 Summary Conclusions**

The right to information is indisputably a vital part of a properly functioning democracy. Access to information is usually emphasized with regard to

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891 See subsection 6.2.
government information concerning solely government activities. Access to information in relation to the topic of this thesis entails access to information on how the tax administration undertakes its duties with regard to tax assessments and other tax matters. However, this information furthermore involves data pertaining to a specific taxpayer – that is, information that might be regarded as personal.

The fact that tax information generally includes personal details and that the activities carried out by the tax administration are decisive for the individual is used in order to argue in favour of a high level of tax confidentiality. However, that argument could be used in promoting tax transparency – since the activities carried out by the tax administration concern individuals at such a personal level, the need for opportunities to control such activities is strong. A transparent public authority prevents the abuse of law enforcement. In this regard the right to information and the right to privacy (which is most often held to in opposition to the right to information) could be viewed as corresponding – that is to say, rules on access to government information as well as rules on confidentiality protection are measures that protect the individual. The right to gain access to personal tax information increases the possibilities of scrutinizing an authority’s activities, which in turn protects the individual from arbitrary interference and increases the authority’s accountability. From that perspective instead of colliding with each other, the rights are complementary.  

Confidentiality can be described as a degree of accessibility to information. To either enhance or decrease the level of confidentiality, different rules governing what information and how individuals can obtain access to it can be employed. One overall conclusion, drawn from the discussions in foregoing chapters, is that the level of transparency should increase with the degree of exercise of public authority. The basis for this conclusion is summarized in what follows.

There are no particular benefits to be gained in terms of the benchmarks with having transparent tax returns. Tax returns do not provide an insight into the tax administration’s activities as they contain raw tax information submitted to the tax administration for the determination of tax. In other words, tax returns in this sense do not provide the public with the opportunity of monitoring the tax administration and how it conducts its duties. Moreover, as the information in tax returns reveals little information about

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the underlying validity of the specific items in them and due to the fact that the public lacks the investigative powers vested in the tax administration, transparent tax returns pose limitations on the scope of monitoring opportunities available to individuals.

The benefits of taxpayers monitoring one another in terms of trust and compliance have furthermore been questioned, holding that shifting the monitoring burden onto individuals might create an informant society, thus having adverse effects on trust and compliance. Hence, transparent tax returns do not afford benefits in terms of either horizontal or vertical trust, which have been concluded to be vital to the taxpayer’s choice of whether or not to comply with the tax laws. Because there are no particular benefits in that regard, the privacy violations provided by open returns are far too extensive. Moreover, a rule on confidential returns does not induce any significant administrative costs in the disclosure chain.

Considering the negative impacts of transparent tax returns on tax compliance, that open tax returns do not to a great extent fulfil the purpose of a right to information, and that confidential returns afford a high level of taxpayer privacy protection and do not induce any particular disclosure costs on the tax administration, rules on (full) transparency of tax returns do not appear to be either necessary or appropriate.

Concerning decisions, however, the conclusion is the reverse in terms of tax compliance. Decisions, especially judicial tax decisions, entail a high degree of exercise of public authority, which is why transparency is more important, especially compared with tax returns. A regime affording transparent decisions offers much insight into the tax administration’s assessment activities, thus forming a sound basis for monitoring. If decisions show that the tax administration applies the tax laws equally and correctly, this increases taxpayer trust in tax administration. Moreover, transparency in its norm-reinforcing function, that is, transparency showing compliant taxpayers and/or that the tax administration is efficient and effective when it comes to detecting and punishing tax evaders, increases both interpersonal trust and taxpayer trust in the tax administration. Hence, assuming that transparency reveals a trustworthy tax administration and complying taxpayers, transparent decisions have benefits for promoting tax compliance in that they enhance both vertical and horizontal trust.

Furthermore, total transparency of tax administration decisions do not induce high costs in the disclosure chain, as the highest costs are estimated within the second step (reviewing) and fully transparent decisions only involve activities within the third and fourth steps (reproducing and disclosing).
Total transparency of tax administration decisions inevitably bears costs with regard to taxpayer privacy, since such a regime affords a low level of protection of individual tax information. If the costs are deemed too high from a privacy perspective, redaction of identifying information might be a means of protecting individual taxpayer privacy. Redaction of information may be conducted on a routine basis (that is, taxpayer-identifying information such as name and address etc are always redacted) or on a case-by-case basis afforded by the recommended requirement of damage. Redacting identifying information routinely is less likely to induce administrative costs than redaction of information due to a requirement of damage, as the latter is much more likely to involve the personal attention of a skilled tax officer.

Another type of decision, yet not of the same character as the judicial tax decisions dealt with above, is that of advance rulings. Since advance rulings often contain detailed information on the requesting taxpayer, they are often embraced by a high level of confidentiality. It seems there is some consistency between Sweden and the United States in that the legal conclusion of an advance ruling is of interest to the public as to why it may be disclosed if taxpayer-identifying information is redacted. It can be argued that with regard to the possibility of redaction in terms of advance rulings, individuals may be protected but the general notion of keeping such information available to the public would be lost if redaction led to the ruling no longer providing any guidance.

Another conclusion, concurrent with the discussion above on transparency increasing with the degree of exercise of public authority, concerns confidentiality of agreements. Agreements between a taxpayer and the tax administration inevitably hold information on the application and enforcement of the tax rules, that is to say, they contain a certain level of exercise of public authority. The public should therefore be afforded the possibility of access to these agreements. However, as held in subsection 6.5, such agreements might hold detailed information on the taxpayer concerned, the disclosure of which would cause harm. Redaction of taxpayer-specific information while disclosing the legal conclusion of the agreement affords the benefit of protecting taxpayer privacy while enabling the public to monitor how the tax administration applies the tax laws. Provided that such disclosure shows a fair and just tax administration, taxpayer trust may increase which in turn increases the prospects of compliance with tax laws. Having said that, it is important to note that an important feature of agreements, which distinguish them from advance rulings, is the fact that they may entail deviation from tax laws. Transparency of agreements might therefore reveal unequal treatment. This should not, however, be an
argument in favour of confidentiality. Transparent agreements might show that while it entails deviation from the law (that is, unequal treatment) it might also show the reasons for such deviation. These reasons might well appear to be fair to those individuals taking part in the agreement and who therefore accept such deviation as legitimate. Confidentiality of agreements risk creating suspicion and mistrust, with adverse effects on tax compliance.

As held, rules on the scope of accessible information as well as those demarcating the scope of accessibility are of importance in any discussion on tax confidentiality. A way of limiting the range of accessibility is through time limits. This requires a division into different areas where a time limit could be employed. A time might on the one hand be set in order to limit transparency and on the other to limit confidentiality. An example of the former is found in Norway where a time limit to transparency is provided by the rule dealt with in subsection 6.10 on access to public tax information, prescribing the tax lists to be provided on the tax administration’s website for a period of one year. The Swedish rule on time limits is an example of the latter, since it holds a 20-year limit to the semi-absolute secrecy provided for on tax returns. It is difficult to compare these different kinds of time limits, as one concerns final information and the other raw tax information. Despite this, the following can be argued.

Information on individual taxpayers is most relevant when it is current. As time passes, so does (in most cases) the topicality of the information in question. The Swedish time limit restricting confidentiality is set at a period when the risk of harm upon disclosure of economic circumstances is considered to be low as the information in question in most cases is no longer relevant after such period of time. Limiting access to final tax information, as is done in Norway, prevents old information from being used in misleading ways and damaging the individual taxpayer. Both rules thus provide benefits for taxpayer privacy protection, though in different ways.

Another issue regarding the scope of accessibility relates to technology. Before the advent of technology that enabled computerized filing, agencies were committed to paper and manual files. Countries without the resources to use computers and databases might still employ such methods. This markedly limits the utility of information. One could argue that the fact that technology erases this limitation and thus makes access easier is positive because it expands the exercise of the right to information. However, easy access has its drawbacks against which the benefits of extending a right to information must be weighed.

893 Kristoffersson and Pistone (n 120) 29.
The lack of computerized technology with its limits as to the utility of information might as such function as inertia built into the system, automatically limiting access to information and thus setting up a higher level of privacy protection. With the development and use of the digital computer built-in inertia is lost and might need to be replaced by other measures for adequately protecting privacy. Turning away from technology and going back to manual files in order to regain lost inertia might appear alluring – however, it is also retrograde, not to say impossible. What is required is not to go back in time but to adapt the objectives of the rules to modern times. Just because it was once deemed necessary to implement a rule on access to government information does not necessarily mean that the rule should not have boundaries. New boundaries might need to be set as both society and technology develop. What might thus seem to be far-reaching restrictions on the right to information might on closer examination be necessary in order to prevent misuse of this right – enabled, for instance, by technological development.

The rapid development of technology affords new and enhanced opportunities for citizens in exercising their right to information. It provides easy and cost-reducing means to obtain access to public information. A right to information not only constitutes a means for government authorities to use public information, perhaps held by other authorities, to monitor citizens, but also opens the way for opportunities for people to scrutinize one another. The right of access to public information might thus evolve to serve mainly as an effective instrument to control citizens and not, as intended, as a tool for scrutinizing government activities. It is important to recognize that the purpose of freedom of information laws is to reveal information about government activities, not to expose personal information about private individuals. Open government and the right of access to public information should afford public insight into, and monitoring of, government activities, not provide insights into the living conditions of citizens and their personal circumstances. Setting up restrictions on access to information of this latter kind, should thus not be regarded as a substantial threat to the right to information but as a means of adequately protecting individual privacy.

Consequently, rules on how the information is accessible could have an influence on what information should be available. If information is very

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894 Wiweka Warnling-Nerep highlights the greater openness that comes with technological development, which might have both positive and negative impacts, especially concerning privacy protection, Wiweka Warnling-Nerep, *En introduktion till förvaltningsrätten* (Norstedts Juridik 2014) 14–15.
easily accessible perhaps more information should enjoy confidentiality protection than would be the case if it were to be more difficult to obtain. For instance, if transparency were always to be equivalent to publicity, confidentiality legislation for the purpose of protecting taxpayer privacy has to be more far-reaching, that is to say, much more information needs to be protected by confidentiality rules in order to protect privacy. Rules might instead be designed so that more information is accessible, but not automatically publicized. More information accessibility puts up greater demands for boundaries for disclosure.

It has been repeatedly held in this thesis that transparency might bolster tax compliance if it is used as a means of creating or upholding a compliance norm. If transparency is based on a more deterrent function with its focus on enhancing the probability of detection, where transparency provides individuals with a means of monitoring fellow taxpayers, this could create an informant society where individuals mistrust both one another and the tax administration. That in turn decreases tax compliance, since trust is an important aspect of compliance. It is therefore vital to consider the underlying justifications when adopting rules in favour of tax transparency.

It is, however, equally important to consider the basis for a regime in favour of tax confidentiality because the reasons might vary – from wanting to hide a malfunctioning tax administration to protecting taxpayer privacy. The latter is considered to be a legitimate limitation on access to information, while the former is not. While it might seem alluring to use confidentiality as a means of hiding the tax administration’s mistakes and short-comings in order not to lose taxpayer trust, exposure could in the long run help to strengthen the tax administration. Hiding behind confidentiality as a public entity would allow far less insight into the dealings of the tax administration and therefore by-pass taxpayer interest, namely that of having access to beneficial knowledge in terms of the taxation process and structure.

As has been noted previously the tax system determines the type of information held by the tax administration. This raises difficult questions as to what information needs protection and what may be disclosed. Another way around the transparency–confidentiality issue would be to change the tax system. A system based on a “flat tax”, for instance, requires only

\[895\] UN Special Rapporteur on Freedom of Opinion and Expression (n 117) 44.

\[896\] Flat tax is a tax applied at the same rate to all levels of income, often discussed as an alternative to the progressive tax, ‘Glossary of Tax Terms’ (n 121); For more details on flat tax and how the flat tax has been adopted by different countries, see
wages to be reported by individuals; dividends and interest would not be reported on an individual’s return.\textsuperscript{897} If deductions were not allowed, the tax administration would have no need to obtain extensive financial information about individuals. Furthermore, under a tax regime based only on taxes on consumption, the report burden placed on private individuals on calculation of their taxes would be rather limited. However, profound changes in a tax system for privacy purposes clearly require serious consideration. What is aimed at in addressing this issue is merely to point to other solutions – albeit not easy solutions – in the matter of the transparency-confidence dichotomy as encapsulated in this thesis. As this thesis has delimited the actual tax system out of the study, this issue has yet to be explored.


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