the comments. We do need to move on very shortly. I'm sure no one wants to go past 4:30.

MS. RUWART: I want to add one more thing about process and procedure for those of you not familiar with the Board's process. Board member Yee is correct. More information is good, but that doesn't necessarily mean more alternatives are good.

If you could work together amongst yourselves to develop consistent or coherent, that is ideal. So we encourage you to find common ground in developing your alternatives.

With that said --

MR. DAVIS: Ken Davis.

I just want to clarify a comment that Susan Borgman made and that is the Alternative B that is suggested by our Chief Counsel is to post the -- have a public log maintained of the information and then provide it to the Chief of Board Proceedings who will post it on the agenda or calendar that coincides with the matter being heard not on -- not on the website.

MS. RUWART: Was there a -- yes.

MR. RIVERA: On behalf of the Silicon Valley Leadership Group -- Gus Rivera, I'm sorry, with Intel. On behalf of the Silicon Valley Leadership Group and its related companies, there's been a lot of
talk of alternatives, but there's been a tremendous
amount of support with the language as is, so I just
wanted to state that on the record.

MS. RUWART: Thank you. Good job.
You're done.

MS. MATULICH: Hi, this is Diane Matulich. I'm
from Silicon Valley Leadership Group and there's three
members also on the telephone that are listening, and I
believe we did submit a written letter, so we hope
that's in the record.

MS. MANDEL: Diane Matulich, M-A-T-U-L-I-C-H,
right, Diane?

MS. MATULICH: Right, yes.

MS. RUWART: We personally haven't seen it.

Doesn't mean it's not here. It's probably -- did it get
sent to Diane Olson or Brad Heller?

MS. MATULICH: I know it was sent to --

MR. EVERETT: This is Kirk Everett with the
Silicon Valley Leadership Group.

The letter was sent to all Board members. We
can make sure it gets to the appropriate person.

Thanks for considering our comments.

MS. RUWART: No problem. And that just, again,
one more item of information that might help people.
It's great to send things to Board members. Please send
them to Board Proceedings or to Brad, because they are
the collectors of the official comments. If you send
them to Board members and not to us, then it gets lost
in the shuffle.

MS. MANDEL: And, Kirk, this is Marcy. If you
send anything to the controller's office, you need to
copy me or it could be, I don't know, a little while
before I see it.

MR. HELLER: All of our information -- this is
Brad Heller.

My contact information is on our website, and
you can access it through a link, the link on our home
page for this meeting that says 12/14/05 right here. If
you link on that, it will take you to a page with a
first notice we issued for this project and it has all
my contact information.

I will go ahead and take a look for it as well,
and if we can locate it, we'll go ahead and get it
disseminated.

MS. RUWART: Was there any more --

MR. EVERETT: We'll make sure we beat the
deadline and make sure you all get a copy of the letter.

MR. HELLER: Thank you.

Was there another comment on top of that?

MS. RUWART: No, there was somebody back there.
MR. NIELSEN: This is Richard Nielsen.
I kind of echo Joe's previous comments about
the historic development of all of this.
It seems the answer is in the hands of the
Franchise Tax Board. They have the policy of not
wanting to communicate. From what everything I have
heard here is the Board is not reluctant to have them
communicate. So, I guess, maybe the solution and the
resolution is in their hands; it's to change the policy.
Now, if they need something in writing to
encourage that, then, you know, I would limit the scope
of whatever you put in writing.

MR. HELLER: And with that final comment,
although not really final since everyone will have until
next Friday to submit written comments or telephone me,
if you'd like, or e-mail as well, we're going to move on
to our disclosure issue.

Now we're on page 31 of the information that
was posted on the website in September, and it starts
with Section 5033. It says "Public Records (First
Alternative)" in parentheses. And real briefly, I just
wanted to set up the issues so that we're all on the
same page as we go forward commenting.

And I think also, as I explained, for the
Franchise Tax Board, this is not as much of a major
concern for them, since most information in appeals of
the Franchise Tax Board are already publicly disclosable
information once received by the Board. However, it's a
very big issue of property taxes and business taxes
cases, especially business taxes.

And basically the Section 5033 first
alternative essentially is an attempt to set forth the
Board's current practice, which is essentially to
provide -- well, I should go back a little bit.

To the extent that a taxpayer requests an oral
hearing before the Board members and it actually
proceeds to a hearing, the Board generally allows -- you
know, based on the Bagley-Keene Open Meeting Act, the
Board is required to allow the public to attend the
meeting. The public can then listen to the meeting.
They can also record it, both orally and visually, so
they can have a video representation.

And based on those -- the Bagley-Keene
provisions, the Board has already concluded that the
Board will provide information that has been publicly
disclosed at a Board hearing to the public following the
conclusion of a business taxes matter.

And so the public is usually entitled to a copy
of our official minutes and also a copy of the
transcript of the actual hearing itself so they can see
what transpired, and also any documents that are
actually introduced into the record at the oral hearing
itself. However, most of the underlying information
remains confidential taxpayer information and will not
be provided to the public pursuant to a Public Records
Act request in a nonredacted form, and even then, only
if we can redact it in a manner so that you wouldn't be
able to identify the taxpayer.

So if you were still to ask for a redacted
version of Joe's case, we still can't give you Joe's
case information because it's redacted so it doesn't say
"Joe's case." So essentially that's a pretty limited
situation.

And what we've found is, despite the Open
Meeting Act's policy of making the Board's meetings open
so that the public can participate and stay informed
about how the Board's administering all of its many tax
programs, what we found is it's generally hit or miss.
It just depends on the particular hearing.

If the parties tend to discuss in detail all of
the factual issues presented to the Board at the
hearing, then the transcript of the hearing tends to
contain exactly what you would need to understand what
the Board members did.

In other cases, where people are just referring
back and forth to documents, people are tangentially referring to something by a title or something as "the deduction" or "the income" or whatever other -- you know, the D & R or Issue 3 or other things, it may become practically impossible for the public to really follow what's going on at a hearing, much less practitioners or other, you know, members of the Board staff.

And so we have set forth Section 5033, first alternative, as a proposal to continue that practice into the future and to continue essentially just disclosing exactly what we do currently, which is the transcript and, you know.

We've now prepared also a second alternative, which starts at 5033, in parenthesis, "Second Alternative," and that's basically a four-section alternative proposal.

And what it does is, it basically takes the Board's historical analysis that allowed them -- the Board members and Board staff -- to discuss a taxpayer's confidential information at the Board hearing itself, which essentially is based on a taxpayer's waiver of their right to confidentiality by discussing it in a public oral hearing and concludes that essentially the waiver continues to apply to all the information that
would be directly relevant to the issues being decided
by the Board, even if they're not actually disclosed on
the record.

So following a hearing, if, in fact, a
taxpayer -- the taxpayer at the hearing, of course, is
always able to get their own confidential information,
but if, you know, another representative who was at the
hearing, some other taxpayer, say, a reporter from one
of our journals, wants to figure out what the underlying
factual basis was or the timing of certain facts or
whatever, assuming they're directly relevant to what the
Board decided on at that hearing, then this alternative
would allow Board staff to disclose that information
pursuant to a Public Records Act request. And that's
basically the innovative -- that's basically the
innovative substance of the secondary proposal.

In order to make that work, essentially we
created -- it specifically informs taxpayers in
Section 5033.1 that there, in fact, is a waiver being
done when you're -- that you're, in fact, giving an
implied waiver when you request an oral hearing in front
of the public under the Open Meeting Act which has been
the case all long but is not something that really
taxpayers are informed of currently unless they have a
representative who's generous enough to inform them that
there is confidential information that they may be able
to retain if they don't request one.

And then also, in effect, it basically creates
a mechanism in 5033.2 that allows taxpayers who then
request that certain information not be disclosed at the
oral hearing are subject to a Public Records Act
request, and that language we've already received
comments on is very -- is currently somewhat loosely
written because we really weren't exactly clear on what
the parameters needed to be for that, so we are aware
that it definitely could use further work on defining it
with more detail or specificity. And we'd be glad to
hear comments regarding that today.

Basically it allows this mechanism for people
to request that certain information be preserved and
then it also creates a provision that preserves the
Board's attorney-client privilege to the extent that
that privilege actually extends to a specific bit of
advice they received from their attorneys and only in
cases where it would be a covered by the attorney-client
privilege as provided in the Evidence Code.

And so it's not necessarily that it wouldn't
apply to every bit of information that possibly has been
looked at by an attorney or Board member, but certainly
actual legal advice provided by the Legal Department to
Board members and not in an open meeting context where
it would otherwise become disposable and no longer
retain its privilege. So it's very limited. Let me put
it that way.

And -- but anyway, if I -- let me backtrack a
little more. Maybe I can make myself more clear. But
essentially the majority of documents that involve a
particular taxpayer's case go through lots of levels of
review, and the potential for something to lose its
privilege status is great just because of the amount of
people who see information and the way it's shared and
the fact that it can be incorporated into certain types
of files. There's just a multitude of situations.

And so all this really does is it says to the
extent that some document -- or I shouldn't say
document -- a document containing advice or actual oral
advice from attorneys to the Board members that still
retains that privilege, the Board has not waived it
somehow by creating this additional disclosure. That's
really all that was intended by that provision; and to
the extent that both my explanation and the provision
failed to do so, feel free to give me those comments as
well.

But essentially I just want to say that 5034 is
really not an alternative. That's just a -- that will
go along with the entire package, fees for copying
transcripts and stuff, and that's not part of the
changes or the alternatives. But essentially at this
point we can open it up for comments on both the first
and second alternatives.

MS. RUWART: Here's how I'd like to have people
just consider structuring it is global comments about
first or second, you know, the general parts of it. At
some point I would like to go through each part, A, B,
C, D for phrasing and for specific issues. So maybe
right now we'll open it up to just either clarification
questions or global "I totally prefer the first way" or
"I totally prefer the second alternative." Let's do
that for a few minutes and then get down to brass tacks.
Yeah. Peter Michaels.

MR. MICHAELS: Peter Michaels. And I prefer
neither of the two alternatives and, in fact, think
neither of them complies with the law.

And the conduct of the meeting, according to
the rules we're working with here under Section 5020,

I'm looking at one of the provisions cited
here, and it says in the Bagley-Keene law section 11126
of the Government Code, it says nothing in this article
shall prevent the State Board of Equalization from
holding closed sessions for the purpose of hearing confidential taxpayer appeals or data the public disclosure of which is prohibited by law.

Well, is it prohibited by law or not?

Yesterday I had a hearing in front of the Board where our property -- my client -- one of my client's property statements, the attachments, the appraisal data report, the work papers, all correspondence and all expert reports were introduced as a part of the record.

All right.

Now, let's juxtapose that with a court ruling which the State Board of Equalization lost in which the Appellate Court here in the State of California, 1989 GATX case says staff work papers, appraisal data reports containing financial information, cash value appraisals, projections of income, expenses, interest cost, depreciation, those are, according to the Court of Appeal, this is the law, State of California, you're ignoring proprietary, confidential. Bagley-Keene was intended to protect the disclosure of the very information you're saying should be disclosed.

This is not just standing on principal. Anyone who has been in business knows the importance of trade secrets and proprietary information, cost margins, expenses.
What essentially is being presented here is a choice between due process and trade secrets, a choice between having the business affairs information remain your private business affairs information and not that of the public or your competitors or your would-be competitors, highly charged as that information is. You get a choice: Keep my secrets and no due process, or due process and tell the world what my margins are. Neither of those is permitted by the law, so neither alternative is acceptable.

MS. KINDALL: May I make a comment?

MS. RUWART: Your name, please, for the record?

MS. KINDALL: Oh, I'm sorry. Ami Kindall.

With regard to state assessee matters, by the way, the law is different from the cases you're citing. Taxation Code 743 specifically provides state assessee matters have to be held in open session, so that law is not applicable to the very types of cases you're most interested in. I'd just like to have that be on the record.

MR. MICHAELS: Well, that is not inconsistent at all. Of course there are public sessions, but how does that conflict with what the law itself is? The Board -- nothing shall prevent -- this is Bagley-Keene -- the Board from holding closed sessions.
for the purpose of hearing confidential information. That's exactly what's going on here. The Board can close its session for a --

MS. KINDALL: Not for state assesseee matters.

MS. RUWART: May I just -- may I just interject? This is an interested parties meeting. We're trying to get different points of view and comments, not to revolve anything. Well, I mean, unless we can. But I don't think we can. Okay. Mr. Kamp.

MR. KAMP: I would note further 743 is -- the way it's worded, it says state assessees may assess petition hearing shall be open to the public, comma, except that the Board members may confer after the taking of evidence with staff, which by implication can't confer in closed session with anybody else.

And then you have Prop 59, which is now the law, effective for about a year, that you could construe every statute requiring open meetings or open records broadly and anything limiting that narrowly, so -- and that's -- and the GATX case arose out of the private railroad car tax. There's no statute like 743 that would govern any of those hearings.

MS. RUWART: New points. Yes.

MR. GOLDBERG: This is Lenny Goldberg. I appreciate Mr. Heller's introduction in which he said,
not reflecting, presumably, his point of view, but that
people in the public have said that it is impossible to
follow any cases because you have no underlying
information.

I'll begin by saying I'm speaking in favor of
the second alternative. And it's ironic because, in a
court context, the proceedings of the court are on the
record. Documents that have been filed are public
documents, and what the taxpayers say and what the
Franchise Tax Board or opponents are saying is in a
court filing.

Now, what's ironic here is that we have an
unusual situation here, as Mr. Vinatieri said, we have
elected officials, so that elected officials more so
than a judge who may or may not -- is elected, but in a
different context -- we need to be able to know that
elected officials are actually doing their job in an
honest, direct manner, weighing the evidence, looking at
these cases appropriately.

So then the argument becomes, if we do not know
that an elected official is actually acting on the basis
of the record that's before them, we cannot hold them
accountable.

And so I really appreciate the staff
alternative. It does make it clear, because I know in
cases of my own where I've tried to find out what's going on, it's very, very difficult to hold any accountability, to provide any accountability for a decision on a case.

The second alternative provides a great deal of that with presumably appropriate protection for the taxpayer and then the section preservation of harmful information.

Now, one more comment. This may be a legal matter, and those of you who have done state assessees cases can say this is the law and not for interpretation by the Board of Equalization, but I find it tremendously ironic that anyone in the world can know what anybody's home and land are valued at, or any business, you know, Intel or Cisco or any business in the state of -- any business or land in the state of California can pull those up on assessor's records, usually remotely now on a computer, and yet the --

MS. MANDEL: That's not what he's talking about.

MR. GOLDBERG: No, no. I know. But this gets to the question of property tax. That particular pieces of land, the value of particular telephone poles, shall we say, or switching equipment, or -- but really in terms of just raw land owned by a utility, we cannot get
access to those values.

Now, if that's a legal matter, I'll stand corrected. If it's not a legal matter, then state assessee appeals should make public what the sum breakdown beyond here's the total value of all of our land and equipment.

MR. HARRIS: Lenny, this is Bill Harris from Intel. You know, I guess what I'd like to make a point is for local property taxes, yes, you can find out what our land is valued at as of Prop 13. It doesn't tell you what the land is valued, what its value is now. It doesn't give you market value. It used to before Prop 13, but it doesn't anymore. Same with the buildings. And there is no way you can find out -- you can get a value on our personal property, but you can't get all the details, Lenny. They can't provide that data.

MR. GOLDBERG: That's questions of levels. And, Bill, I would say that in a -- I've looked at a lot of property data for businesses such as yours, and because there is so much revision in new construction and reassessment, you get much, much closer, particularly with regard to building, if not land, to what market value may be. In any case, the assessed values are exposed to the public. They certainly are at
time of sale. They are not for state assesses. 

MS. MANDEL: But, Lenny, they are for state
asseses. The unitary value of all the property and
its allocated value --

MR. GOLDBERG: To the counties.

MS. MANDEL: -- to the counties is public
information. It's the Board roll, and you can go look
at it.

MR. GOLDBERG: Not broken down by, let us say,
the land holdings of Pacific Gas & Electric.

MS. MANDEL: There is a separate -- the
allocated values, there's an allocated value to the
counties and there's a value to the land.

MR. THOMPSON: Ken Thompson, Valuation
Division. The Board roll has, with the exception of
railroads, has fallen under the statute. The Board roll
has individual land parcels of every state assessee
listed on the Board roll by county. It's public record.

MR. GOLDBERG: I stand corrected.

MR. MICHAELS: And you can be corrected on
something else, too. You suggested that -- you seem to
disregard the notion of a submission of evidence under
seal. This is the aberration here. The rule in courts
of law, every court of law in the state of California,
in the United States of America, every court of law
recognizes and provides for the submission of confidential information or information that's otherwise sensitive under seal.

MR. GOLDBERG: And this rule does that.

MR. MICHAELS: Every court of law.

MR. GOLDBERG: And this rule does that, too.

It says that if you are -- if you have -- it might be harmful to the taxpayer, you can do that. But in general, all of the information that is available in a court of law is not available to anyone trying to hold a Board of Equalization member accountable for the decisions they may make.

MS. RUWART: May I interject? This is good. This is all good stuff. What I'd like to do is, these were good general comments about the general policies of pro and con of each provision. I'm sure there's other thoughts. What I'd like to do at this point is, putting aside the legal issues for the moment, for the moment, yes, because, No. 1, I'm going to say, the Board believes that it has the legal authority to enact either of these alternatives. That obviously is questioned by some. We are more than happy to accept alternative legal analyses. We've talked about the main points of one of those lines of approach here. I think we got them for the record.
What I'd like to do now is putting aside the legal questions, let's talk practicalities and policies. And really, even putting aside broad policies for the moment, let's go through the first alternative A-B-C-D-E, get the technical issues out, do the same for the second alternative, and then rope it back for general pro and con or suggestions, just to structure the conversation a little bit.

MR. MICHAELS: That's great. And just if I may make one observation, there are a couple of earlier sections, I think, that are implicated in our focused discussion about 5033, mainly 5020 and 5022(a)(3)(E).

MS. RUWART: And what I would like to do is, I see that, I see 5020, and that's a general -- that's a reference. And, I'm sorry, what was the second one?


MS. RUWART: Yes. It's on top, very top of page 23.

MR. MICHAELS: Yeah.

MS. RUWART: I'm going to make a judgment call right here and say that we can discuss those issues in their numerical order. I see how they would be implicated, but I think that it's probably more constructive to do 5033 first.
MR. MICHAELS: Thank you.

MS. RUWART: Okay. That said, 5033 is intended to be our current procedures, and a codification for our current procedures and policies.

Aside from the legal question, does anybody --

MR. MICHAELS: I'd like a clarification. In (b), it says, the fourth line down, it says, "Open to public inspection unless exempted."

MS. RUWART: I'm sorry, I was going with Section (a). I'm sorry, Subsection (a), aside from the overarching legal question, any issues? Good.

Subsection (b)?

MR. MICHAELS: Could I get a clarification?

Just it says here on the fourth line down, "Unless exempted from disclosure by state or federal law." What does that contemplate?

MR. HELLER: And that's basically, if you're looking at 5033, the reason it gets to our current policy with that statement is because those confidentiality provisions take care of those State and federal laws that prohibit disclosure.

And under the Board's current interpretation of the waiver applicable to oral hearings, basically that waiver would not apply to any information that wasn't actually discussed at the oral hearing on the record.
and, therefore, any information that wasn't discussed on
the record would not be exempt from disclosure under
this provision, because of the confidentiality statute.

MR. MICHAELS: Without again arguing the law or
anything, if I say, for example, the words "cost
indicator," have I then opened everything underlying my
cost indicator to public disclosure?

MR. HELLER: Just exactly what you said on the
record, and we could provide a transcript of that.

MS. KINDALL: Is that for State's -- Peter,
you're just in a different category from most everybody
else because you said state assessee matters and the law
just happens to be different there. I know we're always
going to disagree on this.

MS. MANDEL: In this example -- sorry. Marcy.

If, say, an appeals tax party came in and said,
"My Schedule A," and the only thing involved was my
interest deduction, does my whole Schedule A all of a
sudden --

MS. KINDALL: There's a series of documents on
State assessee's hearing.

MS. MANDEL: I'm not talking about State
assessee. Income tax returns.

MR. VINATIERI: One at a time.

MS. RUWART: One speaker at a time, please.
MR. HELLER: Let's say we were talking about a business tax scenario. As I indicated earlier, this is a not really applicable to Franchise Tax Board appeals because there is statutory authority for the full disclosure of almost basically all the information that the Board receives with regard to an appeal from the Franchise Tax Board.

And, so, let's say we're in a business tax matter and a taxpayer was petitioning an issue dealing with sales of interstate commerce, and that's something that would be taxed by California, because it's interstate commerce, and they simply said "my sales" and "interstate," would that necessarily allow the Board to disclose every word that we have that lists every transaction, then, in interstate commerce? Absolutely not.

Under 5033 first alternative or the Board's current policy, we would not disclose that.

The person who made a Public Records Act request could get a copy of the hearing transcript where you actually said "transaction" and "interstate commerce" and see who said that, and that would be basically the limit, unless we took those schedules, some Board member or the taxpayer actually introduced it into the record on the hearing. Absent that, they are
not disclosable public records currently or under the first alternative.

MS. PELLEGRINI: Peter, the other thing is Carol Minden's AB 1752, which basically said when it comes to the tax programs, we don't have to provide the information, but when it comes to every other piece of information given to the Board members, it needs to be out there in the front for you.

So it was very specific about not including the tax requirement.

MR. MICHAELS: Okay. I remember that.

MS. PELLEGRINI: And that kind of is exactly what this wording --

MS. RUWART: Was intended to capture.

MS. PELLEGRINI: -- was intended to capture, was that particular realm.

MS. RUWART: Any on Subsection (b)?

Okay. Subsection (c) talks about the minutes of the meeting.

Subsection (d) is a couple of provisions about transcripts.

Is there any comments on (d)(1)?

(d)(2)?

(d)(3)?

(d)(4)?
(d)(5)?

Or (d)(6)?

Very good.

Moving on to 5033, the second alternative, were there any particular comments on 5033(a)?

MR. MICHAELS: Yes, I note -- Peter Michaels speaking.

I notice that the term "hearing" is defined on page 5 to include a written presentation. "Hearing" as defined means a taxpayer's oral or written presentation before the Board during Board meetings.

So does that mean here, I guess in either scenario, that even if a taxpayer waives the hearing, that by submitting a writing for consideration by the Board, without an oral argument, that there is the risk of proprietary and confidential information being disclosed?

MR. HELLER: No. That's not the case, and I thank you for pointing out the difference in the definitions though. I definitely need to stay aware of that.

But essentially the way that this works is that the 5033 economic alternative is just providing -- is -- really only states the bare bones of the first alternative.
And then as you can read on 5033.1, the condition is the actual waiver on requesting an oral hearing, and that's right in 5033.1(b) where it says, "If a taxpayer submits a written request for an oral hearing before the Board," and so it lets them do that, and then also as part of the provisions dealing with protection of harmful information, at least the way they're currently written, it would require the Board to make a ruling on their request in time for the taxpayer to withdraw their request for an oral hearing and still preserve confidentiality.

So it's really designed so that a taxpayer can request an oral hearing, get through the process, be requesting that certain information be kept confidential, and if that's denied and there's now this -- there's now a situation where information they don't want disclosed is to be disclosed, they can withdraw or waive their request for an oral hearing at that time.

MS. MANDEL: What you see on page 34, Effective Date of Waiver, Peter.

MR. HELLER: Correct.

MS. RUWART: And to be more succinct about it, the second alternative actually is not as wide open as maybe even arguably as it could be.
We've gone with the Open Meetings Act idea, or if you are seeking the benefit of an oral hearing before the Board, you are now waiving your right to keep secret things that -- keep confidential things that you're talking about in public and your public elected officials are talking about and can be held accountable for.

What we've chosen to say is that that's the line, and if the Board is making a decision on writings, then we're going to continue our current policy essentially.

This may or may not be desirable, but this is what the alternative contemplates in its current form.

MR. HELLER: Is that okay? Does that answer the question?

MS. RUWART: Yes.

MR. NIELSEN: I had a question. You've got "adjudicatory hearings."

MS. RUWART: That may not be the best word. Was that in (a)?

MR. NIELSEN: That's in (a). It wasn't in the first (a).

MS. RUWART: Okay. We will take a look at that.

Anything else on Subsection (a)?
Subsection (b)?

Okay. Subsection (c)? Transcripts again. I
don't know why there's only three. Maybe we could make
a cross-reference instead. I'm just kind of looking at
that. Oh, I know why. We just have to -- you would
adopt one or the other alternatives. That's why. So
we'll have to just make sure we conform all that,
conform to the alternative it is from.

The next section is 5033.1, the waiver of
confidentiality, and the second alternative.

Subsection (a), this describes the waiver
mechanism and how we get there. Subsection (a) deals
with waivers of Franchise Tax Board. Any comments with
respect to Franchise Tax Board matters, any comments?

MR. HELLER: I think also that does add a
little bit of importance especially to taxpayer appeals
from the Franchise Tax Board who may or may not be aware
that they just made their entire -- that entire dispute
before the Franchise Tax Board a public issue by
appealing to the Board.

And we do -- it would be preferable if they
could weigh the consequences before making their
decisions. I know -- I think there's some FTB staff who
let the taxpayers know that as well, but it wouldn't be
bad if they could see it in writing.
MS. RUWART: Subsection (b), waiver with regard to essentially our business taxes, timber yield, and special taxes and fees program.

MR. MICHAELS: Peter Michaels.

Speaking to the last sentence of (b) says, "Such waiver shall only apply to information provided to or obtained by the Board that is directly relevant to the issues to be discussed."

Whose discretion is that? Is that the Chief of the proceedings division? Is that a staff appeals division lawyer? Is that -- who gets to decide what's directly relevant?

MS. RUWART: Is that our disclosure officer?

MS. KINDALL: That's actually one of my concerns with this action, regulation change.

MS. RUWART: Agreement?

MS. KINDALL: We're agreeing.

MR. PETERS: We're friends.

MR. HELLER: We haven't fleshed out a mechanism yet.

MS. RUWART: But any thoughts about that?

MR. NIELSEN: The other thought is, is the taxpayer going to be notified of those such requests? They should have the ability to comment on what they think is relevant and not relevant and whether something
should be disclosed or not.

MS. KINDALL: I think it has to be -- you cannot have a discretionary standard that somehow staff is deciding what was relevant and what is not. You have to basically go with the documents that went to the Board members or the documents that were submitted and that's what has to happen; otherwise, you won't have a functional rule.

MR. NIELSEN: The problem with that is that Franchise Tax Board or the Board of Equalization can submit a whole slew of stuff.

MR. MICHAELS: Talking about sales tax here.

MR. NIELSEN: Or same, any situation. Sales tax they can put in a whole file. It's not relevant to half of the stuff that's in debate, you know. Just like the example, interstate commerce sales, they can put in a whole audit that has a whole lot of other stuff in there and you may have one interstate sale that's being questioned.

You know, I don't think you're going to come up with a bright line.

MR. MICHAELS: You can have an audit with 11 issues, only one of which is being contested.

MS. KINDALL: You cannot expect staff to go through what were the issues that were relevant and
which documents pertain to those. You have to have at a
Board meeting what is -- you have an actual procedure
where you follow an existing rule, and submitting
documents into evidence, and those are documents that
become part of the record. And the other party can
object to that submission.

    MR. KAMP: I don't have -- I think in court
it's assumed that basically anything that's filed as
part of a motion is public record.

    The stuff that led up to the filing, the
depositions and everything else, is not necessarily
public record.

    But that is a bright line that is a fairly
bright-line test. And the problem is just saying
everything is confidential. I don't think you can make
that stick after Prop 59. Some journalist is going to
complain if you have a rule that's just so broad that it
covers everything.

    MR. NIELSEN: Even in court now it's hard to
keep things confidential because they easily can go in
there and get things unsealed.

    But I think your proposal, yeah, if there's a
record of what's being entered into by both parties and
all that kind of stuff, that's better than the way it is
now.
MS. MANDEL: Well, Richard's point is, when you're speaking about -- or part of the point that I'm hearing is that when you're talking about business tax matters and special tax matters where the Board is the administrator of the tax, the taxpayer's information with the Board is confidential information. Their audit information, everything is confidential. Just like you can't go ask FTB to give you the audit on so-and-so. It's confidential taxpayer information, tax return information, confidential taxpayer information.

What I'm hearing is, okay, so I have this whole audit, I have my whole file, and I've got one problem that I would like the Board to actually decide. And that's the only part -- you know, I understand I'm going to a hearing before the Board, I'm going to talk, so the whole world is going to know that I had this, you know, alleged interstate sale and they're going to know everything. But I've got all this other junk in my audit. I've got my return. That's all confidential.

All the staff has to do -- not that they would ever do this, because -- oh, my goodness -- but, you know, if you're a neurotic taxpayer, you think they could do it, it could happen, they take the whole audit file and send it up as part of the Board meeting materials. And now all of your legal -- you know, your
rights as a taxpayer to have your information --
taxpayer information held confidential is sort of -- is
blown up. That's what I hear you saying.

MR. GOLDBERG: At the Franchise Tax Board you
don't see the results of what may be a multi-year-long
audit. You see only those documents filed relative to
the issue at hand, and those are public. But you
certainly don't see the -- if there's one issue out of
many that's at issue, you don't see the entire audit.

MS. MANDEL: No, you don't. And remember that
the franchise tax matters before the Board are
different, and they've always been of the view that
everything that comes filed with the Board on a
franchise tax matter is a public record, just like it
would be in a court.

The difference is where the Board has been
acting as an administrator of the tax, that that's
taxpayer confidential information. And if there's going
to be this provision, what I'm hearing is, how do you
set the standard of relevance?

So you need to have a bright line that anything
that gets sent to the Board members in the meeting
packet or that they get on the case, that that
confidentiality as to that information, which currently
is part of taxpayer confidential information, would be
waived. What Richard's saying is, well, what would prevent staff from just dumping the world in before the Board and making that -- you know, blowing up the confidentiality?

MR. GOLDBERG: This is Lenny. As somebody who's never been privy to any of that, it would seem to be that perhaps the wrong word -- "relevant" is the wrong word, but really what we're talking about is that is related to or directly on point, not a legal word, obviously, to the issues at hand, which gives direction to staff not to make a subjective judgment but to only submit that material that is related to the issue at hand, which is what, after all, all that you see in a Franchise Tax Board case.

So it really isn't a question of seeing all the background audits. It's only -- the Board is adjudicating a case, and the issues -- the information presented as part of that case is what is on point to the issue at hand.

MS. RUWART: Okay. Very good. I don't want to foreclose any different comments. Yes, sir.

MR. NIELSEN: Just one follow-up, sort of consistent with what I said before on the other one. You know, you disclose to the taxpayer at least something's being requested. Same thing here.
Depending on what the ultimate resolution is, at least
to have the taxpayer have the ability to comment on what
staff's putting in, assuming they know what staff's
putting in, whether they think it's relevant or not,
then at least it, you know, it can be decided before
somebody else asks for it and the Board can rule on
whether it's relevant or not.

MS. RUWART: Okay. So noted.

Just in the interest of time -- this is all
very fascinating and good stuff. (c)(1) A and B just
states the statement of what, when and how you waive
your confidentiality. You do it by requesting your
hearing. Any comments? (c)(2).

MR. MICHAELS: Legal authority, that's a
separate discussion.

MS. RUWART: That is. Thank you for
recognizing that. (c)(2), it restates the same --

MR. MICHAELS: Sorry. Pardon me. What does it
mean here in (1)B? It says "files and application."
What is an application? Is that a petition?

MS. RUWART: No. That's a welfare -- I think
the application is either Article 2, part 13 or --

MR. MICHAELS: Oh, okay. Thank you.

MS. RUWART: (c)(1)B, it's not a petition.
It's either a Section 11 or it's a welfare. Yeah.
MR. MICHAELS: Then paragraph 2, it does use those same words as before, directly relevant, maybe on point.

MS. RUWART: Yes. Very good.

(d), we can have a substantive discussion about this, I'm sure, (d)(1) -- actually, (d)(1) and (2) are the same or similar. Brad, why don't you just summarize them and we can discuss them together, if necessary, (d)(1) and (2), the waivers.

MR. HELLER: Basically (d)(1) and (2) is just designed basically to put an effective date of the waiver so that, as we were just responding to Peter's earlier questions, this is the mechanism that says that even though a taxpayer's requested an oral hearing in the earlier part of this section which, under subdivision (d) -- or (b) -- excuse me -- would trigger this waiver, it's not effective under (d)(1) until the public agenda notice is issued for that hearing.

MR. MICHAELS: There's only ten days before the hearing.

MR. HELLER: So ten days before. And then it's still not effective if they've waived their right to the oral hearing as of that time. And then, as you can see in the next provision, we're going to try to have a response to their request for preservation of harmful
information by that time so the taxpayer can make an
informed decision on whether they really want a hearing
or don't.

MS. RUWART: We felt that gave the maximum
amount of time for the taxpayer to determine what they
wanted to do. Yes.

MR. GOLDBERG: Does (2) apply to Franchise Tax
Board cases?

MS. RUWART: No, because their waivers are as
soon as --

MR. GOLDBERG: So as written.

MS. MANDEL: Yeah. It says (b) and (c), and
FTB would be (a), so it's not covered.

MR. GOLDBERG: Thank you.

MS. KENDALL: So this moves up the timing on
state assessee matters to the beginning.

MS. RUWART: Yes. Until ten days before.

MR. HELLER: Correct. Ten-day change. But it
would help people who want to follow the hearing
actually understand what's going on.

MS. RUWART: And that was the reason behind it.

(e), here are some exceptions. (e)(1),
personal information, this follows standard statutory
and current practice, statutory practice. You don't
even have to worry about your home address, home phone
number, Social Security or federal identification
number. Are there any questions about that, or
comments?

MR. HELLER: I might just quickly add, you
know, the Board is concerned with identity theft and
basically having the ability for somebody to just come
in here with a Public Records Act request and get
thousands of Social Security numbers, names and
addresses. So there may be need to work with it to make
it more appropriate to the particular programs, but it's
definitely something we wanted.

MR. GOLDBERG: Wearing my privacy hat, which I
also wear, I think you want to make sure that there's a
general phrase or other personal identifying
information. If it were credit card numbers or bank
account numbers, which are not -- bank account numbers,
for example, which are not included in here, you would
want to make sure those are not --

MS. KENDALL: We don't actually have the
authority to redact that information. We have kind of
gone out a little bit on a limb and gone ahead and said
that this information is going to come out because
especially in franchise matters it's always there and
it's very sensitive information. But we don't really --
if we go with this route of saying this information
becomes public, we don't really have the authority then
to say but this is not and this is.

    MS. MANDEL: Lenny, is there some privacy
statute that we could rely on for -- I mean, because
sometimes, particularly, like, an income tax case there
might be credit card statements.

    MS. KENDALL: They're in there.

    MS. MANDEL: They're in there and they're
released.

    MR. SPERRING: This is Jon Sperring. Your
dependents' Social Security is on your tax return.

    MS. RUWART: So not just the taxpayer's Social
Security but other individuals as well.

    MR. SPERRING: Yeah. Minor children.

    MR. GOLDBERG: So that's public.

    MS. RUWART: That's public.

    MS. KENDALL: We're doing that. We're on the
side of the angels. No one's going to question us.

    MS. RUWART: We'd like to get the Board the
laundry list. That would be great. You know, in a
moment we're going to jump to 5033.2.

    MS. KENDALL: We have a workload issue right
now. If you start adding those kinds of documents,
you're going to have to have staff redacting it and
you're going to have to come up with the authority for
doing it.

MR. GOLDBERG: You know, in some legislation there has been authority to say you may not use a full number but you can use the last four digits or something like that, and it becomes an automatic question, because there really is no public interest to knowing what the actual account number is.

MS. RUWART: Yes. A part of this, I think, with all -- I'll just put my personal opinion in here -- with all this privacy and all that, it's very important, but also individuals and representatives also need to have some responsibility. And so if you're going to go give a whole slew of credit card data to the Franchise Tax Board as part of your brief, you know, maybe people can work, you know, themselves, "Can I just redact everything but the last four words," or whatever. We're never going to be able to catch -- just for the good reason we're never going to be able to catch everything.

So we are going to try the best we can. We're going to codify what is practical. We want to hear what the laundry list would be, but I'm not going to guarantee everything is going to get in there for the reasons that Ami stated.

(e)(2), Tax Returns. This sounds like a pretty big change. Brad, do you want to?
MR. HELLER: Yeah. Once again, here on this
is -- this has slightly less emphasis than the Personal
Information Act because the Personal Information Act
applies much more broadly and it really is much more
concerned with theft, but at the same time, there's been
some concern and this one also deals with basically all
the programs, but essentially if a person is contesting
simply like one Schedule A deduction, as Marcy was
trying to use as an example earlier, we don't
necessarily think that because the Franchise Tax Board
is submitted the entire personal and other personal
income tax returns that the Board should then go ahead
and provide information to the public on every single
line in there.

And the fact there's a disclosure statement on
some interest in an LLC they sold or that they're doing
a 1031 exchange with some other business property or
whatever isn't really relevant to the public, it's not
relevant to the appeal, it's not relevant to the Board's
decision, so this was just an effort to try to recognize
that. And basically that's just why it's there.

MS. RUWART: So were there any particular
comments on the phrasing of that policy? Great.

MR. GOLDBERG: Is this more restrictive than
the current?
MR. HELLER: Currently we provide basically the entire return as provided by the Franchise Tax Board to the Board, and so this would be more restrictive. So instead, that information on a return that wasn't relevant to the appeal, it wouldn't -- it would be redacted from the version provided to somebody who requested it on a Public Records Act request.

MS. KINDALL: Could you repeat that? I wasn't following.

MR. HELLER: What I was saying is this is more restrictive than current policy in a sense that normally when we receive -- if we receive a return from a Franchise Tax Board, our current policy is that that is now a document that we would produce pursuant to a Public Records Act request and that we would not redact other areas of the return that weren't relevant to the appeal.

This is suggesting that to the extent that there's areas that just have no relevance at all to the issues before the Board, that we would now -- that we would redact those.

MS. KINDALL: I'm not sure, again, one, who is making that determination, and, two, what the authority is? I'm very uncomfortable with that to the point where I'd say I think there's no authority for that position.
whatsoever.

MS. RUWART: Okay.

MS. PELLEGRINI: This is Debbie Pellegrini.
I would just like to kind of let everyone know, back to what Ami is saying what the current process is, and I'll use Franchise Tax Board as an example, when we get a request for a Franchise Tax Board Public Records Act, I have a staff person who makes a copy of the entire thing, takes a felt tip pen, and reading every line, taking out the items. Now, it just so happens the items right there have numbers in them, so somebody can look through and start doing numbers.

But that's where you -- what Ami is saying is a work-load issue we have gotten. And she didn't say this, but some requests have come in and said, "Can I have every appeal that has been filed for the last four months?" And we are talking a tremendous work load to go through. And, you know, I think when you think about this, let's make sure that staff really catches what is the most critical, which is that social security number, and we certainly don't want home addresses going out.

MS. KINDALL: And, again, there's also an authority issue, because what happens, the Franchise Tax Board, normally their materials are confidential and it's at the Franchise Tax Board. There's statutory
authority that says once they have to do a judicial or
administrative proceeding, that information can be
provided. Now, all of sudden we've lost
confidentiality.

Where is your authority to withhold anything?
Social security numbers have their own confidentiality
associated with them, so there is authority there. We
have gone -- again, we've gone out and said we're going
to go ahead on our own authority and take out those
phone numbers and take out those home addresses and take
our chances that there isn't anyone who is going to sue
us on that. Once you go past that, the further you go,
the more you're out on a limb.

We did try and do some legislation this year.
That was the Runner Bill, which would codify what the
Board did. That legislature did, not for this reason
I'm sure, but did not go forward.

We've got two problems here. One is, and I
think more importantly, because we can always get the
legislation if we need it, but there better be some
funding and some body behind that legislation, or you've
created a rule that we can't practically work with.

MS. RUWART: Any comments?

MS. CROCETTE: I just wanted to ask you a
question about your comment that representatives might
want to take some responsibility for it. I mean, is
that a practical way of saying that?

    MS. RUWART: You know, it was just my
completely personal, unofficial, Board opinion, that
when I do things that I have to give people data, I take
my own making sure that I'm only giving them exactly
what I want them to have and they need to have.
Probably my comments should be just disregarded.

    But it's something --

    MS. CROCETTE: It would seem to me like the
vested interest would be mostly theirs. We've got three
million things that we're looking at. They've got one.
So that is a balance at least admittedly.

    MS. RUWART: It's just something to be thought
about.

    Yes, sir.

    MR. GOLDBERG: Yeah, this is Lenny.

    I'd be concerned on FTB cases, since it's
already gone through a winnowing process as to what's at
issue, that there be a further winnowing on as a result
of this.

    MS. RUWART: Okay. Yes. Anything else
different?

    MR. SHAH: Carole?

    MS. RUWART: Yes.
MR. SHAH: Why doesn't the FTB redact the income tax returns and send us what's just necessary?

MS. RUWART: I don't know.

FTB, Neil has a question for you.

MR. LANGSTON: Well, we do partly and partly we don't because almost always the amount of income is at issue. There are a lot of things that are at issue in a Franchise and Income Tax appeal that, for example, to establish that this is the taxpayer's tax return, the current method is, you use the social security number. The name and the address is relevant to verify things.

We do, though, as a policy matter, we don't throw the whole return on there anymore as exhibits. We try to show the relevant parts of the return.

But we believe that, you know, within this sphere of confidentiality is the Board staff and Board members.

And, you know, that's something I suppose we could work on. But I'm not sure that you want to get lots of exhibits with black lines all over the place so you can't really evaluate what the taxpayer is doing.

But, we do -- we have, you know, the new law passed saying we can't have a social security number visible in mailing, and we redact certain federal information when we give an IRS transcript pursuant to
federal law. But in general, I mean, you're always
going to have that balance between getting a full and
fair adjudication. Maybe a Board member or Board staff
might think one of those things that we knocked out was
relevant. Traditionally, it's all been under one big
umbrella. It's when it goes out to the public, people
who aren't parties and aren't part of the Board staff,
that you then do the redaction.

And that's so that you -- really so the Board
members and staff can really look and see maybe there's
something they think is relevant, even though it's
confidential.

MS. RUWART: Okay. Yeah, sounds good.

(e)(3), the Exemptions by the Board. Unless
there's phrasing questions with that, it basically
brings us right next to the next section. Are there any
phrasing questions?

MS. MANDEL: The "sensitive information," this
is like when we have one of those HRAs and we try not to
talk about what they really said their personal issues
were.

MS. RUWART: Speaking of Section 50 -- yeah,
5033.2, moving on to that.

MR. MICHAELS: Is there a source for the word
"sensitive"? Is that like in a statute or something?
MR. HELLER: No, it's not.

MR. MICHAELS: Very Californian.

MR. HELLER: Absolutely. Sensitive to the issue is all that really is, without any ability to write a better word at the same time.

MR. KAMP: Both your remark and your remark are too hard to follow. You should both compete with Jay Leno.

What I was going to suggest is my question, does this language, "sensitive," isn't there a statute, isn't there some language that's developed in the court cases on trade secrets or something about what is a trade secret, what is the core of what the courts will protect from disclosure in a lawsuit?

MR. NIELSEN: And that's the issue that you have with the assessment appeals Board at the local level. They have the ability to close the hearing for trade secrets. And I think there's three categories or something. And we're literally fighting over that all the time because some City attorneys or County attorneys will take the position your financial information does not fall within that. Therefore, they won't cover it. Other assessment appeals boards will say it does fall within that.

There are court cases that arguably say some
financial information even falls within trade secrets
and so forth.

So that's the problem I have here. You have
"sensitive," you have the word "harmful," and, you know,
you're going to get back again to who is going to be
interpreting it and applying it, because I can tell you
at the assessment appeals Board level, we go round and
round on that when we make a motion to close a hearing.

MS. RUWART: Well, I'm glad you mentioned that
because by the time we get down to Subsection (d),
Subdivision (d), you will find who is going to make that
decision. We did decide who was going to make that
decision. It's going to be the Chair of the --

MR. NIELSEN: It would be nice to have some
guidelines.

MS. RUWART: So if everybody has read this one,
maybe we should just go through and talk about comments
to (a).

MS. CROCETTE: 5033.2?

MS. RUWART: Yeah.

MR. KAMP: I think you need to -- I think
whatever problems Mr. Nielsen pointed out with the
assessment appeals Board, I think the language that
governs them is probably much narrower than the word
"sensitive." Maybe you could provide some suggestions
for a good alternative.

MR. MICHAELS: Actually in the State Bar submittal here it cites Revenue and Taxation Code Section 1605.4 and provides that any party -- well, it's in the writing from the -- anonymous writing from the tax section, state and local tax committee of the State Bar.

MS. RUWART: Okay. Very good. We will -- like Brad said, this is our -- we just want to put out the general idea. I thought I heard a comment about, you know, what is harmful?

MR. HELLER: I think, too, the only other thing I'd say is that, you know, I mean, we certainly are aware of the term "trade secrets." And it wasn't -- you know, it wasn't a fear of adding confusion by using that term. It actually was an idea that maybe there was more out there to be protected than necessarily trade secrets.

I know we received comments that, you know, that this type -- that basically the disclosure of any information can have a chilling effect, even if we don't change our policy, but by having the current policy that we do have. And so we were kind of experimenting with this language in the idea of inviting comments to help us get towards the idea of what about the person who's