



April 30, 2019

Mr. David Yeung, Chief
c/o Ms. Angie Berry
County-Assessed Properties Div.
State Board of Equalization
450 N Street, MIC: 73
P.O. Box 942879
Sacramento, CA 94279-0073

RE: CATA Responses to the State Board of Equalization Interested Parties Topics (3)
Request for Inform. Appl., 2) Postpone. & Continuances, 3) Use of Confidential Inform.

Dear Mr. Yeung:

Please find attached the California Alliance of Taxpayer Advocates (CATA) responses to the email communication provided on March 28, 2019 where the California State Board of Equalization's (BOE) Interested Parties (IP) topics and draft documents were presented. CATA's responses appear in the order of issues set forth in your communication – Request for Information Application (Form), Postponements & Continuances, and Use of Confidential Assessor Information.

Request for Information Application – Revenue & Taxation Code (RTC) 441(d) Form

We have recommended revisions to the form which include a statement that taxpayer provided information will be held confidential (RTC Section 451). We suggested changes that will simplify the letter and provide for less intimidating language to the average taxpayer.

Postponements & Continuances (Assessment Appeals Board Manual – P. 97-98)

We have provided suggested language in both the Postponements & Continuances portion of the Assessment Appeals Manual, P. 97-98.

Use of Confidential Assessor Information (De-Identifying of Confidential Information)

CATA is appreciative of the BOE & California Assessor's Association's (CAA) participation in the IP Meetings over the past year. We understand the complexity of certain topics especially, the "Use of Confidential Information" which requires time to review the issues it presents.

Mr. David Yeung, Chief

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We further recognize the importance of continuing our collaborative and open discussion with the parties in this IP Project. However, we do not believe that the BOE Staff's proposed Draft on this topic is consistent with current law. In fact, the BOE Draft proposed language would be contrary to law. The use of confidential information from 3rd Party Taxpayers is prohibited unless a waiver is obtained from that 3rd Party or a protective order is provided by the Superior Court. The CATA Draft on this topic outlines the proper steps to follow in respect to both Confidential Information from the taxpayer's confidential information and any 3rd Party information that is utilized by the Assessor's Office (See Attachment - CATA – Use of Confidential Information by Assessor's in Assessment Appeals Board Hearings, P. 1-2).

Also, "De-Identifying" or "Redaction" of Information does not cure this prohibited use by the Assessor. It does not provide the taxpayer with the ability to review nor properly examine the data when utilized by the Assessor in an Assessment Appeals Board Hearing. The reliability of this de-identified or redacted information is at issue. These activities limit an Assessment Appeals Board from making a determination of whether the information is reliable or credible. These activities also affect the basic principles of a "Fair Hearing" for a taxpayer. These activities should be presented as examples of what is prohibited.

It was communicated under the BOE Staff statement last year, "In general, the assessor's use of 'information' obtained pursuant to section 441 is limited to either market data or information obtained from the taxpayer seeking the reduction, and not relating to the business affairs of another taxpayer. (*Chanslor-Western Oil & Dev. Co. v. Cook* (1980) 101 Cal.App.3d 407.) **Of course, the confidential information of third parties may not be disclosed even in a closed hearing.** *Chanslor-Western Oil v. Cook* (1980) 101 Cal.App.3d 407; *Trailer Train Co. v. State Bd. of Equalization* (1986) 180 Cal.App.3d 565" (See BOE Assessment Appeals Process Item 11, P. 12, 03/23/18 Correspondence – April 25, 2018 Meeting) (Emphasis added).

The BOE Draft omits reference to the "current law" for locally assessed properties (See *Chanslor-Western Oil & Dev. Co. v. Cook*, 1980). The exclusion of any reference to the *Chanslor-Western Oil v. Cook* in the BOE Assessment Appeals Manual under this topic is inappropriate and requires BOE Staff review. It is our belief that the presentation in this BOE Draft with the "Trailer Train" case reference only does not provide the proper guidance for several reasons. One reason is that this reference applies to centrally assessed properties compared to locally assessed properties which is an important distinction that we address in our discussion about the use of 3rd Party information (See Attachment - CATA – Use of Confidential Information by Assessor's in Assessment Appeals Board Hearings, P. 4).

We have provided the CATA proposed draft for this portion of the Assessment Appeals Manual which would replace the entire section presented for P. 102. If these CATA proposed changes are both not considered nor included in the Assessment Appeals Board Manual, then the BOE Draft P. 102 as written should be simply removed from this IP Project for the reasons provided in the CATA Draft Documents (See Attachment - CATA – Use of Confidential Information by Assessor's in Assessment Appeals Board Hearings, P. 1-4).

Mr. David Yeung, Chief

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Enclosed are the CATA Draft Documents with Proposed Revisions and the Original BOE Draft with the specific new language, words deleted, and line references for "Tracking the Changes". We respectfully submit these responses to your office.

If you should have any questions or concerns, please contact us or Mr. Marc Aprea at (916) 761-4347. On behalf of CATA, we thank you in advance for your time and consideration in these matters.

Sincerely,

CALIFORNIA ALLIANCE OF TAXPAYER ADVOCATES



Peter Kotschedoff
Board Chair



Michael Brennan
President

Attachments (CATA Response to the BOE Interested Parties – Request for Info. Application)
(CATA Response to the BOE Interested Parties – Postpone. & Continuances)
(CATA Response to the BOE Interested Parties – Use of Confidential Inform.)

cc: Honorable Malia Cohen, Chairwoman (w/ Attachments)
Honorable Ted Gaines, Member (w/ Attachments)
Honorable Michael Schaefer, Member (w/ Attachments)
Honorable Tony Vasquez, Member (w/ Attachments)
Honorable Betty T. Yee, State Controller
c/o Deputy Controller Yvette Stowers (w/ Attachments)
Henry D. Nanjo, Chief Counsel, Legal Department (w/ Attachments)
CATA Board of Directors

1 **ASSESSOR REQUEST FOR INFORMATION**
2 **PURSUANT TO REVENUE & TAXATION CODE**
3 **SECTION 441(d)**
4
5

For Assessor's Use Only:	Owner Name: Property Location: Assessor's Parcel Number(s): Account Number or Unsecured Bill No.: Due Date for Requested Information: <input type="checkbox"/> This request is being made in conjunction with an Assessment Appeals Board hearing: Applicant's Name: Assessment Appeal Application Number(s) (if assigned): List Appeal Application – Part 6 (The "Facts"): Assessment Type (Supplemental, Annual, Escape): Appeal Issue(s): Hearing Date (if assigned):
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6
7
8 Various provisions in the Revenue and Taxation Code grant assessors the authority to obtain information to fulfill
9 their assessment duties. This request for information is made pursuant to the authority granted by Revenue and
10 Taxation Code (RTC) Section 441, subdivision (d), which states:

11
12 At any time, as required by the assessor for assessment purposes, every person shall make available for
13 examination information or records regarding his or her property or any other personal property located on
14 premises he or she owns or controls. In this connection details of property acquisition transactions,
15 construction and development costs, rental income, and other data relevant to the determination of an
16 estimate of value are to be considered as information essential to the proper discharge of the assessor's
17 duties.
18

19 Therefore, you are required by law to comply with this written request for information, if this information is relevant
20 and available. All Information requested by the assessor or furnished in the property statement shall be held secret
21 by the assessor (RTC Section 451).
22

23 The information specifically being requested is listed on the enclosure. If you are uncertain as to what information is
24 being requested or need more time to comply with the request, please contact the assessor's office employee
25 whose name and contact information appear on the enclosure. However, if you provide false information *even if*
26 *you do not sign a penalty of perjury statement*, please be advised that you may be subject to criminal penalties (See
27 RTC §§ 461, 462, and 468.)
28
29

1 If the Assessor has checked the box above indicating that this request is being made in conjunction with an
2 Assessment Appeals Board (Board) hearing and based on the information you provided, the Assessor may arrive at a
3 Value conclusion that is satisfactory to you. If this occurs, the Assessor will make a recommendation to the
4 Board that your assessed value be changed to that value.

5

6 If you still do not agree with the recommended value, a hearing will proceed. If you do not comply with this
7 request, your hearing may be delayed. If you appear at the hearing and introduce the information that had been
8 requested, the assessor is entitled to a continuance of the hearing to examine the new information. If you do not
9 bring the requested information, you will have an opportunity to explain to the Board members or hearing officer why
10 you have not complied with the request for information. They will decide whether to hold the hearing without the
11 information, whether to continue the hearing in order to give you time to comply with the request or whether other
12 action should be taken by the assessor or by the Board.

13

14 For more information about the assessment appeals process, including how to obtain information from the assessor,
15 please see the State Board of Equalization's *Assessment Appeals Manual* at:

16 <http://www.boe.ca.gov/proptaxes/asmappeal.htm>

Use of Confidential Information by Assessors in Assessment Appeals Board Hearings

The Handling of Confidential Third-Party Information by Assessors

California Revenue and Taxation Code Section 451¹ states that information which assessors obtain from taxpayers shall be “held secret.” Section 408(a) removes the “held secret” requirement for certain types of information called “market data,” which is defined in Section 408(d) and Section 408.1. Section 408(d) also says the “assessor shall not display any document relating to the business affairs ... of another.” And Section 408.1(b)(7) prohibits an assessor from listing for public use information about a taxpayer’s business or the income generated by the taxpayer’s property. California Government Code Section 6254(i) contains a similar provision: “nothing in this chapter shall be construed to require disclosure of records that are: ... (i) Information required from any taxpayer in connection with the collection of local taxes which is received in confidence and the disclosure of the information to other persons would result in unfair competitive disadvantage to the person supplying such information.”

In 1980, the California Court of Appeal in the case of *Chanslor-Western Oil v. Cook* stated “[T]he assessor cannot on his own initiative disclose confidential information.” (101 Cal.App.3d 407 at 415.) The Court of Appeal’s decision in *Chanslor-Western* was made during an appeal from an equalization hearing before an assessment appeals board. Referring to Sections 451, 408 and 441, the appellate court stated:

Respondent argues that in defending his assessment of the Chevron property the assessor has the right to use any information in his possession, even if it relates to the business affairs of another taxpayer. Respondent relies upon section 1609.4, which sets forth certain procedures to be used in a hearing on an application for reduction of assessments, and which states in part: “The assessor may introduce new evidence of full cash value of a parcel of property at the hearing and may also introduce information obtained pursuant to Section 441.” However, the procedural rules for the conduct of such hearings are subject to the qualification that they shall not “be construed as permitting any violation of Section 408 or 451.” (§ 1609.6 (formerly § 1609.1).) In order to construe all sections harmoniously, which we are required to do (Code Civ.Proc., § 1858), we must conclude that the assessor’s use of “information obtained pursuant to Section 441” is limited to either market data or information obtained from the taxpayer seeking the reduction. (Ehrman and Flavin, *Taxing California Property* (1st ed. 1967) § 270, pp. 247-247 & fn. 9; Id. (2d ed. 1979), pp. 357-358.) (Italics added)

The concurring opinion by Justice Kaus in *Chanslor-Western* stated that “de-identifying” confidential third-party information conflicted with an assessor’s obligation to hold such information secret:

Obviously, this provision [“the assessor shall not display any document relating to the business affairs ... of another”] cannot be circumvented by withholding the

¹ All subsequent references to the Revenue and Taxation Code are designated by “Section.”

document and displaying copies or summaries containing the same information. (101 Cal.App.3d 407 at 416-417.)

The *SBE Assessment Appeals Manual* discusses the use of confidential third-party information by assessors as follows:

Confidential documents, as described in sections 408 and 451, obtained by the assessor while discharging the duties of his or her office may not be disclosed to the public or competitors of the taxpayer unless a court so orders. If the confidential information relates to the applicant, it may be used in the course of the appeals hearing. (*Id.* at p. 102.)

Should any such evidence include confidential information, it should only be admitted with the permission of the affected parties, or be deleted prior to introduction. (*Id.* at p. 81.)

There are two possible ways in which an assessor may use confidential third-party information in an assessment appeals board hearing:

1. By obtaining a court order expressly permitting disclosure of the confidential information under Section 408(e)(3)); or
2. By obtaining a waiver from the third-party taxpayer who supplied the confidential information to the assessor.

Other methods for using confidential third-party information have been suggested, such as allowing an assessment appeals board to review the confidential information *in camera* (privately off the record), or closing an assessment appeals board hearing to the public under Property Tax Rule 313. These methods do not avoid the prohibition against assessor disclosure of confidential information set forth in Section 451 and related statutes.

Using De-Identified Confidential Third-Party Information

Another method used by assessors to introduce confidential third-party information in local assessment appeals board hearings is to “de-identify” or redact the confidential information. This practice does not relieve an assessor of his or her obligation to maintain the privacy of such information. In addition, the practice raises the following issues:

1. Taxpayers have a constitutional due process right to cross-examine an assessor’s evidence in tax proceedings. (*Universal Consolidated Oil Co. v. Byram* (1944) 25 Cal.2d 353, 360-363; *Interstate Commerce Comm’n v. Louisville & N. R. Co.* (1913) 33 S.Ct. 185, 187-188.) The right to cross-examination is discussed in Property Tax Rule 313(e): “[t]here shall be reasonable opportunity ... for cross-examination of all witnesses and materials proffered as evidence” An assessor’s use of de-identified confidential third-party information limits a

taxpayer's ability to cross-examine evidence presented at an assessment appeals board hearing.

2. When a third-party taxpayer submits confidential third-party information to an assessor, he or she expects the information will be held in confidence under Section 451. An assessor's use of confidential third-party taxpayer information during an assessment appeals board hearing, even if the information has been de-identified, may motivate third-parties not to disclose information to the assessor. (*See Gallagher v. Boller* (1964) 231 Cal.App.2d 482, 491 [main purpose of confidentiality requirement in property tax statutes is to encourage full disclosure by the taxpayer supplying the information].)
3. Assessment appeals boards must rely on "proper evidence presented at the hearing" and "proper evidence admitted into the record" in deciding cases before them. (SBE Property Tax Rules 302(c) and 313(e); also Property Tax Rule 324(a).) Property Tax Rule 324(a) requires assessment appeals boards to examine "the factual data, the presumptions, and the estimates relied upon." Assessment appeals boards must also determine whether the evidence presented at a hearing is reliable and credible. Unreliable evidence may receive little weight or no weight (in which case it should be excluded). (SBE, *Assessment Appeals Manual*, p. 79.) As explained in the *Assessment Appeals Manual* at page 103:

In order to evaluate evidence and render a decision, the [assessment appeals] board members must determine the weight each piece of evidence merits. Weight is not based on quantity, but rather depends on credibility, that is, the effect of the evidence in inducing belief. ... In order for the appeals board members to properly adjudicate any matter before them, they must be presented with sufficient information to render a decision. ... A decision should not be based on inconclusive evidence.

The unreliable nature of de-identified confidential third-party information may limit an assessment appeals board's ability to fully examine such information in order to determine whether it is reliable and credible, and to determine if such evidence is conclusive or inconclusive.

4. Courts reviewing assessment appeal board decisions must evaluate the evidence presented at the appeals board hearing using the substantial evidence review standard. If the evidence supporting an assessment is based on de-identified confidential third-party information, it limits the reviewing court's ability to evaluate whether there is substantial evidence in the record to support the assessment appeals board's decision.

Trailer Train and Use of De-Identified Confidential Third-Party Information

The Court of Appeal's decision in *Trailer Train Co. v. State Board of Equalization* (1986) 180 Cal.App.3d 565 refers the use of de-identified confidential third-party information. The appellate court's decision does not address the use of de-identified information in the context of hearings before assessment appeals boards. SBE Annotation No. 260.0095 (January 14, 1994), which discusses the details of the *Trailer Train* litigation, also does not consider the use of de-identified confidential third-party information in assessment appeals board hearings.

Several reasons have been given for distinguishing *Trailer Train* and Annotation No. 260.0095 from the situation in which de-identified confidential third-party information is used in local assessment appeals board hearings:

1. In *Trailer Train*, the property being assessed was privately-owned railcars, not real property land and improvements as is typically the case in local assessment appeal proceedings. Land and improvements are location-specific, unlike the railcars in *Trailer Train*. De-identification of locally-assessed property (land and improvements) information may include redaction of location information which makes evaluation of land and improvements more difficult.
2. *Trailer Train* involved an SBE equalization hearing for centrally-assessed property, and not an assessment appeals board for locally-assessed property. In SBE equalization proceedings, the SBE "is both the constitutionally assigned assessor and the statutorily designated appeals board." As the trier-of-fact in *Trailer Train*, the SBE was "already privy to the secret business records which were submitted to the [SBE] via the property statements of the various assessees." (See Annotation No. 260.0035, 2nd paragraph.) This differs from local assessment where the assessment appeals board is a separately constituted and independent trier-of-fact. Thus, in SBE hearings the SBE has knowledge of confidential third-party information as both the assessor and the trier-of-fact. In local equalization proceedings before assessment appeals board, the appeals board does have access to the confidential third-party information because the assessment appeals board is not also the assessor.
3. In *Trailer Train*, the SBE's staff de-identified information of eight taxpayers who were referred to as assessees A through H. When the taxpayer objected to use of the de-identified information, the SBE's "staff offered to produce copies of the eight property statements with the names of the submitters blanked out in order to meet the minimum requirements of Revenue and Taxation Code, subsection 11655(a)." (See Annotation No. 260.0035, 2nd paragraph.) Section 11655(a) only applies to centrally-assessed property equalization hearings before the SBE – it is not applicable to local equalization proceedings before assessment appeals boards.