

**Possessory Interests Annual Usage Report (Form BOE-502-P)
Proposal To Remove Confidentiality Language From The Form**

Issues Raised In Comments From Interested Parties¹

	Issue	Assessors/County Counsel	Time Warner Cable
1.	Whether or not the data a public entity is required to report pursuant to Section 480.6 must be held in confidence by county assessors in light of Proposition 59? ²		<ul style="list-style-type: none"> • The writings in question in this Interested Parties Process are the most obvious public records relevant to the people's business as articulated by the California Constitution and Public Records Act ("PRA") – data transmitted from one public agency to another public agency about leases of public property. (TWC Letter at p.1) • The PRA grants public access to governmental information. Its purpose is to maintain governmental accountability and to prevent secrecy in government. The PRA states that "[p]ublic records are open to inspection . . . and every person has a right to inspect any record." The PRA mandates disclosure from every "local agency," which includes county assessors. (TWC Letter at p.3) • When faced with the reach of the PRA to require disclosure by a public agency, the courts have held that the precise documents all state and local governmental

¹ Issues are color coded by how they were raised as follows: Black: Raised by Letter to Assessors from Mr. David Gau dated September 29, 2010, Red: Raised by Assessors/County Counsel in Interested Parties Process and Blue: Raised by Time Warner Cable.

² All "Section" references are to the California Revenue and Taxation Code, unless otherwise indicated.

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			<p>entities must transmit to county assessors – leases and licenses of public lands that create possessory interests ("PIs") – are public records that must be disclosed. (TWC Letter at p.3)</p> <ul style="list-style-type: none"> • The information state and local governmental entities generate in compliance with their obligation under Section 480.6 and transmit to the assessors are "public records" subject to disclosure under the PRA. (TWC Letter at p.3) • The Constitution requires a narrow reading of the secrecy requirements in Sections 451 and 481, and, given the broad interpretation that must be given to the exception in Section 408, there is no statutory justification for keeping secret the public records that state and local governmental entities created in compliance with Section 480.6. (TWC Letter at p. 6) • Advising the county assessors that they can keep those documents secret would lead to the bizarre result that public writings creating possessory interests would become secret when a state or local governmental entity – a public agency – reports their contents to an assessor – another public agency. The law does not provide that a public agency may shield a record from public disclosure simply by relocating it and labeling it "secret". (TWC Letter at p. 5)
2.	Discussion of the express terms and legislative history of statutes and decisions, including those listed below, apply to	<p><u>San Diego County Counsel:</u> <i>While the "real property usage report" is not the "property statement"</i></p>	<ul style="list-style-type: none"> • The Constitutional Amendment adopted in Proposition 59 providing that statutes, court rules, or other authority in effect at the time of the amendment "shall be broadly construed if it furthers the people's right of access, and

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	<p>information provided in the possessory interest report:</p> <ul style="list-style-type: none"> ● Rev. & Tax. Code, §451 ● Rev. & Tax. Code, §481 ● Rev. & Tax. Code, §408 ● Other Rev. & Tax. Code provisions ● <i>Gallagher v. Boller</i> (1964) 231 Cal.App.2d 482 	<p><i>referenced in section 451, the exemption from disclosure in section 481 should apply. It appears from the legislative history that the failure to make specific reference to the form in section 481 is an oversight. The original language of section 480.6 (SB 657 - 1995) required the public entity to file a PCOR or COS for a renewal of a possessory interest. It was amended the following year (SB 713 - 1996) to allow an annual filing in lieu of filing a separate PCOR or COS for each PI at the opinion of the public entity. It would be incongruent to hold the information if provided separately for each PI in a PCOR or COS as confidential, but the same information provided in the form of a comprehensive annual usage report is not confidential.</i></p>	<p>narrowly construed if it limits the right of access." (TWC Letter at pp. 6-7)</p> <ul style="list-style-type: none"> ● There is no specific indication that the Legislature intended to keep possessory interest information provided to an assessor by a state or local governmental entity pursuant to Section 480.6 secret. Under any circumstances, however, the California Constitution requires that, in interpreting the Legislature's intent, the Board must narrowly construe Sections 451 and 481 to the extent that they limit the right of access. Moreover, Section 408 – which is the exception to the secrecy provisions in Sections 451 and 481 and has been upheld by a California appellate court to ensure that public records should be disclosed by an assessor for public inspection – must be "broadly construed" in the Board's analysis. (TWC Letter at p.7) ● Regardless of whether Section 451 or 481 applies, the California Constitution requires that both must be narrowly construed because they limit the right of access. And, because both Section 451 and 481 are subject to the exception under Section 408, which must be broadly construed to ensure that public records are open to public inspection, neither statute can prevent disclosure of the Possessory Interest Usage Reports by a county assessor or any other data on possessory interests provided by state or local governmental entities in either written or electronic form to the public. (TWC Letter at p. 8) ● <i>Gallagher</i>, which predates Proposition 59, supports the conclusion that statutes requiring assessor secrecy are not

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			<p>absolute and do not apply to "public records" generated by state and local governmental entities. (TWC Letter at p. 9)</p> <ul style="list-style-type: none"> ● NOTE: Time Warner Cable believes the Board should consider two additional sections of the Revenue and Taxation Code that may be relevant – Section 408.2 (which only applies to counties with populations of greater than 4 million) and Section 408.3. ● Section 408.2(a) reads in part: "Except as otherwise provided in Sections 63.1, 69.5, 451, and 481 of this code and in Section 6254 of the Government Code, any information and records in the assessor's office which are required by law to be kept or prepared by the assessor, other than homeowners' exemption claims, are public records and shall be open to public inspection." ● Section 408.3(a) reads in part: Except as otherwise provided in Sections 451 and 481 and in Section 6254 of the Government Code, property characteristics information maintained by the assessor is a public record and shall be open to public inspection." ● Government Code Section 6254 contains specific exceptions to disclosure under the PRA, the only relevant one being subsection (i): Information required from any taxpayer in connection with the collection of local taxes that is received in confidence and the disclosure of the information

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			<p>to other persons would result in unfair competitive disadvantage to the person supplying the information.</p> <ul style="list-style-type: none"> In the plain language of both statutes, the secrecy provision of both Section 451 and 481 must apply <u>and</u> an explicit exception from disclosure in Government Code Section 6254 must apply as well for documents to come outside the definition of a "public record." However, Government Code Section 6254(i) only applies to taxpayer-provided information, whereas under Section 480.6 state and local governmental entities provide county assessors with possessory interest information that is already public.
3.	Discussion of the public interest in disclosure and nondisclosure of information provided on the Possessory Interest Annual Usage Report as required by Gov. Code, §6255.		<ul style="list-style-type: none"> There is no public interest in secrecy because the information contained in documents filed under Section 480.6 is already contained in public records (TWC Letter at p. 10) County assessors may not rely on Government Code Section 6255 to justify withholding documents pursuant to Section 480.6 because the disclosures to the assessors by state and local governmental entities are already public records undermining any public interest in nondisclosure. (TWC Letter at p. 9) The possessory interest reports and statements mandated by Section 480.6 are "public records" and, absent an exception, the public records that state and local governmental entities created and then transmitted to the county assessors should be accessible to the public as

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			"writings of public officials and agencies" under Article I, Section 3 of the California Constitution. (TWC Letter at p. 9)
4.	Assessors need guidance from the Board on whether they have the obligation to disclose the PI documents provided by state and local governmental entities or must keep them secret.	<p><u>Napa County Assessor:</u> <i>There are two issues I see in the interested parties process:</i></p> <p><i>1. Can the public agency which grants the possessory interest keep the terms of the arrangements confidential? If the answer to that question is no, then there is no reason that the Report of Annual Usage should be kept confidential. If the answer to the first question is yes or maybe, then the second issue becomes important.</i></p> <p><i>2. If public agencies are able to keep the terms of possessory interest leases confidential, then the assessor should be able to keep that same data confidential.</i></p>	<ul style="list-style-type: none"> ● Given that the underlying documents creating the PIs are "public records" and California courts have held that public records creating PIs are subject to disclosure under the PRA, any information a state or local governmental entity prepares and provides about a PI consistent with its obligation under Section 480.6 is a public record (TWC Letter at p. 5) ● Section 408 provides that records not required by law to be kept or prepared by the assessor are not public; records regarding PIs <u>are</u> required by law to be kept or prepared by the assessor, and therefore, are public (TWC Letter at p. 8) ● There is no public interest in secrecy because the information contained in documents filed under Section 480.6 is already contained in public records (TWC Letter at p. 10) ● The Constitution requires interpreting the Legislature's intent with respect to secrecy provisions (451 and 481) narrowly, and with respect to the exception to the secrecy provisions (408) broadly (TWC Letter at p. 7)
5.	Assessors have not had experience with requests under the PRA for PI documents provided by state and local	<u>Shasta County Assessor:</u> <i>We have not had confidentiality come up as an issue in our County.</i>	

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	governmental entities.	<p><u>Ventura County Assessor:</u> <i>It is difficult to provide comments without knowing what the "issue" is and in what context and under what circumstances it has been raised (i.e., appeals, litigation, subpoenas, public information request from media, tenant inquiries, etc.). Ventura County has had no experience with a confidentiality issue and this information.</i></p>	
6.	Assessors believe that PI documents provided by state and local governmental entities are public documents.	<p><u>Siskiyou County Assessor:</u> <i>Being it is the use of publicly-owned property, I would think who uses it and how should not be confidential information.</i></p> <p><u>Calaveras County Assessor:</u> <i>I understand that the information provided on the form contains information that is already public. However, I cannot guarantee that the information is accurate and I do not want my staff time taken up to respond to a</i></p>	<ul style="list-style-type: none"> ● Given that the underlying documents creating the PIs are "public records" and CA courts have held that public records creating PIs are subject to disclosure under the PRA, any information a state or local governmental entity prepares and provides about a PI consistent with its obligation under Section 480.6 is a public record (TWC Letter at p. 5) ● Section 408 provides that records not required by law to be kept or prepared by the assessor are not public; records regarding PIs <u>are</u> required by law to be kept or prepared by the assessor, and therefore, are public (TWC Letter at p. 8) ● There is no public interest in secrecy because the information contained in documents filed under Section 480.6 is already contained in public records (TWC Letter

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		<p><i>Public Records Request. I do not want the liability for inaccurate information. And, I certainly don't have the time to answer questions that may arise from data that is reported.</i></p>	<p>at p. 10)</p> <ul style="list-style-type: none"> Note: Time Warner Cable is unaware of any responsibility under the PRA that an agency has for the accuracy of public records it discloses that it originally received from a third party. In fact, in some cases an assessor is specifically relieved of any liability for disclosure of information. Section 408.3(d) reads: "The Legislature finds and declares that information concerning property characteristics is maintained solely for assessment purposes and is not continuously updated by the assessor. Therefore, neither the county nor the assessor shall incur any liability for errors, omissions, or approximations with respect to property characteristics information provided by the assessor to any party pursuant to this section. Further, this subdivision shall not be construed to imply liability on the part of the county or the assessor for errors, omissions, or other defects in any other information or records provided by the assessor pursuant to the provisions of this part."
7.	<p>Assessors believe that they can keep the documents confidential and are doing so.</p>	<p><u>Mariposa County Assessor:</u> <i>Mariposa has always held information received on Possessory Interest Usage Reports confidential.</i></p> <p><u>Placer County Assessor:</u> <i>We hold the information confidential to the reporting agency and the individual possessory interest holder.</i></p>	<ul style="list-style-type: none"> Given that the underlying documents creating the PIs are "public records" and the courts have held that public records creating PIs are subject to disclosure under the PRA, any information a state or local governmental entity prepares and provides about a PI consistent with its obligation under Section 480.6 is a public record (TWC Letter at p. 5) The Constitution requires interpreting the Legislature's intent with respect to secrecy provisions (451 and 481) narrowly, and with respect to the exception to the secrecy provisions (408) broadly (TWC Letter at p. 7)

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		<p><u>San Diego County Assessor:</u> <i>We don't disclose any of this information. The lease terms should remain confidential.</i></p> <p><u>Santa Clara County Assessor:</u> <i>We do occasionally have taxpayers asking lease information regarding the other possessors. It is nice to have the confidentiality clause on the form to show the inquirers.</i></p> <p><u>Yolo County Assessor:</u> <i>I think it should remain confidential as there may be information relating to business affairs of the various taxpayers being reported. The Assessor should not have to review and confirm with other agencies whether any information contained on the form is confidential. The person requesting the information can request it from the originating source. Besides agencies can feel</i></p>	<ul style="list-style-type: none"> Section 408 provides that records not required by law to be kept or prepared by the assessor are not public; records regarding PIs <u>are</u> required by law to be kept or prepared by the assessor, and therefore, are public (TWC Letter at p. 8)

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		<i>free to share information with the Assessor; they may not if it is not held confidential.</i>	
8.	Assessors believe that they do not have to respond to requests under the PRA for a variety of reasons including that the data is the information of another agency or they cannot vouch for the accuracy of the PI information provided by the state or local governmental entity.	<p><u>Glenn County Assessor:</u> <i>The only issue that I have is that this is not my information to release. I would direct them to the agency that has provided the information to our office and let them disclose the information.</i></p> <p><u>Calaveras County Assessor:</u> <i>I understand that the information provided on the form contains information that is already public. However, I cannot guarantee that the information is accurate and I do not want my staff time taken up to respond to a Public Records Request. I do not want the liability for inaccurate information. And, I certainly don't have the time to answer questions that may arise from data that is reported.</i></p>	<ul style="list-style-type: none"> Given that the underlying documents creating the PIs are "public records" and the courts have held that public records creating PIs are subject to disclosure under the PRA, any information a state or local governmental entity prepares and provides about a PI consistent with its obligation under Section 480.6 is a public record (TWC Letter at p. 5) If a public record, an assessor is required to make the data available in response to a request under the PRA; as demonstrated in <i>Gallagher</i>, the focus of the courts is not on who provides the data, but on whether the data is a public record (TWC Letter at p. 9) The document treated as "public" in <i>Gallagher</i> was provided by a taxpayer (TWC Letter at p. 9) No provision allows an agency such as a public assessor to ignore a PRA request (TWC Letter at p. 12)
9.	Assessors believe that the	<u>Alameda County Assessor:</u>	<ul style="list-style-type: none"> Section 480.6 requires that state and local governmental

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	<p>official statement on the form should remain for a variety of reasons including that it is reassuring to agencies that provide the PI data, it is helpful to getting information from state and local governmental entities that might otherwise be difficult to secure, removal of the language will likely result in additional cost and escape assessments, or for more general reasons.</p>	<p><i>The confidentiality statement on BOE-502-P is reassuring to agencies supplying the assessor with indispensable data and should be retained.</i></p> <p><u>Sacramento County Assessor</u>: <i>Some agencies have been reluctant to provide information regarding their tenants. The confidentiality clause has been beneficial in gaining [sic] their cooperation.</i></p> <p><u>Los Angeles County Assessor</u> (9/9/2010 letter): <i>We do not support the removal of this language. The confidentiality clause contained in this section allows us to obtain needed information that my [sic] otherwise be difficult to secure. The removal of this language will likely result in additional cost and escape assessments.</i></p> <p><u>California Assessors' Association</u>: <i>The CAA's position, taken at its August</i></p>	<p>entities report possessory interest information to assessors so that the assessor can appraise the value of public land occupied by a private taxpayer throughout its term. State and local governmental entities must comply with this obligation. The Legislature has the power to determine how best to preserve the property tax base by ensuring that state and local governmental entities report possessory interest data in a timely basis to county assessors so that those possessory interests can be appraised and property taxes can be levied throughout their term consistent with the California Constitution.</p> <ul style="list-style-type: none"> ● Given that the underlying documents creating the PIs are "public records" and CA courts have held that public records creating PIs are subject to disclosure under the PRA, any information a state or local governmental entity prepares and provides about a PI consistent with its obligation under Section 480.6 is a public record (TWC Letter at p. 5) ● CA Constitution requires interpreting the Legislature's intent with respect to secrecy provisions (451 and 481) narrowly, and with respect to the exception to the secrecy provisions (408) broadly (TWC Letter at p. 7) ● Section 408 provides that records not required by law to be kept or prepared by the assessor are not public; records regarding PIs <u>are</u> required by law to be kept or prepared by the assessor, and therefore, are public (TWC Letter at p. 8) ● There is no public interest in secrecy because the

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		<p><i>11 meeting, is that the language of confidentiality should remain.</i></p>	<p>information contained in documents filed under Section 480.6 is already contained in public records (TWC Letter at p. 10)</p> <ul style="list-style-type: none"> ● Whether additional escape assessments will result is not relevant to the analysis of the public nature of the documents supplied by state and local governmental entities under Section 480.6 (TWC Letter at p.12, n. 34) ● Direct costs of duplication are recoverable under Government Code Section 6253(b). (TWC Letter at p. 12) ● NOTE: Time Warner Cable believes that the Board should consider several additional sections in the Revenue and Taxation Code that permit county assessors to collect costs greater than those delineated in the Government Code when disclosing public records. For example: <ul style="list-style-type: none"> ● Section 408.3(c) provides: "Notwithstanding Section 6257 of the Government Code or any other provision of law, if the assessor provides property characteristics information at the request of any party, the assessor may require that a fee reasonably related to the actual cost of developing and providing the information be paid by the party receiving the information. The actual cost of providing the information is not limited to duplication or production costs, but may include recovery of developmental and indirect costs, as overhead, personnel, supply, material, office,

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			<p>storage, and computer costs. All revenue collected by the assessor for providing information under this section shall be used solely to support, maintain, improve, and provide for the creation, retention, automation, and retrieval of assessor information."</p> <ul style="list-style-type: none"> ● Section 409(a) provides: "Notwithstanding Section 6257 of the Government Code or any other statutory provision, if the assessor, pursuant to the request of any party, provides information or records that the assessor is not required by law to prepare or keep, the county may require that a fee reasonably related to the actual cost of developing and providing that information be paid by the party receiving the information. The actual cost of providing the information is not limited to duplication or reproduction costs, but may include recovery of developmental and indirect costs, such as overhead, personnel, supply, material, office, storage, and computer costs." ● While Section 408.3 may be relevant, Section 409(a) is not relevant because an assessor is required to keep records transmitted from state and local governmental entities.
10.	The Board should make it clear that all documents, regardless of the form in which they are transmitted to or kept by county assessors, generated by state and local governmental entities in		<ul style="list-style-type: none"> ● In order to comply with the reporting requirements under Section 480.6, there are other means by which state and local agencies can transmit possessory interest data to county assessors in addition to the Annual Possessory Interest Usage form. For example, in its 2002 Handbook pertaining to Assessment of Taxable Possessory Interests ("Handbook"), the Board suggested a three-step alternative

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	<p>compliance with Section 480.6 are public records that must be disclosed under the PRA.</p>		<p>approach by which county assessors could collect possessory interest data from state and local agencies so that it could be used to appraise possessory interests and kept throughout the term of the possessory interest. Moreover, eight years ago in the Handbook, the Board acknowledged that some assessors and state and local agencies in their counties engaged in electronic exchange of information to track possessory interests. The exchange of information in public records about leases of public property between and among public agencies has probably evolved since 2002. (TWC Letter at p. 2)</p> <ul style="list-style-type: none"> ● Government Code Section 6252 defines "public records" to include any writing that contains information relating to the public's business that is prepared, owned, used, or retained by any state or local agency, regardless of physical form or characteristics. (TWC Letter at p. 3) ● The Legislature's requirement in Section 480.6 specifies which details must be transmitted by state or local governmental entities regularly to county assessors. It is silent as to the form. The Annual Usage Report and the alternatives in the Handbook are among a variety of means for a state or local governmental entity to achieve compliance. Thus, given that the underlying documents or details in the leases creating the possessory interests are "public records" and California courts have held that public records creating possessory interests are subject to disclosure under the PRA, any information a state or local governmental entity prepares and provides about a possessory interest consistent with their obligation under Section 480.6 – whether written or electronic – is a public record. (TWC Letter at p. 5)

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			<ul style="list-style-type: none"> <li data-bbox="1108 272 1940 548">● One big risk in this Interested Parties Process is that the Board simply corrects the Annual Usage Report by striking the Official Explanation. This could inadvertently leave county assessors to conclude that alternative means that they have worked out with state and local governmental entities to the Annual Usage Reports do not make those disclosures by the state and local governmental entities public records. (TWC Letter at p. 5) <li data-bbox="1108 597 1940 829">● Given the Board's duty under Government Code Section 15608 to "instruct, advise, and direct assessors as to their duties under the laws", the Board needs to be accurate in its advice to the assessors about the law as it relates to the public nature of the data that is transmitted by state and local governmental entities to county assessors no matter in what form the data is provided. (TWC Letter at p. 5)