



STATE BOARD OF EQUALIZATION
PROPERTY AND SPECIAL TAXES DEPARTMENT
450 N STREET, SACRAMENTO, CALIFORNIA
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0064
916 274-3350 • FAX 916 285-0134
www.boe.ca.gov

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February 10, 2011

TO INTERESTED PARTIES:

POSSESSORY INTERESTS ANNUAL USAGE REPORT

In September 2010, we announced in Letter To Assessors 2010/049 a project to solicit information regarding the *Possessory Interests Annual Usage Report*, form BOE-502-P (copy enclosed). At issue is whether the data that a public entity is required to report pursuant to Revenue and Taxation Code section 480.6 must be held in confidence by county assessors.

Board staff met with interested parties on December 1, 2010 to discuss the confidentiality issue for the form. At the conclusion of the meeting, it was requested that the Board's Legal Department review applicable statutes and provide an opinion on the issue. Enclosed is a copy of the legal opinion. Interested parties are encouraged to provide comments regarding the opinion by March 4, 2011 to Ms. Sherrie Kinkle at sherrie.kinkle@boe.ca.gov or mailed to the above address.

A second interested parties meeting will be held at the Board's headquarters at 450 N Street, Sacramento, in Room 122, beginning at 1:30 p.m., on March 14, 2011. It is anticipated that the issue will then be heard by the Board at its April 25-27, 2011 meeting.

If you plan to attend the March 14 interested parties meeting, please notify Sherrie Kinkle via email or at 916-274-3363. All documents regarding this project are posted on the Board's website at www.boe.ca.gov/proptaxes/cpia.htm.

Sincerely,

/s/ Dean R. Kinnee

Dean R. Kinnee, Chief
County-Assessed Properties Division

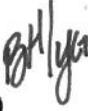
DRK:sk
Enclosures

Memorandum

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

Date: February 8, 2011

From: Bradley Heller (MIC:82)
Tax Counsel III (Specialist)



Subject: *Confidentiality of Possessory Interests Annual Usage Report
Assignment No. 10-297*

This is in response to your inquiry and the December 1, 2010 interested parties meeting, at which questions were raised regarding whether information a state or local governmental (public) entity is required to report on its Possessory Interests Annual Usage Report, Form BOE-502-P, must be held secret by county assessors. The Legal Department has reviewed the California Public Records Act (Gov. Code, § 6250 et seq.) as well as the potentially applicable confidentiality statutes from the Revenue and Taxation Code (RTC) and is of the opinion that the express terms of the confidentiality statutes do not require county assessors to keep the Possessory Interests Annual Usage Report (hereafter, for ease of reference, "annual usage report") secret.

Information Reported on Annual Usage Reports

Annual usage reports require public entities to report the following information for each reportable transaction involving a possessory interest:

- The name and mailing address of the possessory interest holder;
- The location and description of the public entity's property subject to the possessory interest;
- The date of the transaction in which the possessory interest was acquired;
- The amount and type of consideration paid for the possessory interest;
- Whether the transaction being reported is the creation, renewal, sublease, or assignment of the possessory interest;
- The term of the possessory interest; and
- Any agency paid expenses.

In addition, if a public entity reports a sublease of a possessory interest, the public entity must also provide the original term and remaining term of the possessory interest, and the consideration paid for the master lease. If a public entity reports an assignment of a possessory interest, the public entity must also provide the original term and remaining term of the possessory interest, and the consideration paid for the underlying lease.

California Public Records Act

The California Public Records Act (CPRA) provides that state and local agencies' public records are open to public inspection, unless expressly exempt by federal or state law, and, when only a portion of a public record is exempt from disclosure, the CPRA requires the public record to be disclosed after the exempt portion is deleted. (Gov. Code, §§ 6253, subds. (a) & (b), 6254, subd. (k).) The CPRA defines the term "public records" broadly to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Gov. Code, § 6252, subd. (e).) Therefore, the Legal Department believes that annual usage reports are public records within the meaning of the CPRA.

The CPRA provides a number of express statutory exemptions from public disclosure that apply to certain information, as well as a "catchall" exemption allowing a state or local agency to withhold a public record if, under the facts of a particular case, the public interest served by nondisclosure clearly outweighs the public interest served by disclosure. (See Gov. Code, § 6250 et seq. and 6255.) The CPRA also provides a list of confidentiality statutes outside of the CPRA that may work to hold information confidential. (See. Gov. Code, § 6276 et seq.)

It does not appear that any of the *express* statutory exemptions contained in the CPRA would apply to annual usage reports. As well, the Legal Department does not believe that the catchall exemption will generally apply to an annual usage report. This conclusion is consistent with the California Court of Appeal's holding in *California State University, Fresno Association, Inc. v. Superior Court*,¹ which provides that the catchall exemption must be narrowly construed and that California State University Fresno did not meet its burden to show that the catchall exemption applied to information in its possession regarding persons who purchased luxury suites in the university's sports arena.²

As a result, the Legal Department believes that annual usage reports are generally subject to public disclosure.³ To the extent that a public agency believes that possessory interest information is confidential under a specific statute outside of the CPRA, or under the CPRA catchall exemption, it should file its information with the assessor using a Change in Ownership statement under section 480.6, for which, as explained below, there is a specific confidentiality statute. As explained below, all the information reported on or submitted with the annual usage report is public information and once the report is filed with the assessor, that information is publicly disclosable, subject to review and redaction of any confidential personal information that may have been erroneously included such as a person's social security number.

¹ (2001) 90 Cal.App.4th 810.

² *Id.* at p. 835. The California Court of Appeal further held that the catchall exemption must be applied to specific records on a case-by-case basis and that "the burden of proof is on the proponent of nondisclosure, who must demonstrate a 'clear overbalance' on the side of confidentiality." (*Id.* at p. 831.)

³ The Legal Department has not reviewed all of the provisions of California law, including those listed in Government Code section 6276 et seq., that might apply to every public entity to exempt that entity from publicly disclosing information reported on an annual usage report. Therefore, the Legal Department makes no representations regarding whether there may be some state and local agencies with such express statutory exemptions outside of the CPRA.

Strict Construction of Confidentiality Statutes

In addition to the provisions of the Government Code, the Legal Department reviewed the RTC's confidentiality statutes that could potentially apply to annual usage reports in the manner prescribed by article I, section 3, subdivision (b)(2) of the California Constitution (added in 2004 as part of Proposition 59), which provides that:

A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.

In addition, the Legal Department reviewed the potentially applicable RTC confidentiality statutes in the manner prescribed in *Gallagher v. Boller* (1964) 231 Cal. App. 2d 482, 489-490 (*Gallagher*), where the Court of Appeal said:

[When RTC] sections are restrictive of the express legislative policy and general inspection statutes (which provide that public records and other matters are open to inspection), the sections should be construed strictly especially where it is contended that the matters are confidential under the privileged communications statutes. [Citations omitted.] The burden of showing that matters are confidential within the meaning of the privileged communications statutes is on the party asserting the privilege.

Therefore, the Legal Department looked to see if the express terms of each potentially applicable RTC confidentiality statute, strictly and narrowly construed, require county assessors to hold secret or keep confidential the annual usage reports at issue.

Article 2.5, Change in Ownership Reporting

Article 2.5 (RTC, §§ 480-487) of chapter 3 of part 2 of division 1 of the RTC, entitled "Change in Ownership Reporting," contains provisions:

- Requiring taxpayers to file change in ownership statements whenever a change in ownership occurs and authorizing the Board and assessors to request to inspect books and records to verify whether changes in ownership have occurred with regard to real property owned by legal entities (RTC, §§ 480-480.2);
- Requiring taxpayers to file preliminary change in ownership reports when recording documents evidencing a change in ownership (RTC, §§ 480.3, 480.4);
- Requiring owners of tax exempt real property to report the execution of any document conveying the right to use the real property (if the county enacts the required ordinance) (RTC, § 480.5);
- Excusing the holders of possessory interests from filing change in ownership statements and preliminary change in ownership reports, and requiring "***every state or local governmental entity that is the fee owner of real property in which one or more taxable possessory interests have been created***" to "***either file any preliminary change in ownership report or change in ownership***

statement otherwise required to be filed with respect to any renewal of a possessory interest, or annually file with the county assessor . . . a real property usage report" (RTC, § 480.6, subd. (a) [emphasis added]);

- Requiring certain life insurance companies to file statements of transfer (RTC, § 480.7); and
- Authorizing assessors to request "ownership reports" from condominium associations, etc. (as defined) (RTC, § 480.8).

Article 2.5 also contains an article-specific confidentiality provision, RTC section 481, which provides as follows:

All information requested by the assessor or the board pursuant to this article or furnished in the change in ownership statement shall be held secret by the assessor and the board. All information furnished in either the preliminary change in ownership statement or the change in ownership statement shall be held secret by those authorized by law to receive or have access to this information. These statements are not public documents and are not open to inspection, except as provided in Section 408.

The Legal Department considered whether the express terms of RTC section 481, when strictly and narrowly construed, require county assessors to hold secret or keep confidential annual usage reports required to be filed with county assessors by RTC section 480.6. RTC section 481 expressly requires county assessors to hold secret:

1. change in ownership statements required by RTC sections 480-480.2 or 480.6;
2. books and records requested under RTC sections 480.1 and 480.2;
3. preliminary change in ownership statements (reports) required by RTC sections 480.3 and 480.6; and
4. ownership reports requested under RTC section 480.8.

However, RTC section 481 does not expressly apply to the annual usage reports that state and local governmental entities are required to file under RTC section 480.6. This is because an annual usage report is not a "preliminary change in ownership statement" or "change in ownership statement" and is not *requested* by the assessor pursuant to article 2.5. Instead these documents are *required to be filed* pursuant to article 2.5. Therefore, the Legal Department believes that the express provisions of RTC section 481 do not require county assessors to keep annual usage reports secret.

RTC section 481 does, however, explicitly state that change in ownership statements are confidential. Therefore, any possessory interest information provided by a public agency on a change in ownership statement is not subject to public disclosure.⁴

⁴ We recognize the potential inconsistency of the same data being confidential or not confidential depending on the form on which it is delivered to an assessor. However, the fact that section 481 provides that the change in ownership statement is confidential does not preclude the public from asserting its right to the information contained therein with the originating public agency. In fact, it is that public agency that is in the best position to assert and defend any claimed right to confidentiality, not the assessor.

Article 2, Information from Taxpayers

Article 2 (RTC, §§ 441-470) of chapter 3 of part 2 of division 1 of the RTC, entitled “Information from Taxpayer,” contains provisions:

- Requiring the owners of taxable personal property to file property statements;
- Authorizing assessors to inspect books and records, require affidavits, and issue subpoenas to examine witnesses to verify the accuracy of property statements; and
- Requiring assessors to conduct audits of locally assessable trade fixtures and business personal property to ensure that taxable personal property is properly assessed.

Article 2 also contains a confidentiality provision, RTC section 451, which provides that:

All 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.

The Legal Department considered whether the express terms of RTC section 451 require county assessors to hold secret or keep confidential “annual usage reports.” However, the Legal Department believes that the express terms of RTC section 451 only apply to information requested by an assessor and, accordingly, do not apply to annual usage reports because the reports are required by section 480.6 and are not requested by county assessors.

This interpretation is consistent with the Court of Appeal’s decision in *Gallagher*, which held that county assessors are not required by RTC section 451 to keep applications for the welfare exemption confidential. The *Gallagher* court determined that applications for the welfare exemption are not “requested” by assessors and are not part of the statutorily required “property statements.” Therefore, the court concluded that the applications do not fall within the clear meaning of the express terms of RTC section 451.

Article 1, General Requirements

Article 1 (RTC, §§ 401-409) of chapter 3 of part 2 of division 1 of the RTC, entitled “General Requirements,” contains general provisions that are intended to apply to county assessors when assessing real and personal property under part 2 of division 1 of the RTC⁵ and contains RTC section 408, subdivision (a), which provides, in relevant part, that:

. . . any information and records in the assessor’s office that are not required by law to be kept or prepared by the assessor, disabled veterans’ exemption claims, and homeowners’ exemption claims, are not public documents and shall not be open to public inspection.

⁵ For example, RTC section 401 provides that “Every assessor shall assess all property subject to general property taxation at its full value.”

However, the Legal Department does not believe that the express terms of RTC section 408, subdivision (a) require county assessors to keep confidential or hold secret annual usage reports based in part upon the above-discussed *Gallagher* opinion.

As previously noted, in *Gallagher*, the Court of Appeal held that county assessors are required to disclose applications for the welfare exemption. In support of this holding, the court concluded that welfare exemption applications are “required by law to be kept” by assessors within the meaning of RTC section 408. Specifically, the court concluded that county assessors have a general duty to keep records that pertain to the assessment of real and personal property and, as a result, county assessors are required to keep records of applications for the welfare exemption and their decisions thereon.

In this case, the Legal Department believes that: (1) annual usage reports should be analyzed similarly to applications for the welfare exemption (e.g., they are not prepared by county assessors but are required to be filed with county assessors, they provide county assessors with important information regarding the assessment of the subject properties, etc.); and (2) assessors have a general duty to “keep” annual usage reports as part of the county assessors’ records regarding the assessment of the subject properties. Therefore, the Legal Department does not believe that RTC section 408, subdivision (a) applies to annual usage reports.

Furthermore, we do not believe that section 408, subdivisions (d) and (e)(3) require assessors to hold annual usage reports confidential as non-disclosable “business affairs of another.” This is because annual usage reports are public records, they are not excluded from being public records by RTC section 408, subdivision (a), and the public may request annual usage reports under the provisions of Government Code section 6253, rather than under the more narrow provisions of RTC section 408, subdivisions (d) and (e) regarding an assessee’s requests for market data and other documents pertaining to the appraisal and assessment of the assessee’s property.

Legislative History

Finally, the Legal Department looked at the legislative history regarding the enactment of RTC section 480.6 in 1995 (Stats. 1995, ch. 498 (Sen. Bill No. 657 1995-96 Reg. Sess.), § 10) and we could not find any discussion regarding the confidentiality of annual usage reports. Further, RTC section 481 was enacted prior to 1995; however, when the Legislature enacted section 480.6 in 1995, the Legislature did not amend section 481 to expressly make annual usage reports confidential, and the Legislature has not amended section 481 since enacting section 480.6. Thus, there does not appear to be any indication that the Legislature intended for RTC section 481 to apply to annual usage reports. Furthermore, the Legislature did make unrelated amendments to RTC section 408’s confidentiality provisions as part of the same 1995 bill that contained section 480.6, and the Legislature did not feel prompted to amend section 408 to expressly make annual usage reports confidential. Therefore, the Legal Department could not find any legislative history indicating that the Legislature intended for county assessors to keep annual usage reports secret or that the Legislature failed to amend RTC sections 408 or 481 to exempt annual usage reports from disclosure as a result of oversight.

Conclusion and Recommendation

The Legal Department believes that annual usage reports filed with county assessors are subject to public inspection under the CPRA and that, when strictly and narrowly construed, the express terms of the potentially applicable confidentiality provisions in RTC sections 408, 451, and 481 do not require county assessors to hold secret or keep confidential annual usage reports.

The Legal Department also believes that information reported on or submitted with the annual usage reports is generally subject to public inspection at the reporting public entities, unless the entities can identify a specific statutory exemption, other than the express statutory exemptions in the CPRA, that permits nondisclosure or the public entities can meet their burden to establish that nondisclosure is permitted under the CPRA's catchall exemption, in a specific case.

Because a decision as to whether such information is confidential must be made by the public entity in the first instance, the language stating that the form is confidential should be removed so that public agencies are on notice that the annual usage report is not confidential. As well, a statement should be included on the form that expressly states that any information provided on it is subject to disclosure.

BH:yg

J:/Prop/Prec/Possints/2011/10-297.doc

cc: Mr. David Gau MIC:63
Mr. Todd Gilman MIC:70

**POSSESSORY INTERESTS
ANNUAL USAGE REPORT**

Section 480.6 Revenue & Taxation Code
(Name and Mailing Address of Agency)

*This is a written request made pursuant to Sec. 480.6 of the Revenue and Taxation Code. This report must be completed in detail by the agency and filed with the Assessor **by February 15.***

This report is not a public document. The information contained herein will be held secret by the Assessor (Sec. 451, Rev. & Tax. Code); it can only be disclosed to the district attorney, grand jury, and other agencies specified in Sec. 408 of the Rev. & Tax. Code. Attached schedules are considered to be part of the report.

California law requires every state or local governmental entity that is the fee owner of real property in which one or more taxable possessory interests have been created or renewed to provide the assessor of the county in which the property is located information identifying the holder(s) of a taxable possessory interest, the property involved, and the terms and conditions of the agreement giving rise to the taxable possessory interests. The agency may provide the county assessor the information on either (1) a preliminary change in ownership report or change in ownership statement, or, (2) an annual real property usage report. If, as of January 1 this year, your agency owns any property with taxable possessory interests that have not already been reported on a preliminary change in ownership report or on a change in ownership statement, you are required to complete and file this form with the county assessor by **February 15.**

PROPERTY USAGE

NAME OF HOLDER OF POSSESSORY INTEREST	MAILING ADDRESS
LOCATION/DESCRIPTION OF SUBJECT PROPERTY	DATE OF TRANSACTION IN WHICH A TAXABLE POSSESSORY INTEREST WAS ACQUIRED
TYPE OF TRANSACTION <i>(check one)</i> <input type="checkbox"/> Creation <input type="checkbox"/> Renewal <input type="checkbox"/> Sublease <input type="checkbox"/> Assignment	AMOUNT AND TYPE OF CONSIDERATION <i>(i.e. gross, full service, NNN, other)</i>
TERM OF POSSESSORY INTEREST <i>(including renewal or extension options)</i>	AGENCY PAID EXPENSES <i>(if any):</i> \$

Sublease:

Original Term and Remaining Term _____

Consideration Paid for Master Lease _____

Assignments:

Original Term and Remaining Term _____

Consideration Paid for Underlying Lease _____

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Consideration Paid for Master Lease _____

Assignments:

Original Term and Remaining Term _____

Consideration Paid for Underlying Lease _____

CERTIFICATION

I certify (or declare) under penalty of perjury under the laws of the State of California that I have examined this report, including any accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete and covers any property required to be reported by the agency named in the statement. If prepared by a duly authorized person other than an agency official, the certification declaration is based on all the information of which the preparer has knowledge. This certification statement must be signed.

SIGNATURE OF AGENCY REPRESENTATIVE	TITLE	DATE
NAME OF PREPARER <i>(print or type)</i>	DAYTIME TELEPHONE NUMBER	
	()	