

KEY FINANCIAL SECRECY INDICATORS

Key Financial Secrecy Indicator 14: Tax Court Secrecy

What is measured?

This indicator assesses the openness of a jurisdiction's judicial system in tax matters by analysing two relevant aspects.

1. **Openness of court proceedings/lawsuits/trials:** it assesses for a) criminal and b) civil/administrative tax matters¹, whether the public always has the right to attend the full proceedings and cannot be ordered to leave the court room even if a party invokes tax secrecy, bank secrecy, professional secrecy or comparable confidentiality rules.
2. **Public online availability of verdicts/judgements/sentences:** it assesses for a) criminal and b) civil/administrative tax matters, whether all written judgments are published online for free or at a cost of no more than EUR/GBP/USD 10. For a judgement to be considered published, only personal details which are not relevant for assessing the tax matter in question, such as personal addresses and account numbers, could be redacted. Tax Secrecy, bank secrecy, professional secrecy or comparable confidentiality rules are not acceptable as the basis for exceptions from public disclosure. This component also assesses if the names of the parties are anonymised².

Regarding the openness of court proceedings/lawsuits/trials, we consider **acceptable** justifications for exceptions from the principle of public access that include (subject to contextual analysis): against moral, involvement of a minor, public order, national security, administration of justice, business or trade secrets or exceptional circumstances. **Unacceptable exceptions** include: discretion by the judge (if it refers to a general discretion), the taxpayer requesting privacy or the involvement of, for example, a trustee. The discretion of the judge is unacceptable only if it refers to a general discretion, where the judge can decide for holding closed proceedings in any circumstance. We do not increase the secrecy score of the jurisdiction if the discretion is limited to exceptional circumstances.

We consider the answer as unknown when exceptions to the principle of public access include: a) personal privacy or the protection of private or family life, because it is not clear if these provisions are used in extraordinary circumstances or if they can be abused to exclude the public from proceedings on tax matters; b) professional secrecy, because it is not clear if this provision is limited to relationships such as doctor-patient or attorney-client in the context of a trial, or if it is more comprehensive to include all relationships between accountants or legal professionals and their clients³.

Furthermore, the indicator is considered not applicable for jurisdictions with no income taxes. The six jurisdictions that fall in this case – Anguilla, Bermuda, Bahamas, Cayman Islands, Turks and Caicos and British Virgin Islands – received the full secrecy score (100 points) for the indicator.

If court proceedings are openly accessible, this indicator's secrecy score is reduced by 25 points for each criminal and civil tax matters. By the same token, the secrecy score will be reduced by 25 points of secrecy score if all judgments in criminal tax matters are published online for free; and likewise, by another 25 points for judgements in civil tax matters. However, the score is reduced only by 12.5 points (instead of 25) if judgments are available online only against a cost of no more than EUR/GBP/USD 10 or if judgments are published online for free in anonymised form.

Thus, for instance, a jurisdiction with public and comprehensively accessible criminal and civil tax proceedings, will have a secrecy score of zero if all the judgements/verdicts resulting from those proceedings are published online for free. The jurisdiction would have a 25 points secrecy score if the judgements resulting from both criminal and civil tax proceedings are available online against a cost of up to EUR/GBP/USD 10 each or if judgements are available online for free, but at least some of them in an anonymised form.

The information for this indicator has been drawn from the following sources: a) results of the TJN-Survey 2019; b) Thomson Reuters Practical Law [Tax Litigation Global Guide](#)⁴ or similar online sources; c) in certain cases we searched for and analysed the local legislation of jurisdictions to find out whether there are any limitations to public access embedded in the laws; and d) in cases where the above sources indicated that written judgments of both criminal and civil tax court cases are published online, the corresponding local court website or other government agencies' websites were consulted to ensure that both criminal and civil tax judgments are effectively available and that technical problems do not prevent access to information.

If we were unable to find supporting evidence (either any (i) academic article or source, such as Thomson Reuters Practical Law [Tax Litigation Global Guide](#), or (ii) a Law plus Section/Article/Paragraph), we concluded the answer to be "unknown", and described the situation in a note (e.g. "while the Ministry of Finance said X, we could not verify this").

For practical purposes, we consider court judgments to be publicly available online when it is not necessary to establish complex payment or user-registration arrangements for accessing the data (e.g. registration of bank account, requirement of a local identification number, or sending a request by post).⁵ Accordingly, we have split this indicator into two components. The overall secrecy score for this indicator is calculated by simply addition of the secrecy scores of each of these components. The secrecy scoring matrix is shown in Table 1 (below), with full details of the assessment logic given in Table 3 (at the end of the document).

Table 14.1: Secrecy Scoring Matrix KFSI 14

Regulation		Secrecy Score Assessment
		[Secrecy Score: 100 points = full secrecy; 0 points = full transparency]
Component 1: Public access to tax court proceedings (50 points)		
<u>Court proceedings on criminal tax matters</u>	No or restricted access to criminal tax proceedings	25
	Public access to criminal tax proceedings	0
<u>Court proceedings on civil tax matters</u>	No or restricted access to civil tax proceedings	25
	Public access to civil tax proceedings	0
Component 2: Online publication of tax judgements/verdicts (50 points)		
<u>Criminal tax judgements/verdicts</u>	Not available online	25
	Always available up to 10 EUR/GBP/USD, or available for free but in anonymised form	12,5
	Always available online for free	0
	Not available online	25

<u>Civil tax judgments/verdicts</u>	Always available up to 10 EUR/GBP/USD, or available for free but in anonymised form	12,5
	Always available online for free	0

All underlying data can be accessed freely in the [Financial Secrecy Index database](#). To see the sources we are using for particular jurisdictions please consult the assessment logic in Table 14.3 at the end of this document and search for the corresponding info **IDs (IDs 407 to 410)** in the database report of the respective jurisdiction.

Why is this important?

The public’s right to open courts is well established in most countries, regardless of whether the legal system is rooted in common law or civil law.⁶ Open court proceedings and public availability of verdicts are often considered to be important pillars of a modern democratic state, directly derived from a jurisdiction’s constitution and/or the principle of the rule of law, on which the legitimacy of the entire judicial process hinges.

The “Rule of Law Department” of the Organisation for Security and Co-operation in Europe (OSCE) makes a direct connection between the Universal Declaration of Human Rights and public access to court judgements:

“The obligation of states to ‘make public’ the decisions of their courts is found within the provisions on ‘the right to a fair trial’. This right stems from Article 10 of the Universal Declaration of Human Rights (1948) and has been elaborated and set down in binding form in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights and Fundamental Freedoms (ECHR)”.⁷

Governments and private actors alike abide by court decisions at least in part because the openness of the process allows the public to monitor if it meets requirements of procedural justice. These requirements include the transparency of the process, thereby building confidence in the non-arbitrary application of the law. The transparency of the process safeguards the independence and impartiality of courts.

Closely linked to the fundamental human rights of the freedom of expression and freedom of the press,⁸ open courts not only allow the scrutiny of judicial decisions, but also are a prerequisite for the

accountability of governments (in the form of the public prosecutor and/or tax administration).⁹ Furthermore, open courts are essential in ensuring compliance with both the letter of the law and its spirit.¹⁰ Thus, open courts are an important element in protecting the integrity of the entire judicial system and of the administration.

If any exceptions are allowed for certain types of civil and/or criminal tax matters, governments and private sector actors may misuse these exceptions for sweetheart deals, questionable out of court settlements or political vendettas. Generally speaking, the possibility of allowing exceptions to public access to proceedings may invite powerful lobbyists and/or defendants to exert pressure on judges not to grant access to court proceedings or verdicts in order to avoid public scrutiny.

While specific exceptions to this open court principle are widely seen to be legitimate with respect to “the protection of children or victims of sexual crimes”¹¹, the holding of closed sessions of a court (‘in camera’) should be restricted to such specific situations.

Nonetheless, in practice, in some countries tax proceedings are typically conducted behind closed doors and/or tax judgements are not published. Privacy arguments or official ‘tax secrecy’ legislation, which may have the power to override the open court principle, are sometimes used as justification for the exclusion of the public or non-disclosure of verdicts.

This practice creates fundamental conflicts with the rule of law. While all tax proceedings should be public, to address data protection concerns, specific personal data of taxpayers (dates of birth, addresses, names of children, bank account numbers, etc.) could be redacted from verdicts, and their reporting could be restricted. These details are not required for judicial decision making and hence removing them does not conflict with the open court principle.¹² This approach balances the taxpayer’s right to privacy over their personal affairs and to informational self-determination, and the public’s right to transparent judicial proceedings. However, we consider that public availability of the names of the parties (plaintiff, defendant) is relevant for contextual research and media purposes, to ensure accountability. While anonymisation in exceptional circumstances, such as to protect victims’ lives or minors, is acceptable, anonymisation of all or most decisions may create obstacles for the process of researching and analysing decisions.

Preventing public access to tax court judgments may result in important court decisions that have an impact on the public’s revenue, being made without the public’s knowledge. This denies the public the information required to exercise the right to protest or criticise decisions, to determine the need for a policy change, or to engage the court through an “amicus

curiae” process. In some jurisdictions, all “important” or “relevant” court verdicts are said to be chosen by judges or others to be made public. However, this selection process of relevant cases for the public is inevitably subjective and thus rife with risk that cases considered to be relevant by some parts of the public remain out of reach of legitimate scrutiny.

Furthermore, court adjudications usually provide an essential part of the application of the laws by setting precedent and therefore provide clarity among citizens about the right way to interpret the law. They are also often an important driver of policy changes and legislative action by exposing gaps and loopholes in, or unintended consequences of, laws and regulations. Not disclosing judgements therefore cuts off an important feedback loop for policy- and law-makers. It may lead over time to flawed legislation as well as to a low deterrence effect and impaired law enforcement by prosecutorial authorities and tax administration’s failure to collect taxes as intended by parliament. Without public access to all tax verdicts, meaningful empirical research about the outcomes of tax trials, especially with respect to large taxpayers, is near impossible. Consequently, sweetheart deals at court and undue political interference in the administration can neither be detected nor ruled out.

The secrecy emanating from a lack of open tax court proceedings and verdicts shields both domestic and non-resident actors involved in domestic economic activity who seek to aggressively minimise their tax payments from public scrutiny. For example, any non-resident individual or multinational company fearing spontaneous tax information exchange with home jurisdiction authorities may feel reassured to invest in jurisdictions with strict tax secrecy provisions that allow them to intervene to postpone or even frustrate that exchange at court in silence.

Similarly, in the context of tax wars (or “tax competition”), non-resident individuals and companies may be given special tax deals by local administrations in the race to the bottom which may not withstand legal or public scrutiny. While limited access to information about special tax deals brokered between taxpayers and the tax administration is a different problem to tax court secrecy (and is dealt with [in KFSI 9¹³](#)), the latter can act as an important backstop for the former in case for some reason a non-resident is taken to court.

Therefore, without public scrutiny, the risk of (undetected) biases by tax administrations and courts in favour of non-resident investors increases.

The reason why we place emphasis on open, unpaid data access lies in the enhanced utility in open data environments when data is available free of cost. If relevant data can only be accessed by paying a fee, it can be

prohibitively expensive to import this data into an open data environment or to access sufficient cases for research/media purposes, even when the cost per record is low. This creates substantial hurdles for making comparisons between jurisdictions and new creative data usages.¹⁴

All underlying data can be accessed freely in the [Financial Secrecy Index database](#) (IDs 407 to 410).

Results Overview

Figure 14.1: Tax Court Secrecy overview

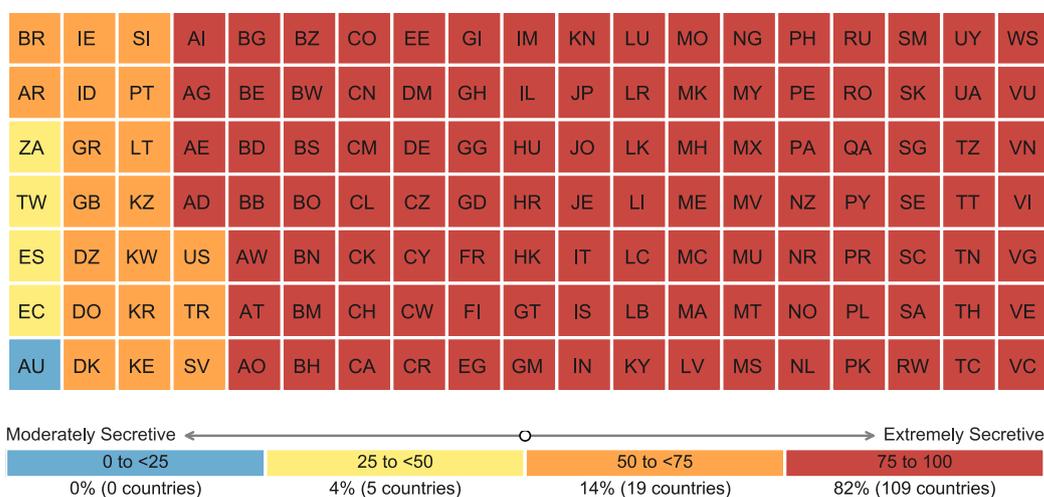


Figure 14.2: Public Access to Tax Court Proceedings

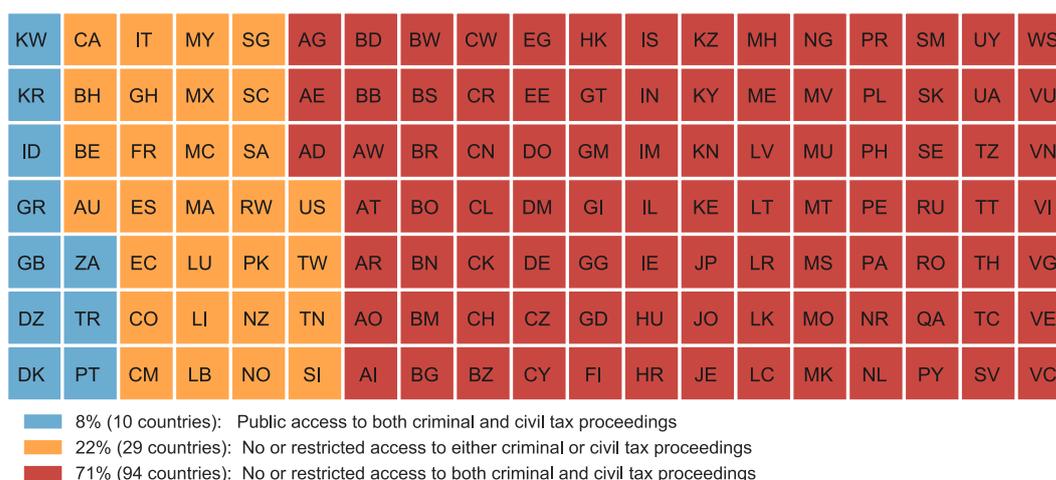


Figure 14.3: Online Publication of Tax Verdicts

IE	EE	ZA	AW	BN	CK	CZ	FR	HK	IS	KW	LU	MO	NL	PK	RU	TC	UY	WS
ES	CL	US	AT	BM	CH	CY	FI	GT	IN	KR	LR	MK	NG	PH	RO	SM	UA	VU
EC	TW	SK	AO	BH	CA	CW	EG	GR	IM	KN	LK	MH	MY	PE	QA	SG	TZ	VN
DO	SV	SI	AI	BG	BZ	CR	DZ	GM	IL	JP	LI	ME	MX	PA	PY	SE	TT	VI
BR	LT	MT	AG	BE	BW	CO	DM	GH	ID	JO	LC	MC	MV	NZ	PT	SC	TR	VG
AU	KZ	GI	AE	BD	BS	CN	DK	GD	HU	JE	LB	MA	MU	NR	PR	SA	TN	VE
AR	KE	GG	AD	BB	BO	CM	DE	GB	HR	IT	KY	LV	MS	NO	PL	RW	TH	VC

- 9% (12 countries): Public access to both criminal and civil tax judgements/verdicts
- 7% (9 countries): No or restricted access to either criminal or civil tax judgements/verdicts
- 84% (112 countries): No or restricted access to both criminal and civil tax judgements/verdicts

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Table 14.2: Secrecy Scores of Tax Court Secrecy

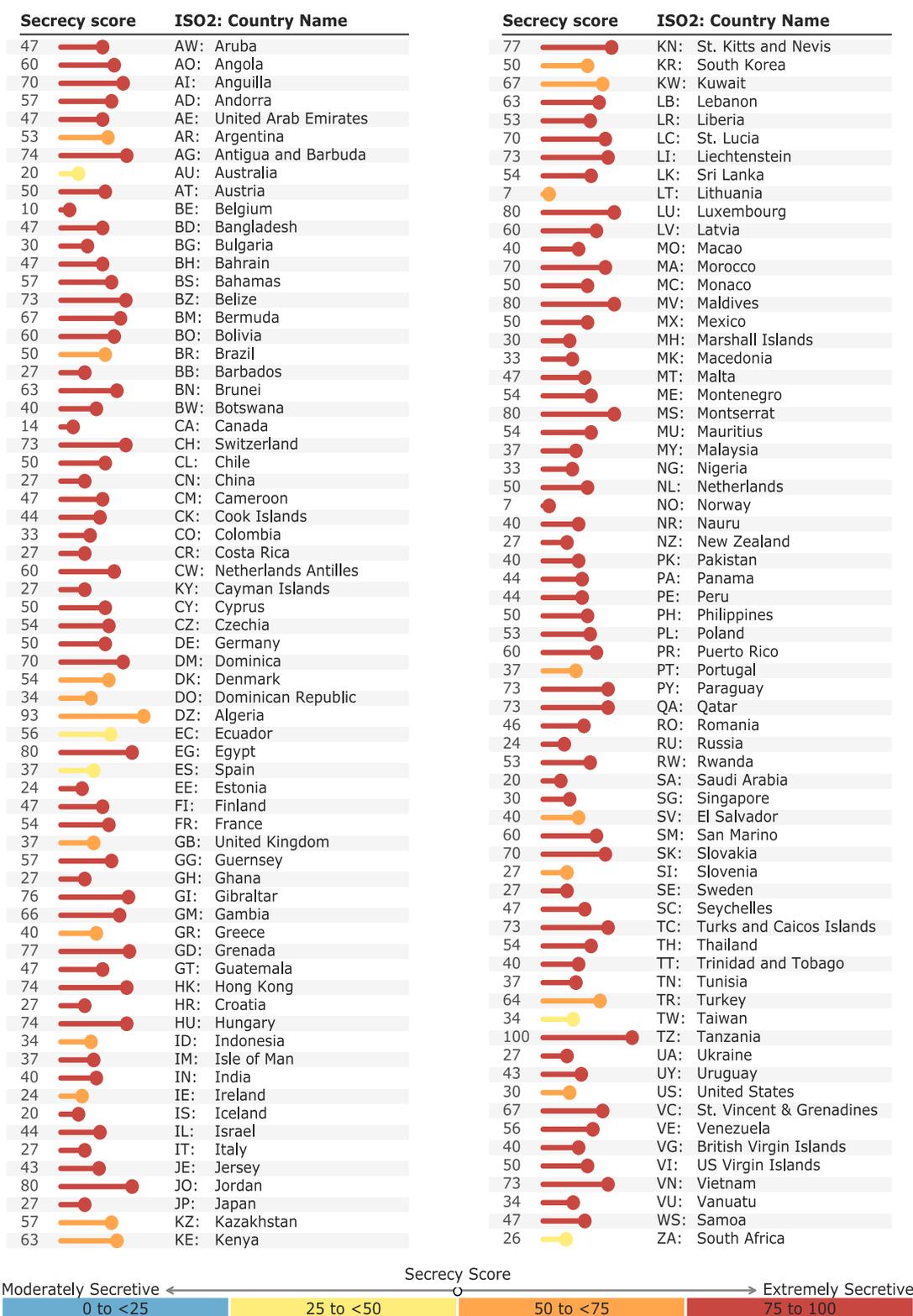


Table 14.3: Assessment Logic

Info_ID	Text_Info_ID	Answers (Codes applicable for all questions: -2: Unknown; -3: Not Applicable)	Valuation Secrecy Score
407	Are all court proceedings on criminal tax matters openly accessible to the public, and the public cannot be ordered to leave the court room by invoking tax secrecy, bank secrecy, professional secrecy or comparable confidentiality rules?	YN	ID407<=0 & ID408<=0: 50 points ID407<=0 & ID408=1
408	Are all court proceedings on civil tax matters openly accessible to the public, and the public cannot be ordered to leave the court room by invoking tax secrecy, bank secrecy, professional secrecy or comparable confidentiality rules?	YN	Or ID407=1 & ID408<=0: 25 points ID407=1 & ID408=1: 0 points
409	Is the full text of judgements / verdicts issued by criminal tax courts published online for free, or for a cost of up to 10 €/US\$/GBP?	0: No, full text of verdicts is not always online (up to 10€/US\$/GBP); 1: Yes, full text of verdicts is always online but only at a cost of up to 10 €/US\$/GBP, or it is always available for free but in anonymised form; 2: Yes, full text of verdicts is always online for free.	<=0: 25 points 1: 12.5 points 2: 0 points
410	Is the full text of judgements / verdicts issued by civil tax courts published online for free, or for a cost of up to 10 €/US\$/GBP?	0: No, full text of verdicts is not always online (up to 10€/US\$/GBP); 1: Yes, full text of verdicts is always online but only at a cost of up to 10	<=0: 25 points 1: 12.5 points 2: 0 points

Info_ID	Text_Info_ID	Answers (Codes applicable for all questions: -2: Unknown; -3: Not Applicable)	Valuation Secrecy Score
		€/US\$/GBP, or it is always available for free but in anonymised form; 2: Yes, full text of verdicts is always online for free.	

Reference List

- Cecelia Burgman, Carrie Gage, Claire Cronin, and Reshmi Mitra, *Our Rights Our Information: Empowering People to Demand Rights through Knowledge* (2007)
- Chatterjee, Sujoy, 'Balancing Privacy and the Open Court Principle: Does de-Identifying Case Law Protect Anonymity?', *Dalhousie Journal of Legal Studies*, 23 (2014), 91
- Forbes, 'IRS Brings "A Team" To Crush Transfer Pricing Abuse', *Forbes*, 2012
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- Joshua D. Blank, and Nancy Staudt, 'Corporate Shams', *New York University Law Review*, 87/6 (2012), 1641–1712
- Organisation for Security and Co-operation in Europe, 'Access to Court Decisions: A Legal Analysis of Relevant International and National Provisions', 2008
<https://www.right2info.org/resources/publications/publications/O SCE_AnalysisAccesstoCourtDecisions17092008.pdf> [accessed 13 March 2019]
- Randall S. Bocoock, 'Protection of the Taxpayer in Court Panel Presentation: Introduction of Topics and Privacy Protection of Taxpayers' (presented at the 5th International Assembly of Tax Judges, Washington, D.C, 2014)
<http://www.iatj.net/congresses/documents/Protection_Bocoock.pdf> [accessed 13 March 2019]
- United Nations, 'Universal Declaration of Human Rights', 1948
<http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf> [accessed 13 March 2019]

¹ Civil and administrative tax matters are treated synonymously throughout this document. They refer to any dispute between a taxpayer and the tax administration which is not governed by criminal law/procedures.

² This indicator has been refined since our last assessment for the Financial Secrecy Index (2018 edition) to consider cases where the names of the parties were removed or anonymised in some or all cases.

³ This indicator has been refined since our last assessment for the Financial Secrecy Index (2018 edition) to consider cases where privacy or professional secrecy were mentioned as reasons to prevent public access. For more information, see our blog post on attorney-client privilege:

<https://www.taxjustice.net/2019/07/24/protecting-enablers-attorney-client-privilege-is-just-the-tip-of-the-iceberg-in-facilitating-illicit-financial-flows/>

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[https://uk.practicallaw.thomsonreuters.com/Browse/Home/International/TaxLitigationGlobalGuide?transitionType=Default&contextData=\(sc.Default\)&navId=1DAC9212383A024E61CC2AB0DFB085D1&comp=pluk](https://uk.practicallaw.thomsonreuters.com/Browse/Home/International/TaxLitigationGlobalGuide?transitionType=Default&contextData=(sc.Default)&navId=1DAC9212383A024E61CC2AB0DFB085D1&comp=pluk); 18.12.2017.

⁵ We consider that for something to be truly available 'on public record' prohibitive cost constraints must not exist, be they financial or in terms of time lost or unnecessary inconvenience caused.

⁶ Randall S. Boccock, 'Protection of the Taxpayer in Court Panel Presentation: Introduction of Topics and Privacy Protection of Taxpayers' (presented at the 5th International Assembly of Tax Judges, Washington, D.C, 2014), 6 <http://www.iatj.net/congresses/documents/Protection_Boccock.pdf> [accessed 13 March 2019].

⁷ Organisation for Security and Co-operation in Europe, 'Access to Court Decisions: A Legal Analysis of Relevant International and National Provisions', 2008, 5 <https://www.right2info.org/resources/publications/publications/OSCE_AnalysisAccessstoCourtDecisions17092008.pdf> [accessed 13 March 2019].

⁸ United Nations, 'Universal Declaration of Human Rights', 1948 <http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf> [accessed 13 March 2019].

⁹ An example of relevant research being enabled through tax court transparency is the study of "Corporate Shams": Joshua D. Blank and Nancy Staudt, 'Corporate Shams', *New York University Law Review*, 87/6 (2012), 1641-1712.. Another example for the potential impact of open tax court judgements on policy decisions and public trust in government are the changes at the US tax administration IRS in response to large scale tax avoidance cases, as reported here: Forbes, 'IRS Brings "A Team" To Crush Transfer Pricing Abuse', *Forbes*, 2012 <<https://www.forbes.com/sites/kellyphillipserb/2012/03/27/irs-brings-a-team-to-crush-transfer-pricing-abuse/>> [accessed 13 March 2019].

¹⁰ Cecelia Burgman and others, *Our Rights Our Information: Empowering People to Demand Rights through Knowledge* (2007).

¹¹ Randall S. Boccock, 'Protection of the Taxpayer in Court Panel Presentation: Introduction of Topics and Privacy Protection of Taxpayers', 7.

¹² Sujoy Chatterjee, 'Balancing Privacy and the Open Court Principle: Does de-Identifying Case Law Protect Anonymity?', *Dalhousie Journal of Legal Studies*, 23 (2014), 91.

¹³ <http://www.financialsecrecyindex.com/PDF/9-Corporate-Tax-Disclosure.pdf>

¹⁴ For more information about this see <http://opencorporates.com/> [accessed 28 November 2016].