

M e m o r a n d u m

To: Mr. Dean Kinnee (MIC:64)
Chief, County-Assessed
Properties Division

Date: July 9, 2008

From: Carole Ruwart
Tax Counsel III

Subject: *Disclosure of Taxpayer Information – Legal Entity Ownership Program
Assignment No. 08-130*

This is in response to your memorandum dated June 23, 2008, in which you request a legal opinion as to whether the names of legal entities that failed to respond to the Board's request to provide change in ownership information on form BOE-100-B (the Board's non-response list) or who were sent an assessor's letter requesting this information, can be released to outside parties (e.g., the media or by public records act request) or to member organizations to which such entities belong. We advise that the identities of legal entities on the Board's non-response list should not be disclosed to the public, regardless of whether the Board initiated contact with the non-responding legal entity based on confidential information received from the Franchise Tax Board (FTB), or from public information sources.

Factual Background

The County Assessor's office (assessor) recently disclosed the identities of twenty legal entities (taxpayers) believed to own real property in County. The assessor obtained the identities of the taxpayers from the Board's non-response list. The identities were disclosed in direct or indirect association with the following information: (1) the taxpayers had failed to file change in ownership information on form BOE-100-B (discussed in more detail below); (2) the failures to file occurred despite two requests from the Board; and (3) the taxpayers were at imminent risk of having a mandatory penalty of 10 percent of assessed value imposed if they did not file the BOE-100-B within a certain period of time. We understand that the motivation for the assessor's disclosures was two-fold: to obtain change in ownership information from the specific taxpayers; and to increase future compliance by other legal entities.

Disclosure to Local Business Association

A representative of the assessor first disclosed to the (association) the names of some or all of twenty taxpayers he believed to be members of the association, along with the fact that none of them had responded to the Board's requests to fill out a BOE-100-B. He requested the group's assistance in contacting taxpayers who were members of the association to encourage them to submit their change in ownership information. The association reportedly

contacted most or all of the taxpayers at higher corporate levels than the assessor or presumably the Board had. This resulted in ten of the taxpayers contacting the assessor to his satisfaction. None of these taxpayers were identified in the media release discussed below.

Disclosure to the Media and the Public

Satisfactory contact was not made with the ten remaining taxpayers (non-filers), so the assessor prepared "strongly worded penalty letters" requesting the information "for the third time" from the non-filers. On June 19, 2008, the same day that the penalty letters were sent to the non-filers, the assessor published a media release naming the ten non-filers and discussing in detail how the assessor discovered their failure to file. The media release contained the following information: ¹

- That the assessor sent to the non-filers a letter requesting them to provide change in ownership information and notifying them that a penalty would be imposed if they did not respond within a specified time.
- That the non-filers had not to date submitted a BOE-100-B covering tax years 2005-06 or 2006-07.
- Details of the investigatory process of determining the identity of the non-filers, including the role of the FTB and the Board in supplying taxpayer information to county assessors.

Whose Information was Disclosed

In the course of communicating with the association and publishing the media release, the assessor disclosed information originated by the taxpayers, the Franchise Tax Board (FTB), the Board, and the assessor himself, specifically:

- FTB's information, obtained from the taxpayers' state income tax returns and provided to Board: that the taxpayers had responded "Yes" to the legal entity change in control question² on their state income tax returns.
- The Board's information provided to county assessors: that the taxpayers had not responded to the Board's two requests to submit the BOE-100-B (i.e., that the taxpayers were on the Board's non-response list), and that the Board's requests

¹ The media release states that "The new penalty letters will become part of an ongoing effort to crack down on businesses that do not complete the BOE's questionnaire....10 companies have not provided information and are being sent a penalty letter today. If they do not respond to this final demand, the assessor is required to levy a penalty of 10 percent of the property taxes on all of the secured real property owned by the legal entity, whether or not a change in control or ownership has occurred....The 10 companies being sent a penalty letter are: [names of 10 companies]."

² For 2006 and later returns, there is a three-part question on each relevant state income tax return form (question J for corporations, question T for partnerships, and question O for limited liability companies) regarding change in control of the entity and whether the entity owned any California real property. The return forms prior to 2006 only contained a single question regarding change in control, and no questions regarding ownership of real property in California. In the future, the Board's LEOP program intends to contact taxpayers who also leave the relevant question blank, and to indicate to county assessors whether the taxpayer answered "Yes" or left the question blank.

were made in response to the individual taxpayer return information received from the FTB.

- The county assessor's information regarding each non-filer's property taxes: that the assessor was sending a letter to each non-filer, and the substance of those letters.

For purposes of this memorandum, we assume that the identity of the taxpayers was obtained by the county assessor from the Board, who obtained the identities via the FTB and the non-filers' state income tax return information, and prepared the non-response list.

LEOP Program

Whenever there is a change in ownership of real property locally assessed by the county assessor, the transferee is required to file a change in ownership statement in the county where the real property is located. (Rev. & Tax. Code, § 480, subd. (a).) To assist county assessors in discovering changes in ownership, Revenue and Taxation Code sections³ 480.1 and 480.2 require legal entities to file a change in ownership statement (form BOE-100-B) with the Board's Legal Entity Organization Program (LEOP), administered by the Board's County-Assessed Properties Division, when a change in control of the entity or the transfer of more than fifty percent of original co-owner interests⁴ has occurred, because these events potentially trigger a change in ownership of the real property owned by the legal entity that would not necessarily be accompanied by a timely change in recorded title. The legal entity is to identify on the BOE-100-B all counties in which the legal entity owns real property. (Rev. & Tax. Code, § 480.1, subd. (a).)

A ten percent penalty of assessed value⁵ applies if a legal entity does not file a BOE-100-B within 45 days from the date of a written request by the Board, or if after a second request fails to provide information that completes an incomplete statement. (Rev. & Tax. Code, § 482, subd. (b).) However, the penalty is automatically extinguished if a complete statement is filed within 60 days after the date that the legal entity is notified of the penalty. Under current practice, within approximately 30 days of the expiration of the 45 day requested response period, the LEOP program sends non-respondents to the Board's first request a penalty notice along with another copy of the BOE-100-B. Identities of legal entities who do not respond to this second request are placed on the Board's non-response list and transmitted to county assessors.

Law and Analysis

The California Public Records Act generally makes all information possessed by government agencies subject to public disclosure (Gov. Code, § 6253, subd. (a)), unless "exempt from disclosure by express provisions of law." (*Id.* at subd. (b).) Disclosure is not required, however,

³ Section references are to the Revenue and Taxation Code unless otherwise indicated.

⁴ Original co-owner interests are those legal entity interests held immediately after a transfer of real property to a legal entity when the transfer is "proportional" and therefore excluded from reassessment under section 62, subdivision (a)(2). (See Rev. & Tax. Code, § 64, subd. (d).)

⁵ If there is no change in ownership of the real property as a result of the change in control of the legal entity or transfer of original co-owner interests, the penalty is measured by the current year's taxes on the property. If there is a change in ownership, the penalty is measured by the new base year value. (Rev. & Tax. Code, § 482, subd. (b).)

of "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." (Gov. Code, § 6254, subd. (k).) The Revenue and Taxation Code and judicial interpretation of the law of evidentiary privilege provide substantial protections for information pertaining to individual taxpayers, their taxes, and their business affairs, and specifically, information contained in a state income tax return.⁶

The FTB, or any officer or employee of the state or its political subdivisions, may not generally "disclose or make known in any manner information as to the amount of income or any particulars (including the business affairs of a corporation) set forth or disclosed in" an FTB return.⁷ (Rev. & Tax. Code, § 19542; see also § 19542.1.) As an employee of a political subdivision of this state, county assessors are included within the purview of this statute. However, the FTB is permitted to supply return information to other tax officials of this state, including the Board and county assessors. (Rev. & Tax. Code, § 19551, subd. (a); *Lyon v. Estes* (1969) 6 Cal.App.3d 979, 982.) Information obtained from the FTB "shall be used solely for the purpose of administering the tax laws or other laws administered by the person or agency obtaining it," and any "unwarranted disclosure or use" is a misdemeanor. (Rev. & Tax. Code, § 19552.) However, the disclosure of mere statistical return information that does not individually identify taxpayers is permitted under section 19563.

Additionally, section 64, subdivision (e) of the Revenue and Taxation Code requires the FTB to assist in determining whether a change in ownership of real property owned by legal entities⁸ has occurred by including questions on the income tax returns of such entities regarding whether the entity has experienced a change in control or whether certain transfers of interests in the entity have occurred. The FTB and the Board have entered into an information-sharing agreement (FTB-BOE Agreement) to implement section 64, subdivision (e), under which the FTB identifies to the Board on a monthly basis taxpayers that answer "yes" or provide no response to the applicable LEOP question. The agreement limits the Board's ability to share the information received under the agreement, as follows:

BOE agrees that state tax return information received under this agreement shall not, in any form or manner, be passed on or otherwise shared with third parties except county assessors and as otherwise authorized by law.

(FTB-BOE Agreement, Exh. A.)

⁶ Unless otherwise indicated, all references to income tax returns are to state income tax returns.

⁷ An income tax "return" and "return information" are defined by statute. A "[r]eturn" means any tax or information return. . . which is filed with the Franchise Tax Board by, on behalf of, or with respect to any person, estate, or trust, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed." (Rev. & Tax. Code, § 19549, subd. (a).) "Return information" includes a taxpayer's identity and "any other data, received by, recorded by, prepared by, furnished to, or *collected by* the Franchise Tax Board with respect to a return . . . for any tax, addition to tax, penalty, interest, fine, forfeiture, or other imposition, or offense." (Rev. & Tax Code, § 19549, subd. (b).) (Emphasis added.)

⁸ For purposes of this memorandum, the term "legal entity" means corporations, partnerships, limited liability companies, and similar business organizations.

The agreement prohibits the disclosure of the provided information, as follows:

Any unwarranted disclosure or use of FTB information or any willful unauthorized inspection of the FTB files is an act punishable as a misdemeanor. Inspection is defined to mean any examination of confidential information. BOE, in recognizing the confidentiality of FTB information, agrees to take all appropriate precautions to protect the confidential information obtained pursuant to this agreement from unauthorized disclosure. BOE will conduct oversight of its users with access to the confidential information provided under this agreement.

(FTB-BOE Agreement, Exh. D, par. 5.)

The answers to the LEOP questions on the FTB returns are "return information" within the meaning of section 19549, subdivision (b). Similarly, the Board's non-disclosure list is "return information" because under current practice a legal entity only appears on the list if it provides certain responses to the LEOP questions. The disclosure to the association and the media release links the taxpayers with the fact that information contained in their FTB returns caused the Board to request that they file a BOE-100-B, that the taxpayers failed to file the requested forms, and that they are now at risk of receiving a penalty. This specific information was accompanied by an explanation that information from state income tax returns can trigger the Board's requests for information, and that failure to respond to those requests results in notification to the county assessors. Therefore, it is reasonable to conclude that the disclosure to the association and the media release disclosed state income tax return information, both directly and as the source of information developed by the Board. While it appears that this information is being used for the purpose of administration of the tax laws for which the county assessor is responsible, within the meaning of section 19552, the question is whether these disclosures would be considered unwarranted and possibly subject to misdemeanor allegations.

Although "[t]here is no recognized federal or state constitutional right to maintain the privacy of tax returns. . . . California courts, however, have interpreted state taxation statutes as creating a statutory privilege against disclosing tax returns. [Citations omitted.] The purpose of the privilege is to encourage voluntary filing of tax returns and truthful reporting of income, and thus to facilitate tax collection. (*Webb v. Standard Oil Co.*, [(1957) 49 Cal.2d 509, 513].)" (*Weingarten v. Superior Court* (2002) 102 Cal.App.4th. 268, 274; see also *Lyon, supra*, at p. 981.) "Although the privilege is not expressly stated in the statutes, it is based on the statutory language and underlying policy." (*Schnabel v. Superior Ct.* (1993) 5 Cal.4th. 704, 720, fn. 4.) The California Supreme Court has ruled in several cases on the scope of the privilege in the context of civil litigation discovery between private parties. We believe that a court would reference this line of cases in determining whether a disclosure was "unwarranted" within the meaning of section 19552 or the FTB-BOE Agreement.

In *Schnabel*, the Court stated that the state income tax return privilege is waived in two situations not applicable here (intentional relinquishment of the privilege and the existence of a lawsuit, the gravamen of which is so inconsistent with the assertion of privilege so as to render the privilege waived). (*Schnabel*, at p. 721.) The privilege is not applicable in a third situation, where "a public policy greater than confidentiality of the tax returns is involved." (*Ibid.*) The court noted that the

public policy exception has been narrowly construed, and "has only been applied when warranted by a legislatively declared public policy." (*Schnabel*, at p. 721.) We will therefore review the statutory scheme related to disclosure of information obtained by an assessor.

The Legislature's primary declarations as to the duties and restrictions with respect to disclosure of individual taxpayer information in an assessor's possession are contained in three sections of the Revenue and Taxation Code: sections 408, 451, and 481; however, it appears that section 408 is most relevant to the situation presented here.⁹ Subdivision (a) of section 408 provides that:

Except as otherwise provided in subdivisions (b), (c), (d) and (e), any information and records in the assessor's office that are not required by law to be kept or prepared by the assessor...are not public documents and shall not be open to public inspection.

Thus, information or records in the assessor's office are only subject to public disclosure if they are "required by law to be kept or prepared by the assessor,"¹⁰ or if another statutory disclosure provision applies. Subdivisions (b) and (c) of section 408 allow disclosure of appraisal data to any county assessor, and disclosure of or access to all records to a host of law enforcement agencies and other governmental entities, and limited access to tax collectors, while subdivisions (d) and (e) provide for taxpayer access to information. There is no mention of disclosure to any other third parties, such as private trade associations or the media.

Sections 480.1 and 480.2 require legal entities to file the BOE-100-B with the Board, which develops its list of non-respondents after making the statutorily-required contacts. It does not authorize the county assessors to keep or prepare the list of non-respondents; rather, that task has been statutorily assigned to the Board. The assessor is merely required to impose the 10 percent penalty, based on the list of non-respondents the Board is required to keep, and make the penalty information public when preparing and publishing the assessment roll.

Moreover, the Legislature has recognized that the assessor may not always receive timely or complete information regarding the taxable property in his or her county, and provides by statute several methods that may be used to assist the assessor in obtaining information from such persons. However, none of those methods appear to contemplate the type of disclosure that occurred in this case.

The process of obtaining change in ownership information from legal entities under sections 480.1 and 480.2 does not provide for any public disclosure of taxpayer identities or the potential

⁹ Section 451 provides that "[a]ll information requested by the assessor or furnished in the property statement shall be held secret by the assessor. The statement is not a public document and is not open to inspection, except as provided in Section 408." Because this information was not obtained from property statements it appears that section 451 does not apply. Section 481 provides that all information "requested by the assessor or the board pursuant to this article [2.5] or furnished in the change in ownership statement shall be held secret by the assessor and the board" as well as by all those authorized by law to receive such information. While the information was obtained in conjunction with attempting to obtain information regarding the change in ownership statement, it was not requested by the assessor or the board – rather, it is information that the legal entity has NOT responded to the Board's requests for information. Therefore, section 481 may not apply. However, even if this information were considered "requested by the assessor or the board," it would not be subject to public disclosure.

¹⁰ It is well-settled that information or records "kept or prepared by the assessor" includes information prepared by others. (*Gallagher v. Boller* (1964) 231 Cal.App.2d 482, 489.)

imposition of the ten percent penalty, until such time as the penalty and any change in assessed value would be noted on the annual assessment roll, which is indisputably a public document. Rather, as when the assessor is faced with a taxpayer's failure to provide timely or complete information regarding change in ownership under section 480, the assessor is to assess the property based on information in the assessor's possession. (Rev. & Tax. Code, § 485.) Other methods of obtaining change in ownership information include the right to inspect property owner records. (Rev. & Tax. Code, § 441, subd. (d) and § 470.) The assessor can request an affidavit of any person "found within his county" as to whether he or she is the owner of any taxable property. (Rev. & Tax. Code, § 453.) None of these methods provide for public disclosure of taxpayer identities in connection with the actions of the assessor or Board, or in connection with the taxpayer's filing status.

The remaining methods of obtaining information appear to acquiesce in public disclosure of a taxpayer's identity because they involve formal judicial action. The assessor may subpoena and examine any person regarding "any statement disclosing property assessable in his county that may be stored with, possessed, or controlled by that person." (Rev. & Tax. Code, § 454, subd. (b).) The assessor may request a court to order any person to furnish information previously requested by the assessor. (Rev. & Tax. Code, § 468.) Furthermore, the failure to furnish information in response to an assessor's request for certain information can be a misdemeanor. (Rev. & Tax. Code, § 462.)

In view of the statutory alternative means of obtaining information from legal entities, obtaining taxpayer information by means of public disclosure of taxpayer identities in connection with information derived from the taxpayer's FTB returns and from the Board's records of non-response to its requests for information is not a "legislatively declared public policy," and therefore would not be appropriate or warranted. Furthermore, even if some of the legal entities on the Board's non-response list were identified through other means, such as public information, we believe that the best practice is to apply the same disclosure standards to all taxpayers.

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