ASSESSMENT PRACTICES SURVEY

A REPORT ON THE CONFIDENTIALITY OF COUNTY ASSESSORS' RECORDS

1989

PREFACE

The State Board of Equalization is required by law to periodically audit the assessment program in each of the 58 counties. The results and recommendations arising from these field and office audits are published in assessment practices survey reports. In addition, the Board makes periodic surveys of specific subjects that have a significant impact upon local property taxation. These special topic surveys, authorized by Sections 15640 and 15643 of the Government Code, are conducted as needed. The findings of these selective surveys are published and distributed to all county assessors, the Members of the Board, and the Board staff who are involved with the particular survey issue as well as appropriate legislative offices. Copies of these surveys are also available to concerned individuals in the private sector.

The subject of this special topic survey is the confidentiality of assessor's records. The goals of the report are:

1. To identify problems encountered by county assessors in defining what data and records are confidential, and in complying with statutory and judicial requirements of confidentiality;

2. To clarify which governmental agencies have access to confidential data and under what conditions;

3. To identify the specific provisions of law that govern disclosure;

4. To summarize data regarding how statutory limits on disclosure affect the operation of the county assessor's office.

The vehicle for obtaining the information pertaining to the practices of the various county assessors was a questionnaire, containing 29 questions, that was sent to all county assessors in 1986.

We extend our appreciation to the county assessors and their staff members and to all others whose cooperation has made this report a valuable tool for use in improving California's property tax program.

This survey was written by the staff of the Assessment Standards Division, Department of Property Taxes, and adopted by the Board on August 1, 1989.

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I. INTRODUCTION

In the not too distant past, county assessors operated in a very different environment than they do today. Almost all of the data collected in connection with the assessment of property was considered confidential and available only to a few county employees and state agencies. Even aggrieved taxpayers were seldom able to obtain the information needed to effectively challenge their assessments.

Over the last 20 years, numerous factors have greatly limited the assessor's control of assessment and appraisal data. Many changes have occurred through legislative and judicial requirements, but even more changes have occurred due to the expanded use of computers in the assessment process. Data that was once only available through tedious, time consuming manual search is now available by pressing a few console keys. Limited only by computer capacity, a county assessor can call up a vast array of appraisal data such as the characteristics of improved residential parcels, recent selling prices, building costs, commercial and industrial properties income and expense data, and land characteristics for rural appraisals. The ready availability of data has led to increased pressure for access by both the public and private sector. Some county assessors have found it advantageous to exchange sales data with private real estate information services in order to increase the county's data base. Other assessors are finding it difficult to gather and store sufficient sales data.

In addition, the Legislature has not been idle in the area of confidentiality. Even before the results of the Board confidentiality questionnaire could be tabulated, Section 408.3 was added to the Revenue and Taxation Code, specifying that assessor-maintained information relating to property characteristics is a public record and open to public inspection.

In Chapter II, Conclusion, we will clarify the current status of assessor data by reviewing the questionnaire findings, identifying specific provisions of law that govern disclosure of information, and providing Board guidelines.

II. CONCLUSION

A. QUESTIONNAIRE

A summary of the answers to pertinent questionnaire items (see Appendix 1 for the text of the questionnaire and summation of responses) is presented in the following text.

1. Data Sources (Questions 1 and 2)

Answers to questions regarding data sources indicated that most county assessor's offices use a wide variety of sources to obtain data, while at the opposite extreme, one county assessor doesn't request the completion of change-in-ownership or business statements.

2. Information Provided the (General) Public and Assessee

(Questions 3 through 11)

Most county assessors restrict public access to data obtained from change-in-ownership and business statements, audits and business income and expense questionnaires. Information such as telephone numbers, sales terms, lender names, amount of loans and specific business operations is not furnished to the public. Some assessors indicated that the public has access to master property records and working papers, a practice which could compromise the confidential status of the previously mentioned items, if noted on these documents. Answers to Questions 5 and 6 indicate that assessor's offices are supplying many private firms with selling prices.

3. Information Provided Public Agencies (Questions 12 through 16)

Twenty-six county counsels did not provide a definition of "taxing agencies." Of the opinions provided, most defined a "taxing agency" as an agency charged with the process of ascertaining the "taxable value of property" as well as the process of levying a tax.

4. Miscellaneous Issues (Questions 17 through 29)

Question 21 asked if the assessor's office participated in a countywide data base and what, if any, confidential data were included. Analysis of the answers seems to indicate that social security numbers and income and expense data are part of the countywide data base and accessible at any county computer terminal. However, all counties that indicated these items are a part of the data base also indicated that it is only accessible to authorized personnel.

Answers to Question 22 showed a tendency to permit the private sector to tap into county computer systems with on-line access to assessor data. This may be a practice that will eventually spread throughout California, particularly if the private sector provides development and maintenance capital for the desired data base systems.

We conclude from an analysis of the questionnaire data that there are differences of opinion among assessors regarding what records are confidential, who may have full/limited access, and under what conditions data may be released. In the next segment of this report we will discuss the laws governing public and confidential records.

B. STATUTORY REQUIREMENTS

All records used, requested or developed for property assessment purposes are designated as either public or confidential.

1. Public Records

Under the California Public Records Act (Government Code Sections 6250, et seq.), citizens are given the right to inspect any public record not specifically exempted by statute. Public records are defined to include "…any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Government Code Section 6252(d).) Subdivision (k) of Section 6254 exempts from public inspection "[r]ecords the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law….."

Revenue and Taxation Code Section 408 narrows the definition of public records as follows, "Except as otherwise provided in subdivisions (b) and (c), any information and records in the assessor's office which are not required by law to be kept or prepared by the assessor, and homeowners' exemption claims, are not public documents and shall not be open to public inspection." Based on the words "required by law to be kept or prepared" the following must be made available for public inspection:

a. Assessment Rolls (Revenue and Taxation Code Sections 601 and 602 and Property Tax Rule 252).

NOTE: Property Tax Rule 252 has been used as the model for both secured and unsecured roll content in lieu of Revenue and Taxation Code Sections 601 and 602 because all counties now have machine prepared rolls.

(1) Contents:

(a) Name of county.

(b) Either the calendar year in which the roll is prepared or the fiscal year for which the taxes are levied.

(c) An explanation of abbreviations and legends appearing on the roll.

(d) The parcel number or other legal description of each parcel of taxable land and each parcel for which an exemption is enrolled.

(e) On the unsecured portion of the roll, a description or designation of the location of each taxable possessory interest, improvement, or personal property sufficient to identify the property, such as the number of the parcel on which it is located.

(f) The name of the assessee, if known.

(g) The latest mailing address of the assessee contained in the assessor's records. If the county auditor prepares a separate roll on which to extend taxes, however, the address need not be shown on the roll prepared by the assessor.

(h) The separately stated assessed values of all land, improvements, and personal property subject to taxation at general property tax rates (or payments in lieu of property tax computed by applying general property tax rates to fixed or variable "assessed values"), and of any privately-owned land, improvements, and personal property of a type that is exempt from taxation, but is subject to ad valorem special assessments when within a district levying such assessments. If real property is situated within a resource conservation district that is levying a special assessment, the assessed value of standing trees, timbers, and mineral rights must be separated from the land value.

(i) The penalties imposed upon such assessments in the form required by Section 261, Title 18 (Rule 261) of the Revenue and Taxation Code.

(j) The assessed value of any property that escaped assessment in a prior year, together with the notation required by Section 533 of the Revenue and Taxation Code.

(k) The exempt amount of any assessed value required by paragraph (h) to be enrolled, with identifying legends or distinctive positions for amounts allowed pursuant to the inventory exemption, the homeowners' exemption and any other reimbursable exemptions.

(l) The total net taxable value.

(m) In a separate section of the roll, the assessed value of any personal property for which tax revenues are subject to allocation in a manner different from that provided for general property tax revenues (e.g., general aircraft).

(n) On the secured roll, a cross reference notation made pursuant to Section 2190.2 that is adjacent to the assessment of any taxable land when a possessory interest in such land or an improvement thereon is separately assessed to another owner pursuant to Section 2188.2 of the Revenue and Taxation Code.

(o) Optional - Paragraph (a) of the Rule 252 – Content of Extended Roll – requires the county auditor to insert the tax-rate area number and a list of all revenue districts levying taxes within each tax-rate area in the county. Some assessors have assumed responsibility for all or a portion of this requirement.

(p) As stated in Revenue and Taxation Code, Section 614 – Tax-sold property – "After each assessment of tax-defaulted property the assessor shall enter on the roll the fact that it is tax-defaulted and the date of the declaration of default."

(q) Alphabetical indexes for both the secured and unsecured rolls.

b. Assessor's Maps

Revenue and Taxation Code Section 327 states that assessor's maps or copies shall, at all times be publicly displayed in the office of the assessor.

c. Exemption Claims

In footnote "construction" following Revenue and Taxation Code Section 408 it is stated "The words 'kept or prepared' in the section are not synonymous, and even though not prepared by the assessor, an affidavit submitted to claim a welfare exemption which is retained in the assessor's records is 'kept' by the assessor for the purposes of this section and is open to public inspection." "Open to public" does not include correspondence with the applicant or their attorneys. Homeowners' exemption claims are excluded from public inspection by Property Tax Rule 135(e) (3).

d. List of Transfers – Revenue and Taxation Code Section 408.1

Although this section applies to counties with populations of 50,000 or more, 1/ it has in effect declassified transfer data and directed that it be released to the public.

1/ Provisional Estimate of the Total Population of California Counties, July 1, 1989. See Appendix 5.

(1) Contents:

NOTE: The list shall contain the transfers of any interest in property which have occurred within the preceding two-year period. The list shall be divided into geographical areas and be revised on the 30th day of each calendar quarter to include all transactions which are recorded as of the preceding quarter.

(a) Transferor and transferee names,

(b) Assessor's parcel number,

(c) Address of the sales property (situs),

(d) Date of transfer,

(e) Date of recording and recording reference number,

(f) Consideration paid for such property where it is known by the assessor. (Section 408.1 (b) (7) and (f) bar the assessor from revealing sales information obtained from the change-in-ownership statements.) and

(g) Additional information which the assessor, in his/her discretion, may wish to add to carry out the purpose and intent of Section 408.1.

e. Property Characteristics - Revenue and Taxation Code Section 408.3

This section is mandatory for 10 counties with populations in excess of 715,000 and voluntary for counties with less population. Again, the effect of this section is to declassify property characteristics data. The data to be made public is as follows:

(1) Contents:

(a) Year of construction of improvements,

(b) Square footage of improvements,

(c) Number of bedrooms and bathrooms of all dwellings,

(d) Property's land area,

(e) Amenities to the property, i.e., swimming pool, view, etc.,

(f) Use code designations,

(g) Number of dwelling units of multiple family properties.

NOTE: "Property characteristics" are not limited to the above and may include additional items at the discretion of the assessor. By inference this would seem to include building class, roof type, heating and cooling, fireplace, etc.

The following is a quick reference list of public information:

Parcel Number
Name(s) of Owner
Mailing Address
Situs
Land Assessed Value
Improvement Assessed Value
Total Assessed Value
Date of Transfer/Recording
Transfer Document Number
Transfer Value
Property Characteristics
Tax Rate Area Code
Zoning
Possessory Interest
Penalties Imposed
Escape Assessment Value
Exempt Amount
Tax Default
Assessor Maps
Exemption Claims (except homeowners)
Transferor/Transferee Names
Use Code
Market Data (except from change in ownership Statement Sales information)

2. Assessee Record Access

Revenue and Taxation Code Section 408(b) states that the assessor "…shall provide any market data in his or her possession to an assessee of property or his or her designated representative upon request. The assessor shall permit an assessee of property or his or her designated representative to inspect at the assessor's office any information and records, whether or not required to be kept or prepared by the assessor, relating to the appraisal and the assessment of his or her property."

Presumably, the assessor utilized property characteristics of comparable property when valuing properties by the comparison method, in order to make an accurate and reliable appraisal. It would, therefore, follow that whatever property characteristics were used for comparison must be made available to the assessee. These would include, but not be limited to, class, use code, square footage, sale price, number of bedrooms and baths, etc. It also follows that other comparable properties not used by the assessor should be made available to the assessee.

This intent is evidenced by the Assembly Committee on Revenue and Taxation staff's analysis of the Statutes 1976, Chapter 671, which added Section 408.1:

> "Although taxpayers can obtain the assessor's comparables in exchange procedures, these comparables will tend to support the assessor's position. What the taxpayer cannot get is the sales data in possession of the assessor which may tend to support the taxpayer's position. The only way the taxpayer can obtain this information is an independent study of comparable sales. This is a costly and time consuming task. The

objective of this bill is to make this data, which is generally in the possession of the assessor, available to the taxpayer."

In Property Taxes Law Guide, Property Tax Annotations, under the heading "County Assessor," the opinion states:

> "Record. Since the purpose and intent of Revenue and Taxation Code Section 408.1 is to provide an additional means by which persons can obtain information as to comparable properties; since the more information one has, the better able he is to determine whether other properties are comparable properties; and since Section 408.1(c) (7) allows an assessor to add additional sales information to the list to carry out such purpose and intent, the assessor could include his records of property characteristics, such as land use, number of structures on a parcel, number of units, square footage(s), and year(s) built on the Section 408.1 list. In that event, being 'public' data or information, the records could be included in a shared data base where they would be available to all, as they would be on the Section 408.1 list. C 3/6/84"

It would seem that for the assessor to be in compliance with Section 408.1 he or she must provide an assessee with not only the property characteristics of the comparable sales utilized to value the assessee's properties but with property characteristics of comparables the assessee considers relative.

3. Confidential Records

Specific documents and data listed in the following paragraphs have been excluded by law from public inspection:

a. Property Statement

Revenue and Taxation Code Section 451. Information Held Secret.

> "All information requested by the assessor or furnished in the property statement shall be held secret by the assessor. The statement is not a public document and is not open to inspection, except as provided by Section 408."

b. Preliminary and Change in Ownership

Revenue and Taxation Code Section 481. Information Held Secret.

> "All information requested by the assessor or the State Board of Equalization pursuant to this article or furnished in the change-in-ownership statement shall be held secret by the assessor and the board. All information furnished in either the preliminary change-in-ownership statement or the change-in-ownership statement shall be held secret by those authorized by law to receive or have access to

this information. These statements are not public documents and are not open to inspection except as provided in Section 408."

c. Homeowner Exemption Claim

Property Tax Rule 135(e) (3).

"Claim Not Open to Public Inspection. Homeowners' exemption claims, Advices of Termination, and related homeowners' exemption records containing social security numbers of claimants, both past and present, are not public documents and shall not be open to public inspection."

d. Social Security Number

The Board has required the following statement to appear on the homeowners' exemption claim form:

"The disclosure of Social Security Numbers is required by Revenue and Taxation Code, Section 218.5 and Title 18, California Administrative Code, Section 135. The numbers are used by the assessor to verify the eligibility of persons claiming the exemption and by the State to prevent multiple claims in different counties and to verify the eligibility of persons claiming income tax renter's credits. The failure of a person to enter his Social Security Number as directed may result in delay in processing the claim or disallowance of the exemption. As noted on the claim form, Social Security Numbers appearing thereon are not subject to public inspection." (Emphasis added)

It, therefore, follows that the Homeowners' Exemption Claim listing, required by Revenue and Taxation Code, Section 218.5, or any record which lists social security numbers is not open to public inspection.

Revenue and Taxation Code Section 2191.3 (b) (2) states:

"The tax collector may file for record without fee in the office of the county recorder of any county a certificate specifying the amount due, the name, federal social security number, if known, and …."

Although this section authorizes the county tax collector to list the social security number, the tax collector must obtain it from a source other than the assessor's record. This is based on Property Taxes Law Guide, Property Tax Annotations indexed under County Assessor which states:

"Records. The assessor is precluded, under Revenue and Taxation Code Section 408, from providing federal social security numbers taken from homeowners' exemption claims to the county tax collector. C12/6/79; LTA 5/20/80 (No. 80/85)."

e. Information Relating to Affairs of Other Taxpayers

Revenue and Taxation Code, Section 408 footnote – Titled "Information Relating to Affairs of Another" states:

> "Market data, as used in the section, is narrowly defined in subdivision (d), and both subdivisions (b) and (d) make it clear that market data and other assessor's records relating to a taxpayer's assessment are not to be construed to require disclosure of information relating to the business affairs of another taxpayer. Thus, information furnished to an assessor by an oil company on its acquisition of certain property did not constitute market data and was not subject to disclosure by the assessor in defending his assessment against taxpayer's oil company. Chanslor – Western Oil and Development Company v. Cook, 101 Cal App.3d 407." 2/

Government Code Section 6254 – Exemption of Particular Records, Subsection(i), exempts from disclosure "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 the information."

In summary, data that must be held secret/confidential by the assessor are:

(1) Property Statement Data.

(2) Preliminary Change-in-Ownership Data.

(3) Change-in-Ownership Data.

(4) Social Security Numbers.

(5) Marketing Questionnaires On Income and Expense Data.

(6) Audit Data.

4. Access to Confidential Records

Under the provisions of Revenue and Taxation Code Section 408(b) "the assessor may provide any appraisal data in his or her possession to the assessor of any county." Other agencies permitted access are those listed in Revenue and Taxation Code Section 408(c):

2/ Chanslor – Western Oil and Development Company v. Cook, 101 Cal.App. 3d.407. See Appendix 6.

> "The assessor shall disclose information, furnish abstracts, or permit access to all records in his or her office to law enforcement agencies, the county grand jury, the board of supervisors or their duly authorized agents, employees or representatives when conducting an investigation of the assessor's office pursuant to Section 25303 of the Government Code, the Controller, probate referees, employees of the Franchise Tax Board for tax administrative purposes only, staff appraisers of the Department of Transportation and the Department of General Services, the State Board of Equalization, and other duly authorized legislative or administrative bodies of the state pursuant to their authorization to examine the records…."

According to the Board's Legal staff, any member of the above named bodies acting in an official capacity must be given access to requested data in the assessor's office. The section permits inspection of the assessors' records during office hours in the assessors' office only.

From responses to the questionnaire and in letters from assessors to the Board it is evident there is some confusion in the terms "law enforcement agencies" and "administrative bodies of the State pursuant to their authorization to examine" such records. The best definition of these terms is found in a letter from Robert R. Keeling, Board Tax Counsel, to Mr. Loyal E. Keir, Deputy County Counsel, County of Riverside, dated February 21, 1985. It reads in part:

> "The California courts have held that the adjective 'law enforcement' is to be narrowly construed to mean having traditional law enforcement powers to enforce the penal statutes of this state. (See State of California Ex Rel. Division of Industrial Safety v. Superior Court, 43 Cal.Ap.3d 778, at page 784.) 3/ An agency is not a law enforcement agency, therefore, if it merely administers laws of the state, county, or city. Almost any agency is empowered to administer some law, regulation, or ordinance. Such law enforcement power does not qualify the agency to claim it is a 'law enforcement agency.' Traditional law enforcement agencies would be, for example, local police departments, state police, alcohol and drug enforcement agencies, California Highway Patrol, local sheriff departments, federal marshals, Federal Bureau of Investigation, Federal Drug and Alcohol Enforcement Agencies, the California Attorney General's Investigative Staff, and any other similar local, state or federal agency enforcing the penal laws of this state or the federal government. Any agencies of a lesser status are not 'law enforcement agencies' entitled to access to the county assessors' records under Section 408(c)."

Recently, Counsel Keeling offered this advice on the question of whether an assessor could effectively resist a subpoena duces tecum by the local district attorney's office for confidential assessor's record.

3/ Division of Industrial Safety v. Superior Court of Los Angeles County. (See Appendix 7)

> "In this instance the district attorney was investigating welfare fraud, and the assessor's records were needed to support the district attorney's case. We agonized over whether the records requested were confidential or not and whether, if confidential, the request was one by a law enforcement agency and thus a valid intrusion into confidential assessor's records. In any event, we concluded that the list of persons and agencies entitled to intrude into confidential assessors' records is large and growing, and it is not always clear (as in this case) whether the request is from persons authorized to have access to the assessors' records. Therefore, I suggest when in doubt the assessor should appear in court; object to the subpoena duces tecum on confidentiality grounds; offer to supply the requested information to the respective taxpayer from whom it was obtained; and ask the court to direct a subpoena to that taxpayer. Such a procedure would offer the taxpayer the opportunity to appear and resist the subpoena, thereby relieving the assessor of the responsibility of quashing the subpoena. At a minimum, and in addition, the assessor should notify the affected taxpayer of the subpoena, of the materials requested, and give the taxpayer the opportunity to appear in court to resist the exposure of the taxpayer's confidential records. I suggest such a procedure would help the assessor remain in good standing with taxpayers and promote the public's confidence that confidential records submitted to the assessor will be kept confidential."

Another term which seems to have multiple meanings is "taxing agency" referred to in Revenue and Taxation Code Section 646, Inspection of Records, which states "The records of the assessor are at all times, during office hours, open to the inspection of any person charged with the duty of assessing property in the county for any taxing agency."

Taxing Agency is defined by Revenue and Taxation Code Section 121. According to this section, taxing agencies include the state, county, city, and every district that assesses property for taxation purposes and levies taxes or assessments on the property so assessed.

We interpret this to mean that the assessor must provide specific data needed by a taxing agency to assess the property and levy taxes. For example, where a special assessment is levied by a lighting district on frontage foot bases, the lighting district must ascertain the taxes to be generated by an assessment. The district would then be permitted limited access to assessor's data pertaining to frontage area only, in order to measure taxes due.

One major taxing agency not covered by Revenue and Taxation Code Section 646 is the Internal Revenue Service (IRS). The IRS, pursuant to an administrative summons, does have access to information contained in property tax records made confidential under Section 408, 451 and 481 of the Revenue and Taxation Code. This was made clear in Attorney General Opinion No. 84-1104 4/, dated July 30, 1985 distributed in Letter to County Assessors No. 85/93. The Attorney General's Conclusion reads as follows:

4/ Attorney General Opinion No. 84.1104. See Appendix 8.

"The county assessor is required, pursuant to an administrative summons issued by the Internal Revenue Service under Title 26 of the United States Code, Section 7602, to produce information contained in property tax records made confidential under Sections 408, 451, or 481 of the Revenue and Taxation Code, where the federal interest in disclosure outweighs the state interest in confidentiality, but is prohibited from producing such information where the states interest prevails. Such information must be produced in any case in compliance with a specific court order."

5. Non-Access to Assessors' Records by Specified Agencies

The Board's legal staff has been asked by assessors, over the years, to provide legal opinions pursuant to requests by various agencies for access to assessor's confidential records. These opinions have been formalized and are now part of the Property Taxes Law Guide, Property Tax Annotations. Those restricting access are as follows:

"Inspection of Records by County Building Inspector. The assessor may not permit a county planning director in his capacity as the county building inspector to inspect his or her confidential records for the purpose of enforcing the county building code. Neither the director nor the inspector is a law enforcement agency. C 10/13/83.

"Inspection of Records by County Building Inspector. An Inspection Warrant issued pursuant to Code of Civil Procedure Section 1822.50 et seq. does not authorize a county building inspector to inspect an assessor's confidential records, and to the extent it purports to do so it is illegal. C 10/25/82.

"Inspection of Records by County Planning Director. The assessor may not permit a county planning director to inspect his or her confidential records. Disclosure of confidential records to anyone, including governmental officials, not referred to in Revenue and Taxation Code Section 408(c) is prohibited by Section 408(a), and county planning directors are not referred to in Section 408(c). C 11/9/84."

III. SUMMARY

A review of the statutes and opinions presented in this survey seems to establish that the confidentiality of assessor's data is not necessarily controlled by the statutory phrases, "if not required by law to be kept or prepared--is not open to public inspection." Statutory additions and amendments have enlarged the access--to the assessor's records. Such legislation has caused confidential data classification to be more difficult. Statute phrases such as "additional information, which the assessor in his/her discretion may wish to add (Revenue and Taxation Code Section 408.3(b)," "include but is not limited to (Revenue and Taxation Code 408.3(b)," and "the assessor in his discretion may wish to add (Revenue and Taxation Code 408.1(c) (7)" have given the assessor a degree of discretion. Therefore, assessors with access to large, advanced computers have a tendency to provide a wide array of data to the private sector while those with less computer capacity generally provide less data.

New legislation is creating difficulties for the county assessors because it directs assessors to provide more and more data to the public without regard to funding for their compliance. While difficult to administer, the Legislature has provided some funding relief by including the following provision in recent legislation, now contained in Revenue and Taxation Code Section 408.3(c):

> "The actual cost of providing the information is not limited to duplication or production cost, but may include recovery of developmental and indirect costs, such as overhead, personnel, supply, material, office, 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."

In the past, the assessors sold copies of the roll, indexes, and maps. The cost of materials and personnel came out of their operating budgets, but the monies derived from the sales did not go to the assessor but went to the county general fund. Greater public demand for data caused a greater expense and resulted in less operating funds for the assessor's regular work. With this new legislation the assessors will be able to increase their data bases for their own use and offset the cost through sales to the private sector.

With the passage of time the Board believes that the new statutes on release of data will prove to be beneficial to the assessors by providing more readily assessable and accurate assessment data for use in the assessment process.

Appendices

SUMMARY OF RESPONSES TO QUESTIONNAIRE FOR SPECIAL TOPIC SURVEY REGARDING CONFIDENTIALITY OF COUNTY ASSESSORS' RECORDS

INFORMATION PROVIDED THE ASSESSOR

1. Does your office obtain the following information under the secrecy provisions of the Revenue and Taxation Code, Section 451 and/or 481?

	Yes	No
Change-in-ownership statement	53	1
Production reports	48	6
Property statements	53	1
Cost statements	46	8
Rent survey	48	11*
Expense survey	41	13

Others (please specify) Trust Agreement, Depreciation Schedules, Operating Statements, New Construction Statements, Partnership Agreement * (Some counties answered twice.)

2. In addition to returned questionnaires and forms, what other data are provided to your office?

	Never	Occasionally	Regularly
Escrow statements		46	8
Income tax returns	2	44	8
Business records	1	32	21
Cost statements		34	20
Leasing schedules		32	22
Profit/loss statements	1	41	12

2. Continued

Others (please specify) Unrecord Contracts, Pro Forma Financial Statements, Environmental Impact Reports

INFORMATION PROVIDED THE PUBLIC

3. Which of the following types of information are available to the public in your office?

Records	Public Generally	Public Selectively	Assessee	Not Made Available
Assessment roll	56			
Ownership list	55			1
Address list	52			4
Maps	56			
Mailing address of owner	52	2	1	1
Telephone number of owner				56
Historical sales list	21	8	1	25
Property statements			43	13
Production reports			37	18
Sales letters			33	21
Preliminary change-in-ownership statement			34	21
Change-in-ownership statement			33	21
Real property usage report	5	9	9	23
Lot size	48	2	5	1
Building records – owner			55	1
Building records – others	1	4	5	46

3. Continued

Master property records - owner	16	2	35	3
Master property records - others	15	6	3	32
Rent studies		4	7	45
CAP rate studies		5	8	43
Audits			41	15
Use code list	31	11	1	12
Exemption claims	13	11	15	17
Working papers	1	3	26	26

Other (please specify) _____

_____

_____

4. Section 408.1 requires assessors of counties with population of 50,000 or more to maintain a list of transfers that is open to public inspection. Does your county's list contain the following information?

	Yes	No
Parcel number	38	
Date of deed	20	18
Date of recording	38	
Amount of stamps	24	14
Full price based on stamps	26	12
Purchase price – gross	17	21
Purchase price – cash equivalent	4	34
Sale terms		38
Lenders	1	37

4. Continued

Name of buyer	35	3
Name of seller	17	21
Amount of loans	2	36
Legal description	10	28
Situs address	27	11
Improvement size	6	32
Property type	26	12
Quality class	3	35
Extras	3	35
Tax rate area	14	24
Zoning	7	34
Number of units	6	35
Construction date	5	36

Others (please specify) Vesting Int., Acres, Book and Page No., Building Effective Age, Neighborhood, OR No., Mailing Address.

5. Does your office exchange information with the following?

	Never	Occasionally	Regularly
Private appraisal firms	19	35	2
Independent appraisers	16	38	2
Utility Company - appraisers	25	30	1
Other assessor's offices		35	22
Out-of-state assessing agencies	26	27	
State agencies - appraisers	3	36	18
Federal agencies – appraisers	10	37	8

5. Continued

Others (please specify) Inheritance Tax Ref.

6. (a) Do you allow private firms to copy the following?

	Yes	No
Maps	56	1
Assessment roll	56	1
Ownership list	53	4
Address list	48	8
Transfer list	34	23
Property characteristics	3	54

Others (please specify)

(b) If yes, who are the primary customers?

Realtors	28
Title companies	35
Real Estate Data, Inc.	53
Mark Larkwood Co.	51

Others (please specify) Data Quick, Damar, Real Estate Consultant, Private Appraisal Firms, Independent Appraisers, Webster Engineering, Data Marketing, S.F. Planning and Urban Research Association, Marketing Software Consultants, Inc., TRW, TICO, Nationwide Real Estate Register, Consolidated Reprod.

6. Continued

(c) How often do these firms obtain information from your office to update their files?

Frequency		Types of Information
9	Daily	8 – Quarterly
10	Weekly	2 – Biannually
16	Monthly	
50	Annually	
___	Others (please specify)	

(d) Do these firms provide copies for your office to sell to the public?

Yes 4 No 53

(e) Do these firms provide copies for your office's use without charge?

Yes 48 No 8

Comment?

7. (a) Are you providing data for a fee? Yes 46 No 9

(b) If yes, please supply a copy of this fee schedule.

(c) If no, would you like to have the discretion for providing data for a fee?

Yes 12 No 5

(d) Should the use of the revenue generated by this fee be restricted?

Yes 28 No 19

(e) Comment.

23 Appropriate to Assessor's Office

8. (a) Has your office been taken to court to obtain access to records?

Yes_12__ No_43__

(b) If yes, what were the issues and the results? (Please cite the court case.)

_____

_____

_____

INFORMATION PROVIDED THE ASSESSEE

9. (a) What "market data" does your office provide the assessee or his agent upon his request?

Comparables	Yes	No
Parcel number	56	1
Date of Sale	57	___
Sale price – gross	52	5
Sale price – cash equivalent	29	28
Terms	18	38
Buyer	48	9
Seller	45	12
Zoning	44	12
Lot size	54	3
Cost statement	13	44
Street address	47	9
Gross rent	22	34
Expenses	16	40
Net Income	18	37
Audits	9	47
M&E – Age	16	40

9 (a) Continued

Others (please specify) _____

_____

(b) In an exchange of information in an appeal, does your office provide information in addition to the "market data" provided above?

Yes__18_ No__38_

If yes, please specify _____

_____

_____

10. (a) Before an appeals hearing, does your office contact either of the principals (buyer and/or seller) involved in a property sale used as a comparable to obtain permission to use the information in the hearing?

Yes__2_ No__54_

(b) If yes, please comment on your experience._____

_____

_____

11. Has your county encountered a problem in which a provider of sales, income, cost, or other information refuses to allow that information to be used in an appeals hearing?

Yes__5_ No__51_

If yes:

(a) What type of property?_____

_____

(b) How was this issue resolved?_____

_____

_____

_____

INFORMATION PROVIDED PUBLIC AGENCIES

12. How does your county counsel define the term "taxing agencies" as used in Revenue and Taxation Code, Section 646? 26 counties stated that the definitions provided by Revenue and Taxation Code Section 121 was the only reference used while the remaining counties had sought county counsel opinions for specific agencies to determine if they were "tax agencies".

13. Are the following public agencies allowed access to your records?

Local	No Access	Full	Limited	Identify Limitation
District Attorney	8	18	31	
Board of Supervisor	8	12	32	
Clerk of Board	28	5	23	
Assessment Appeals Board	22	10	25	
Public Works	21	5	31	
Grand Jury	6	25	26	
Public Defender	24	8	24	
County Clerk	33	3	20	
Fire District	22	1	34	
City Police	11	21	25	
Sheriff	7	22	27	
Judges	15	13	28	
Recorder	31	4	21	
Tax Collector	18	7	31	
Auditor	23	6	27	
Building Inspector	25	4	27	
Planning Commission	22	5	29	

13. Continued

Health Dept.	25	2	29	
Utility Company	34	1	21	
Others (please specify)				

State	No Access	Full	Limited	Identify Limitation
State Police	11	21	21	
Judges	13	13	26	
Calif. Highway Patrol	6	21	25	SS# SBE Opinion 5/19/80
Bd. Of Equalization	3	41	4	
Business Taxes	5	35	11	
Property Taxes		48	5	
Public Utilities Comm.	26	5	18	
Governor's Office	22	4	23	
Controller	13	15	23	
Legislature	23	4	22	
Department of Finance	18	10	23	
Inheritance Tax Referees	6	27	20	
Alcoholic Beverage	18	12	18	
Attorney General	8	21	20	
Dept. of Real Estate	23	4	22	
Franchise Tax Board	5	21	26	
Caltrans	3	23	22	
Others (please specify)				

13. Continued

Federal	No Access	Full	Limited	Identify Limitation
Federal Drug Admin.	16	11	22	
Fed. Housing Admin.	28	2	19	
Judges	14	13	23	
Marshal	15	16	19	
Internal Revenue Service	8	1	32	
Fed. Bur. of Inves. (FBI)	8	19	23	
Fed. Aviation Admin.	30	3	15	
Interstate Commerce Comm.	29	3	15	
Securities Exchange Comm.	29	3	15	
Fed. Communications Comm.	29	3	15	
Others (please specify)	Department of Justice			

14. For people who are allowed full access to records, can they:

	Yes	No
View records?	56	7 *
Copy records?	31	26
Have records copied?	34	22
Checkout records	1	55
Browse working papers?	31	24
Operate data system?	6	50

Others (please specify) * (Some counties answered twice.)

15. Who approves access to records?

Assessor	57
Assistant assessor	35
Chief appraiser	37
Office manager	25
Assessment clerk	6
Supervisor	12
Other (please specify)	

16. How are those who are allowed access to records identified?

Drivers license	22
ID card	56
Birth certificate	2
Business card	28
Letter	46
Notarized letter from Out-of-State firms	16
Other (please specify)	

MISCELLANEOUS ISSUES

17. Are all records, both real property and personal property, kept in a central control room (other than those that are out for processing)?

Yes 41 No 16

18. If no, please identify the other areas where records are kept.

19. If records are no longer needed, how are they disposed?

Trashed	20
Shredded	36
Stored	28
Other (please specify)	8

20. Control of data by private appraisal firms that contract with assessor:

(a) Do these firms retain copies of records for their own files?

Yes 16 No 12

(b) How are records safeguarded in the office or work place of these firms?
Fireproof cabinets, locked doors

(c) Is the ultimate use of the data known or controlled by the assessor?

Yes 25 No 6

21. Many assessors' offices are participating in a countywide data base; the following questions are directed toward this situation.

(a) Is any confidential information placed into this data base?

Yes 22 No 16

(b) If yes, please identify the type of information,

Property use code and sales price, homeowners' exemption, property characteristics, social security name and number, income and expense.

(c) Is there a security screen to protect this information from unauthorized access by other agencies?

Yes 28 No 6

(d) If yes, what form does this security screen take?

Control access code, limit screen data, controlled access

22. (a) Does your office permit online access to your data system by private firms?

Yes 12 No 42

(b) If yes, to what extent is access allowed?

Full Access 1

Partial Access 14

Comment _____

_____

_____

(c) If yes, what types of firms are allowed access?

Title insurance companies 12

Real estate sales companies 7

Real estate service companies 7

Tax representative companies 7

Other (please specify) _____

_____

(d) Please attach a copy of your fee schedule for online access by private firms.

23. There is pending legislation (SB 1653) to make some records of the assessor's office more open. Are you in favor of this move? Why?

35 - No. Reason: 10 – Yes. Reason:

Expense, Confidential, Nothing to hide, Do better job,

Not a service bureau. Reduce cost

_____

24. Do you feel that your staff's time spent dealing with the public would be reduced if assessors' records were made more open?

Yes 16 No 43

25. Has your county counsel given you a written opinion on the confidentiality of assessor's records?

Yes 9 No 40

If yes, please attach a copy of that advisory opinion.

26. Please send us a copy of your written policy for disclosure of records and information.

27. Do you feel a statewide policy for disclosure of assessor's records would be helpful?

Yes 32 No 20

28. Do you have any suggestions to eliminate difficulties in this area?

LIST OF APPLICABLE REVENUE AND TAXATION CODE AND GOVERNMENT CODE SECTIONS

Revenue and Taxation Code Section	Title
218.5	Homeowners' Exemption; assessor to supply board with information
327	Assessor's maps
408	Assessor's records
408.1	List of transfers
408.2	Public records open to public inspection
408.3	Property characteristics information; public records
451	Information held secret (Property statement)
481	Information held secret (Change in Ownership statement)
533	Entry on roll
601	Preparation of roll
602	Contents (roll)
614	Tax-sold property
646	Inspection of records (Tax agency)
2188.5	Planned developments separate assessment
2190.2	Possessory interests
2191.3	Recording certificate of delinquency on certain types of property

Government Code Section	
6250 - 6254.7	California Public Records Act (Government Code)
25033	Supervision of conduct of officers (Government Code)

LIST OF APPLICABLE BOARD OF EQUALIZATION PROPERTY TAX RULES

Rule No.	Title
135	Homeowners' Property Tax Exemption
252	Content of Assessment Roll
261	Penalties; Form and Manner of Entry

EXCERPTS FROM THE CALIFORNIA PUBLIC RECORDS ACT (GOVERNMENT CODE §6250-6254.7)

§6250. Legislative findings and declaration

In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.

§6251. Citation of Chapter

This chapter shall be known and may be cited as the California Public Records Act.

§6252 Definition of terms

As used in this chapter:

(a) "State agency" means every state office, officer, department, division, bureau, board, and commission or other state body or agency, except those agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution.

(b) "Local agency" includes a county; city, where general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof; or other local public agency.

(c) "Person" includes any natural person, corporation, partnership, firm, or association.

(d) "Public Records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. "Public records" in the custody of, or maintained by, the Governor's office means any writing prepared on or after January 6, 1975.

(e) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents.

(f) "Member of the public" means any person, except a member, agent, officer, or employee of a federal, state, or local agency acting within the scope of his or her membership, agency, office, or employment.

§6253. Public records open to inspection; time; guidelines and regulations governing procedure.

"(a) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Every agency may adopt regulations stating the procedures to be followed when making its records available in accordance with this section.

The following state and local bodies shall establish written guidelines for accessibility of records. A copy of these guidelines shall be posted in a conspicuous public place at the offices of such bodies, and a copy of the guidelines shall be available upon request free of charge to any person requesting that body's records:

Department of Motor Vehicles
Department of Consumer Affairs
Department of Transportation
Department of Real Estate
Department of Corrections
Department of the Youth Authority
Department of Justice
Department of Insurance
Department of Corporations
Secretary of State
State Air Resources Board
Department of Water Resources
Department of Parks and Recreation
San Francisco Bay Conservation and Development Commission
State Department of Health Services
Employment Development Department
State Department of Social Services
State Department of Mental Health
State Department of Developmental Services
State Department of Alcohol and Drug Abuse
Teachers' Retirement Board
Department of Industrial Relations
Department of General Services
Department of Veterans Affairs
Public Utilities Commission
California Coastal Commission
State Water Quality Control Board
San Francisco Bay Area Rapid Transit District
All regional water quality control boards
Los Angeles County Air Pollution Control District
Bay Area Air Pollution Control District
Golden Gate Bridge, Highway and Transportation District

"(b) Guidelines and regulations adopted pursuant to this section shall be consistent with all other sections of this chapter and shall reflect the intention of the Legislature to make the records accessible to the public. The guidelines and regulations adopted pursuant to this section shall not operate to limit the hours public records are open for inspection as prescribed in subdivision (a)."

§6254. Records exempt from disclosure requirements

Except as provided in Section 6254.7, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

(a) Preliminary drafts, notes, or interagency or intra-agency memorandum which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure.

(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810) of Title 1 of the Government Code, until such litigation or claim has been finally adjudicated or otherwise settled.

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

(d) Contained in or related to:

(1) Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies.

(2) Examination, operating, or condition reports prepared by, on behalf of, or for the use of any state agency referred to in subdivision (1).

(3) Preliminary drafts, notes, or interagency or intra-agency communications prepared by, on behalf of, or for the use of any state agency referred to in subdivision (1).

(4) Information received in confidence by any state agency referred to in subdivision (1).

(e) Geological and geophysical data, plant production data and similar information relating to utility systems development, or market or crop reports, which are obtained in confidence from any person.

(f) Records of complaints to or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local police agency, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes, except that state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury to property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, vandalism, vehicle theft, or a crime of violence as defined by subdivision (b) of Section 13960, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation; provided, however, that nothing herein shall require the disclosure of that portion of those investigative files which reflect the analysis or conclusions of the investigating officer.

Other provisions of this subdivision notwithstanding, state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:

(1) The full name, current address, and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds; and

(2) The time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent such information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date and location of occurrence, the time and date of the report, the name, age and current address of the victim, except that the address of the victim of any crime defined by Section 261, 264, 264.1, 273a, 273d, 286, 288, 288a, or 289 of the Penal Code shall not be disclosed, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property or weapons involved.

(g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination, except as provided for in Chapter 3 (commencing with Section 99150) of Part 65 or the Education Code.

(h) The contents of real estate appraisals, engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts, until such time as all of the property has been acquired or all of the contract agreement obtained, provided, however, the law of eminent domain shall not be affected by this provision.

(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.

(j) Library circulation records kept for the purpose of identifying the borrower of items available in libraries, and library and museum materials made or acquired and presented solely for reference or exhibition purposes. The exemption in this subdivision shall not apply to records of fines imposed on such borrowers.

(k) Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

(l) Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's legal affairs secretary, provided public records shall not be transferred to the custody of the Governor's legal affairs secretary to evade the disclosure provisions of this chapter.

(m) In the custody or maintained by the Legislative Counsel.

(n) Statements of personal worth or personal financial data required by a licensing agency and filed by an applicant with such licensing agency to establish his personal qualification for the license, certificate, or permit applied for.

(o) Financial data contained in applications for financing under Division 27 (commencing with Section 44500) of the Health and Safety Code, where an authorized officer of the California Pollution Control Financing Authority determines that disclosure of such financial data would be competitively injurious to the applicant and such data is required in order to obtain guarantees from the United States Small Business Administration. The California Pollution Control Financing Authority shall adopt rules for review of individual requests for confidentiality under this section and for making available to the public those portions of an application which are subject to disclosure under this chapter.

(p) Records of state agencies related to activities governed by Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1, Chapter 10.5 (commencing with Section 3525), of Division 4 of Title 1, and Chapter 12 (commencing with Section 3560) of Division 4 of Title 1, which reveal a state agency's deliberative processes, impressions, evaluations, opinions, recommendations, meetings minutes, research, work products, theories, or strategy, or which provide instruction, advice, or training to employees who do not have full collective bargaining and representation rights under the above chapters. Nothing in this subdivision shall be construed to limit the disclosure duties of a state agency with respect to any other records relating to the activities governed by the employee relations acts referred to in this subdivision.

§6254.5. Disclosure of otherwise exempt records

Notwithstanding any other provisions of the law, whenever a state or local agency discloses a public record which is otherwise exempt from the provisions of this act, to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in Sections 6254, 6254.7, or other similar provisions of law. For the purposes of this section, before a disclosure of an otherwise exempt public record by a state or local agency to a federal agency, is made, the federal agency shall agree in writing to comply with the provisions of this act. For purposes of this section, "agency" includes a member, agent, officer or employee of the agency acting within the scope of his or her membership, agency, office or employment.

This section, however, shall not apply to disclosures:

(a) Made pursuant to the Information Practices Act (commencing with Section 1789 of the Civil Code) or discovery proceedings.

(b) Made through other legal proceedings.

(c) Within the scope of disclosure of a statute which limits disclosure of specified writings to certain purposes.

(d) Not required by law, and prohibited by formal action of an elected legislative body of the local agency which retains the writings.

(e) Made to any governmental agency which agrees to treat the disclosed material as confidential. Only persons authorized in writing by the person in charge of the agency shall be permitted to obtain the information. Any information obtained by the agency shall only be used for purposes which are consistent with existing law.

(f) Of records relating to a financial institution or an affiliate thereof, if the disclosures are made to the financial institution or affiliate by a state agency responsible for the regulation or supervision of the financial institution or affiliate.

§6254.7. Air pollution data; Housing code violations; "Trade secrets"

(a) All information, analyses, plans, or specifications that disclose the nature, extent, quantity, or degree of air contaminants or other pollution which any article, machine, equipment, or other contrivance will produce, which any air pollution control district or any other state or local agency or district requires any applicant to provide before such applicant builds, erects, alters, replaces, operates, sells, rents, or uses such article, machine, equipment, or other contrivance, are public records.

(b) All air or other pollution monitoring data, including data compiled from stationary sources, are public records.

(c) All records of notices and orders directed to the owner of any building of violations of housing or building codes, ordinances, statutes, or regulations which constitute violations of standards provided in Section 1941.1 of the Civil Code, and records of subsequent action with respect to such notices and orders, are public records.

(d) Except as otherwise provided in subdivision (e) and Chapter 3 (commencing with Section 99150) of Part 65 of the Education Code, trade secrets are not public records under this section. "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.

(e) Notwithstanding any other provision of law, all air pollution emission data, including those emission data which constitute trade secrets as defined in subdivision (d), are public records. Data used to calculate emission data are not emission data for the purposes of this subdivision and data which constitute trade secrets and which are not used to calculate emission data are not public records.

California Population Table

Provisional estimate of the total population of California counties
July 1, 1989

County	Total Population
Alameda	1,252,400
Alpine	1,190
Amador	29,150
Butte	176,700
Calaveras	32,400
Colusa	15,500
Contra Costa	775,500
Del Norte	20,400
El Dorado	124,100
Fresno	621,200
Glenn	23,600
Humboldt	116,800
Imperial	115,700
Inyo	18,200
Kern	526,600
Kings	96,000
Lake	52,100
Lassen	28,800
Los Angeles	8,650,300
Madera	83,800
Marin	231,900
Mariposa	14,800
Mendocino	76,900
Merced	173,900
Modoc	9,375
Mono	9,800
Monterey	349,300
Napa	107,600
Nevada	78,800
Orange	2,280,400
Placer	160,400
Plumas	20,050
Riverside	1,014,800
Sacramento	988,300
San Benito	35,250
San Bernardino	1,324,600

California Population Table

Provisional estimate of the total population of California counties
July 1, 1989

County	Total Population
San Diego	2,418,200
San Francisco	731,700
San Joaquin	460,300
San Luis Obispo	211,900
San Mateo	632,800
Santa Barbara	348,400
Santa Clara	1,440,900
Santa Cruz	229,900
Shasta	143,100
Sierra	3,600
Siskiyou	43,750
Solano	321,100
Sonoma	371,600
Stanislaus	347,500
Sutter	62,500
Tehama	47,250
Trinity	14,000
Tulare	300,200
Tuolumne	49,000
Ventura	653,600
Yolo	137,000
Yuba	57,300

COURT CASE

CHANSLOR-WESTERN OIL AND DEVELOPMENT CO. V. WILLIAM COOK
[Civ. No. 55422. Second Dist., Div. Five. Jan. 24, 1980]

THE STATE OF CALIFORNIA ex rel.
CHANSLOR-WESTERN OIL AND DEVELOPMENT COMPANY, Plaintiff and Appellant, v. WILLIAM COOK, as County Assessor, etc., et al., Defendants and Respondents.

SUMMARY

Plaintiff, through its parent company, acquired the assets of a petroleum company. Prior to making a competitive bid on the assets, plaintiff prepared a complex appraisal of the future net income stream derivable from the company's oil and gas producing properties. After the acquisition, the assessor obtained plaintiff's records concerning this transaction, pursuant to his power under Rev. & Tax. Code, §441, subd. (d), to require a taxpayer to provide detail of property acquisition transactions. A competitor of plaintiff filed an application seeking reduction of the assessor's assessment of one of its oil and gas producing properties, and, in defending his assessment of that property, the assessor proposed to introduce evidence of sales of comparable properties, including plaintiff's purchase. Plaintiff sought a preliminary injunction restraining the assessor from disclosing certain information acquired from plaintiff, including documents containing the assumptions and methodology used in generating an appraisal, which were top level corporate secrets and if disclosed to competitor companies, would result in a serious loss of competitive advantage in bidding on future oil and gas property acquisitions. The trial court entered an order denying the preliminary injunction. (Superior Court of Santa Barbara County, No. 123765, Charles S. Stevens. Jr., Judge).

The Court of Appeal reversed. The court held that, except with respect to one item, the trial court erred in concluding that the challenged items of information constituted market data that was subject to disclosure within the meaning of Rev. & Tax. Code, §408, subd. (d), which indicates that market data is limited to the location of the property, the date of the sale, and the consideration paid for the property. The court held the numerous items in the appraisal report which was prepared for plaintiff prior to its competitive bid, reflecting such matters as plaintiff's assumptions as to the amount of oil recoverable, the cost of recovery, the future price of oil, the risk factor, plaintiff's after tax income, and the acceptable rate of return to plaintiff, did not constitute market data which the assessor could disclose, but rather constituted business affairs which the assessor could not disclose except under a court order pursuant to Rev. & Tax. Code, §408, subd. (b). (Opinion by Ashby, J., with Stephens, J., concurring. Separate concurring opinions by Kaus, P. J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) Property Taxes §37 – Assessment – Taxpayer's Property Statement – Acquisitions – Confidentiality. – A taxpayer is required under compulsion of law to disclose to the assessor the details of property acquisitions under Rev. & Tax. Code §§441, subd. (d), and 462. The basic rule as to the information thus disclosed is one of confidentiality (Rev. & Tax. Code, §451). While amendments to the statutes have increased a taxpayer's access to information in the hands of the assessor, the amendments have maintained protection against the disclosure of information relating to the business affairs of other taxpayers. The primary exceptions to the rule of confidentiality are "market data", the assessor's public list of transfers of property interests, and information ordered disclosed by a court in proceedings initiated by a taxpayer to challenge the legality of his assessment.

[See Cal.Jur.3d, Property Taxes, §70 et seq., Am.Jur.2d, State and Local Taxation, §729.]

(2) Property Taxes §32 – Assessment – Assessors – Duties and Liabilities – Disclosure of Confidential Information. – While Rev. & Tax. Code, §408, subd. (b), requires the assessor to provide "market data" and other records in his possession to an assessee of property on request, market data is defined narrowly in the statute which makes clear that market data and other assessor's records relating to the taxpayer's assessment are not to be construed to require disclosure of information relating to the business affairs of other taxpayers. Accordingly, in proceedings by an oil company seeking reduction of the assessor's assessment of one of its producing properties, the trial court erred in concluding that certain items of information furnished to the assessor by another oil company on its acquisition of certain property constituted market data and were subject to disclosure by the assessor in defending his assessment. Rev. & Tax. Code, §408. subd. (d), indicates that market data is limited to the location of the property, the date of the sale, and the consideration paid for the property, while the information sought by the assessor included such matters as the taxpayer's assumptions as to the amount of oil recoverable, the cost of recovery, the future price of oil, the risk factor, after tax income, and the acceptable rate of return, which constituted business affairs of the taxpayer which the assessor could not disclose except under a court order pursuant to Rev. & Tax. Code, §408, subd. (b).

(3) Property Taxes §7 - Constitutional Provisions; Statutes and Ordinances - Confidential Information. - Rev. & Tax. Code, §1609.4, which sets forth certain procedures to be used in a hearing on an application for reduction of assessments, and which provides 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 Rev. & Tax. Code, §441, is subject to the qualification that such procedural rules shall not be construed as permitting any violation of Rev. & Tax. Code, §§408 or 451, protecting the confidentiality of information of property acquisitions provided by a taxpayer under compulsion. Accordingly, the assessor's use of "information" obtained pursuant to Rev. & Tax. Code, §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.

COUNSEL

Thomas J. Fitzgerald and Thomas A. Lance for Plaintiff and Appellant.

Rudnick & Arrche and Brett L. Price for Defendants and Respondents.

OPINION

ASHBY, J. - Appellant Chanslor-Western Oil and Development Company appeals from an order denying a preliminary injunction against respondent William Cook (the County Assessor of Santa Barbara County) and his agents.

In 1976 appellant, through its parent company, Santa Fe Industries, Inc., acquired the assets of Westates Petroleum Company. Prior to making a competitive bid on Westates' assets, appellant prepared a complex appraisal of the future net income stream derivable from Westates' oil and gas producing properties.

Subsequent to the acquisition, the assessor obtained appellant's records concerning this transaction, pursuant to his power under Revenue and Taxation Code Section 441, subdivision (d), to require a taxpayer to provide details of property acquisition transactions. It is appellant's contention that the documents contained "[t]he assumptions and methodology used in generating such an appraisal [which] are top level corporate secrets which, if disclosed to competitor companies, would result in a serious if not total loss of competitive advantage in bidding on future oil and gas property acquisitions."

Chevron Oil Company, a competitor of appellant, has filed an application seeking reduction of the assessor's assessment of one of its oil and gas producing properties. In defending his assessment of the Chevron property, the assessor proposes to introduce evidence of sales of comparable properties, including appellant's purchase of Westates' properties.

Appellant seeks a preliminary injunction restraining the assessor from disclosing, in the course of the Chevron proceeding, the following information acquired from appellant:

> "7. The price paid for the working interest acquired:

"8. The number of barrels of oil estimated by plaintiff and its parent, Santa Fe Industries, to be recoverable in the future from the working interest acquired by plaintiff;

"9. The gross future income estimated by plaintiff and its parent to be recoverable from the working interest production acquired in the purchase;

"10. The crude oil price assumed by plaintiff on the projected date of acquisition;

"11. The maximum escalation of crude oil prices assumed by plaintiff and its parent for purposes of formulating their bid;

"12. The period of years for escalation of crude oil prices assumed by plaintiff and its parent in their computations;

"13. The expected net future operation profit projected by plaintiff and its parent for purposes of formulating their bid;

"14. The discount rate assumed by plaintiff and its parent, for purposes of reflecting their level of confidence regarding the risk associated with the acquired properties producing the projected future net operating profit and used in the calculations to project the expected present net worth of the working interest in the acquired properties; and

"15. The effect of the royalty interests the acquired properties are subject to on the discount rate used by the plaintiff and its parent in formulating their competitive bid on the acquired properties." 1/

The declarations supporting and opposing the issuance of an injunction and the testimony of appellant's experts at the hearing on the motion were directed to the issue whether disclosure of the information in question would result in unfair competitive disadvantage to appellant. The trial court, although of the opinion that disclosure could cause competitive "havoc" to appellant, concluded that the information was "market data" which the assessor was entitled to disclose in defending his assessment of the Chevron property.

Appellant contends the trial court's interpretation of the law is erroneous, and that under the pertinent provisions of the Revenue and Taxation Code the assessor is required to maintain the confidentiality of the information disclosed by appellant to the assessor. We agree.

1/ Six other items of information have already been disclosed by appellant to the public: (1) the names of the buyer and seller; (2) the fact that all oil and gas producing properties in North America were acquired in the purchase; (3) the respective oil fields and oil and gas leases acquired in the purchase; (4) the date of acquisition; (5) the percentage of royalty burden to which the properties acquired are subject; and (6) the working interest share acquired in the purchase.

DISCUSSION

(1) A taxpayer is required under compulsion of law to disclose to the assessor the details of property acquisitions. (Rev. & Tax. Code, §§441, subd. (d), 462.) 2/

The basic rule as to the information thus disclosed to the assessor is one of confidentiality. 3/ Section 451 provides: "All information requested by the assessor or furnished in the property statement shall be held secret by the assessor. The statement is not a public document and is not open to inspection, except as provided in Section 408." Section 408, subdivision (a), provide in part: "Except as otherwise provided in subdivisions (b) and (c) any information and records in the assessor's office which are not required by law to be kept or prepared by the assessor…are not public documents and shall not be open to public inspection." 4/ There is no contention that the documents involved here are "required by law to be kept or prepared by the assessor."

Amendments to the statutes over the years have gradually increased a taxpayer's access to information in the hands of the assessor, but these amendments have scrupulously maintained protection against the disclosure of information relating to the business affairs of other taxpayers. (See Ehrman, Administrative Appeal and Judicial Review of Property Tax Assessments in California--The new Look (1970) 22 Hastings L.J. 1, 8-9.)

The primary exceptions to this rule are "market data" (§408, subd. (b), the assessor's public list of transfers of property interests (§408.1), and information ordered disclosed by a court in a proceeding initiated by a taxpayer to challenge the legality of his assessment (§408, subd. (b).) 5/

2/ Unless otherwise indicated, all section references hereafter are to the Revenue and Taxation Code.

3/ The main purpose of the confidentiality requirement is to encourage full disclosure by the taxpayer supplying the information. (See Gallagher v. Boller (1964) 231 Cal.App.2d 482, 491 [41 Cal.Rptr. 880].)

4/ The California Records Act also contains exemptions in Government Code Section 6254 that "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; [¶]….[¶] (k) Records the disclosure of which is exempted or prohibited pursuant to provisions of federal law or state law…." (See Statewide Homeowners, Inc. v. Williams (1973) 30 Cal.App.3d 567, 569-570 [106 Cal. Rptr. 479].

5/ We exclude from discussion the sharing of information between assessors and law enforcement or certain designated official agencies. (§408, subds. (b), (c); see State Board of Equalization v. Watson (1968) 68 Cal.2d 307, 311-312 [66 Cal. Rptr. 377, 437 P.2d 761].)

(2) Section 408, subdivision (b), requires the assessor to provide "market data" and other records in his possession to an assessee of property upon request. However, market data is defined narrowly in subdivision (d), and both subdivisions (b) and (d) make clear that market data and other assessor's records relating to the taxpayer's assessment are not to be construed to require disclosure of information relating to the business affairs of other taxpayers.

Section 408, subdivision (b), provides: "(b) The assessor may provide any appraisal data in his possession to the assessor of any county and shall provide any market data in his possession to an assessee of property or his designated representative upon request. The assessor shall permit an assessee of property or his designated representative to inspect at the assessor's office any information and records, whether or not required to be kept or prepared by the assessor, relating to the appraisal and the assessment of his property. Except as provided in Section 408.1, an assessee or his designated representative, however, shall not be provided or permitted to inspect information and records, other than market data, which also relate to the property or business affairs of another person, unless such disclosure is ordered by a competent court in a proceeding initiated by a taxpayer seeking to challenge the legality of his assessment." (Italics added.)

Market data is defined in subdivision (d) as follows: "For purposes of this section, 'market data' means any information in the assessor's possession, whether or not required to be prepared or kept by him, relating to the sale of any property comparable to the property of the assessee, if the assessor bases his assessment of the assessee's property, in whole or in part, on such comparable sale or sales. The assessor shall provide the names of the seller and buyer of each property on which the comparison is based, the location of such property, the date of the sale, and the consideration paid for the property, whether paid in money or otherwise, but for purposes of providing such market data, the assessor shall not display any document relating to the business affairs or property of another." (Italics added.)

Except with respect to item 7 on appellant's list, the trial court erred in concluding that the challenged items of information constituted market data within the meaning of this section. Subdivision (d) indicates that market data is limited to the location of the property, the date of the sale, and the consideration paid for the property, if the assessor bases his assessment on such comparable sale.

Section 408.1 requires the assessor to maintain a public list of transfers of interest in property. This section also contains a prohibition on disclosure of information relating to the business affairs of the owner, other than the expressly designated items of information:

"(a) The assessor shall maintain a list of transfers of any interest in property, other than undivided interests, within the county, which have occurred within the preceding two-year period.

"(b) The list shall be divided into geographical areas and shall be revised on the 30th day of each calendar quarter to include all such transactions which are recorded as of the preceding quarter.

"(c) The list shall contain the following information:

"(1) Transferor and transferee, if available;

"(2) Assessor's parcel number;

"(3) Address of the sales property;

"(4) Date of transfer;

"(5) Date of recording and recording reference number;

"(6) Where it is known by the assessor, the consideration paid for such property; and;

"(7) Additional information which the assessor in his discretion may wish to add to carry out the purpose and intent of this section. Other than sales information, the assessor shall not include information on the list which relates to the business or business affairs of the owner of the property, information concerning the business carried on upon the subject property, or the income stream generated by the property.

"(d) The list shall be open to inspection by any person. The assessor may require the payment of a nonrefundable fee equal to an amount which would reimburse local agencies for their actual administrative costs incurred in such inspections or ten dollars ($10), whichever is the lesser amount.

"(e) The provisions of this section shall not apply to any county with a population of under 50,000 people, as determined by the 1970 federal decennial census." (Italics added.)

Thus the numerous items in the appraisal report which was prepared for appellant prior to its competitive bid on the assets of Westates Petroleum Company, reflecting such matters as appellant's assumptions as to the amount of oil recoverable, the cost of recovery, the future price of oil, the risk factor, appellant's after-tax income, and the acceptable rate of return to appellant, do not constitute market data which the assessor shall disclose, but rather constitute business affairs of appellant which the assessor may not disclose, except under a court order pursuant to Section 408, subdivision (b).

The provision in Section 408, subdivision (b), for court-ordered disclosure contemplates a somewhat different situation than the present one. Under that provision, Chevron, having initiated a proceeding challenging the legality of its assessment, might seek a court order requiring the assessor to disclose confidential information about appellant, and the court could weigh Chevron's need for the information against the competitive disadvantage which would be suffered by appellant upon disclosure. (See Ehrman, supra, 22 Hastings L.J. at pp. 27-28.) Whether the assessor may seek a court order authorizing disclosure is not as clear. But certainly the assessor cannot on his own initiative disclose confidential information.

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.

(3) 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." (Italics added.) 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 §1605.11].) 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 & Flavin, Taxing California Property (1st ed. 1967) §270, ppd. 247-248 & fn. 9; id. (2d ed. 1979) §15.5, pp. 357-358.)

Another procedure by which a taxpayer may obtain information from the assessor is to request an exchange of information pursuant to Section 1606. (See Henderson v. Bettis (1975) 53 Cal.App.3d 486, 493-494 [126 Cal. Rptr. 199].) But that section, too, must be construed in light of Sections 408 and 451, and thus it does not sanction a taxpayer's obtaining information about other taxpayers' business affairs which would otherwise be secret. (Ehrman & Flavin supra (1st ed. 1967) §270, p. 248, fn. 9; id. (1976) supp.) §468, pp. 282-284.)

We conclude that with the exception of item 7, the trial court erred in denying appellant a preliminary injunction to restrain the assessor from disclosing confidential information at the Chevron hearing. 6/

The order denying a preliminary injunction is reversed.

Stephens, J., concurred.

6/ This conclusion makes it unnecessary to consider appellant's other arguments.

COURT CASE

DIVISION OF INDUSTRIAL SAFETY, V. THE SUPERIOR COURT OF LOS ANGELES COUNTY
[Civ. No. 44740 Second Dist., Div. Three. Nov. 27, 1974]

THE STATE OF CALIFORNIA ex rel.
DIVISION OF INDUSTRIAL SAFETY, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; A. D. Bourne et al., Real Parties in Interest.

SUMMARY

A discovery order was entered in the course of personal injury and wrongful death actions arising out of the collapse of a bridge, and directed certain state agencies, including the Division of Industrial Safety, to answer interrogatories, questions, and produce documents in their possession relating to reports, investigations, complaints and procedures preceding the collapse of the bridge.

In a mandate proceeding by the Division of Industrial Safety challenging the order, the Court of Appeal denied the writ and rejected the division's contention that all of the information sought was absolutely privileged from disclosure. The court held that the long established policy of confidentiality of the division's files has been made subject to the requirements of disclosure enunciated in the California Public Records Act, under which such information is not absolutely privileged from disclosure in tort cases, and that appropriate personnel of the division may be questioned regarding such information. The court further held that the matter ordered disclosed was conditionally privileged, but that the trial court did not abuse its discretion in ordering the disclosure on the basis that the public interest would be better served by the limited disclosure ordered. (Opinion by Cobley, Acting P. J. with Allport, J., and Loring, J.,* concurring.)

HEADNOTES

Classified to McKinney' Digest

(1a, 1b) Discovery §7 - Right to Discovery - Limitation on Right; Privileged Matters. - The legislatively established policy against disclosure of official information by the Division of Industrial Safety cannot be construed as an absolute privilege protecting anything of consequence in the division's files from disclosure, in view of Lab. Code, §6322, which protects from disclosure by the division only information that is confidential under the California Public Records Act, and in view of the fact that the claim of absolute privilege is inconsistent with the general policy of the California Public Records Act favoring disclosure of information concerning the people's business, appropriate personnel of the division may be questioned regarding information in the division's files in a tort action.

(See Cal.Jur.2d, Discovery and Depositions, §10; AM.Jur.2d, Depositions and Discovery, §174.)

* Assigned by the Chairman of the Judicial Council.

(2) Discovery §7 - Limitation on Right; Privileged Matters. - Gov. Code, §6254, subd. (b), exempting from disclosure records "pertaining to" pending litigation to which a public agency is a party was not applicable to an order for discovery of information and documents in the possession of the Division of Industrial Safety, in personal injury and wrongful death actions arising out of the collapse of a bridge under construction. The exception in question essentially provides public agencies with the protection of the attorney-client privilege, including work product, for a limited period while there is ongoing litigation, and the discovery order did not require the disclosure of any documents or records coming within the attorney-client privilege.

(3a, 3b) Discovery §7 - Limitation on Right; Privileged Matters. - Gov. Code, §6254, subd. (f), exempting from disclosure all public files compiled for law enforcement purposes, was not applicable to files maintained by the Division of Industrial Safety which were the subject of a discovery order in personal injury and wrongful death actions arising out of the collapse of a bridge under construction. While the Division of Industrial Safety does make investigations in the course of enforcement of certain aspects of the California Occupational Safety and Health Act of 1973, and undoubtedly compiles files of its investigations, all of such files are not necessarily files compiled for "law enforcement purposes" within the meaning of the subdivision. The adjective "law enforcement," as used in the subdivision, refers to law enforcement in the traditional sense, that is, to the enforcement of penal statutes, etc., and unless there is a concrete and definite prospect of such criminal law enforcement, the subdivision does not apply. Furthermore, the terms "law enforcement" and "investigatory files" would not be given the same interpretations those terms have been given in the regulations of the United States Department of Labor, since the interpretations reflect the point of view of the agency and have not been approved by the federal courts.

(4) Discovery §7 - Limitation on Right; Privileged Matters. - In personal injury and wrongful death actions arising out of the collapse of a bridge under construction, information and documents in the possession of the Division of Industrial Safety were conditionally privileged from disclosure but the trial court in ordering discovery of the pre-collapse reports, investigations, complaints and procedures and other information and documents relating thereto, did not abuse its discretion on the ground that the division could best perform its statutory responsibility of making the employment of every employee of the state safe only if the employers and employees with which its personnel work know that anything disclosed by them to the division, or observed by the division's personnel, is completely confidential. On the contrary, such limited disclosure might make employers more careful, and the division more zealous in enforcing safety requirements.

COUNSEL

Evell J. Younger, Attorney General, Robert H. Francis and Joseph M. O'Heron, Deputy Attorneys General, for Petitioner.
No appearance for Respondent.
Harney, Bambic and Moore and Richard B. Wolfe for Real Parties in Interest.

OPINION

Cobey, Acting P. J. - We have before us in this extraordinary writ proceeding the question of whether a discovery order or respondent superior court violates the official information privilege. 1/ The discovery order at issue was entered upon motion of the real parties in interest in their four personal injury and wrongful death actions that arose out of the collapse of a bridge, under construction by Polich-Benedict Construction Co., over the Arroyo-Seco near Pasadena. The order directs certain agencies of the State of California that are codefendants with Polich in these actions, including the Division of Industrial Safety (Division): (1) to answer interrogatories by identifying certain documents and materials in their possession; (2) to answer questions, through their deponents, concerning pre-collapse reports, investigations, complaints and procedures; and (3) to produce documents in their possession containing pre-collapse information, reports, etc. Only the Division challenges the order. 2/

I

ABSOLUTE PRIVILEGE

The Division takes the position that all of the information sought by the real parties in interest is absolutely privileged from disclosure. It points, first, to the provisions of Labor Code Section 6322; Government Code Sections 6254 and 6255; and Evidence Code Section 1040, subdivisions (a) and (b) (1), and Section 915, subdivision (a). 3/ According to the Division, these sections provide an absolute privilege. Second, the Division points to its statutorily enjoined policy of nondisclosure of information obtained from confidential sources concerning either the failure of any person to keep any place of employment safe, or the violation of any safety order, rule or regulation. This policy was established upon the creation of the Division's predecessor in 1913 (Stats. 1913, ch. 176, §70, p. 310), has continued to receive legislative recognition despite several changes in the statutes governing the Division (Stats. 1917, ch. 586, §52, p. 866; Stats. 1937, ch. 90, §6319, p. 308; Stats. 1945, ch. 1431, §89, p. 2700; Stats. 1970, ch. 575

1/ The petition before us also challenges the scope of the discovery order. We leave the question of whether the order should be modified in this respect to the court making it. We decide only the question we have posed.

2/ The Division sought writs of prohibition herein, but we issued an alternative writ of mandate. This we may do. (See 5 Witkin. Cal. Procedure (2d ed. 1971) Extraordinary Writs, §§183-184, pp. 3942-3944.) We note from respondent court's files, of which we have taken judicial notice pursuant to the provision therefor in our alternative writ of mandate, that Polich-Benedict received notice of the motion of real parties in interest for the discovery over but apparently did not appear at the hearing thereof or otherwise oppose the motion. Polich-Benedict is not a real party in interest in these proceedings. Consequently, we do not here pass upon whatever rights, if any, that Polich-Benedict may possibly have to object to any part of the discovery order.

3/ Labor Code Section 6322 in relevant part reads: "All information reported to or

3/ (Cont.) otherwise obtained by the chief or his representatives in connection with any inspection or proceeding of the division which contains or which might reveal…information that is confidential to pursuant to…(the California Public Records Act) shall be considered confidential….Violation of this section is a misdemeanor." Government Code Section 6254, to the extent claimed to be relevant by the Division, reads: "…nothing in…(the California Public Records Act) shall be construed to require disclosure of records that are:

"(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6…of Title 1 of the Government Code until such litigation or claim has been finally adjudicated or otherwise settled:

"(f) Records of complaints to or investigations conducted by…any state…police agency, or any such investigatory…files compiled by any other state…agency for correctional, law enforcement or licensing purposes:

"(k) Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

"Nothing in this section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law."

"Government Code Section 6255 in relevant part reads: "The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of…(the California Public Records Act)."

Government Code Section 1040 in relevant part reads: "(a) As used in this section, 'official information' means acquired in confidence by a public employee in the course of his duty and no open, or officially disclosed, to the public prior to the time the claim of privilege is made.

"(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information if the privilege is claimed by a person authorized by the public entity to do so and:

"(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this;…"

Evidence code Section 915, subdivision (a) reads: "(a) Subject to subdivision (b), the presiding officer may not require disclosure of information claimed to be privileged under this division in order to rule on the claim of privilege."

§5, p. 1151), and currently receives such recognition, as it always has, in the form of a misdemeanor penalty for disclosure of the Division's confidential information. (Lab. Code, §6322.) The Division argues that this 60-year-old legislatively established policy against disclosure of official information is one of absolute privilege protecting anything of consequence in its files from disclosure.

(1a) We disagree with this blanket claim of absolute privilege. 4/ The pivotal provision on which the Division relies--Labor Code Section 6322--on its face protects from disclosure only information that is confidential under the California Public Records Act. In enacting the latter statute, the Legislature expressly found and declared that, though mindful of the right of individuals to privacy, "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code, §6250.) Manifestly, the work of the Division of Industrial Safety is part of "the people's business." Its claim of absolute privilege therefore is inconsistent with the general policy of the act, which favors disclosure. Accordingly, support for its claim must be found, if at all, among the specific exceptions to the general policy that are enumerated in the Act.

(2) Three such exceptions are relied on by the Division: subdivisions (b), (f) and (k) of Government Code, Section 6254, which are set forth in footnote 3 above. We do not see, however, how the first of these exceptions can possibly apply to the question before us. Subdivision (b) exempts from disclosure records "pertaining to" pending litigation to which a public agency is a party. This essentially provides public agencies with the protection of the attorney-client privilege, including work product, for a limited period while there is ongoing litigation. As we construe the challenged order, it does not require the disclosure of any documents or records coming within the attorney-client privilege. 5/

(3a) Subdivision (f) is likewise inapplicable since the Division, in our view, does not compile investigatory files for "correctional, law enforcement or licensing purposes." The Division clearly performs no correctional or licensing functions. It is engaged, though, in the enforcement of certain aspects of the California Occupational Safety and Health Act of 1973. (Lab. Code, §§6300, 6302, subd. (d), 6307-6308.) It does make investigations in the course of such enforcement (Lab. Code, §6309) and it undoubtedly compiles files of its investigations.

4/ In so holding, we are mindful of Chief Justice Burger's recent admonition that: "Whatever their origins…exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." (United States v. Nixon (1974) 418 U.S. 683. 710 [4] L.Ed.2d 1039, 1065 [94 S.Ct. 3090] (fn. omitted).)

5/ The real parties in interest have requested this court to broaden the challenged discovery order to post-collapse information, but we decline to do so. Whether the order should be so broadened is a matter that first must be submitted to the trial court.

But to our way of thinking all of such files are not necessarily files compiled for "law enforcement purposes" within the meaning of the subdivision. The adjective "law enforcement," as used in the subdivision, refers to law enforcement in the traditional sense--that is, to the enforcement of penal statutes, etc. Unless there is a concrete and definite prospect of such criminal law enforcement, the subdivision does not apply. We say this because we suspect that every administrative agency in state government enforces one or more statutes and in the course of such enforcement conducts investigations and, as an incident thereto, compiles investigatory files. Surely the Legislature did not intend to include within the official information privilege all of such files because, if it did, the exception of nondisclosure would swallow the general policy of disclosure enunciated in the preamble to the California Public Records Act. Rather the subject matter of the protected files must relate to the same type of criminal law enforcement subject matter as is covered generally by the immediately preceding provisions of the subdivision. (See Uribe v. Howie, 19 Cal.App.3d 194, 212-213 [96 Cal. Rptr. 493].) The Division apparently does not claim that any of the information required by the challenged discovery order falls within the category protected by subdivision (f), as we have construed it.

This leaves subdivision (k) as the only potentially applicable subdivision of Section 6254. But this subdivision--like Evidence Code Section 1040, subdivision (b) (1)--refers only to records the disclosure of which is exempted or prohibited "pursuant to provisions of federal or state law." The Division has referred us to no constitutional, statutory or decisional law (see Evid. Code, §160) other than the statutes we have already quoted and discussed, and certain cases that are not controlling, to support its contention that all of its records and observations are absolutely privileged from disclosure.

(1b) We hold that the law is otherwise. The long established policy of confidentiality of the Division's files has not been made subject by Labor Code Section 6322 to the requirements of disclosure enunciated in the California Public Records Act. Under this statute information contained within the files of the Division is not absolutely privileged from disclosure in these tort cases and appropriate personnel of the Division may be questioned regarding such information.

(3b) Following oral argument, the Attorney General filed a supplemental memorandum with this court discussing certain regulations issued by the United States Department of Labor pursuant to the federal Freedom of Information Act (5 U.S.C. §552 et seq.), which is similar to our Public Records Act. The Attorney General contends in his memorandum that the terms "law enforcement" and "investigatory files" in Government Code Section 6254, subdivision (f), should be given the same interpretations those terms have been given in the regulations of the United States Department of Labor.

But the interpretations cited by the Attorney General reflect the point of view of the agency. They have not been approved by the federal courts. Indeed these courts generally have given the term "investigatory files" a narrow scope and have limited its application to situations where the prospect of future enforcement proceedings is "concrete." (See Bristol-

Myers Co. v. F.T.C. (1970) 424 F.2d 935, 939 [138 App.D.C. 22], cert. den., 400 U.S. 824 (27 L.Ed.2d 52, 91 S.Ct. 46]; but see Cowles Communications, Inc. v. Department of Justice (N.D. Cal 1971) 325 F.Supp. 726, 727.) Bristol-Myers Co. has been followed in California (Uribe v. Howie, supra, 19 Cal.App.3d at pp. 212-213), and we adopt its view as our own.

II

CONDITIONAL PRIVILEGE

(4) We believe, though, that the matter ordered disclosed by the challenged order is conditionally privileged from disclosure under the aforementioned Labor Code Section 6322, Government Code Sections 6254, 6255, and Evidence Code Section 1040, subdivision (b) (2). 6/ But we hold, for reasons hereafter stated, that in making the challenged discovery order, the trial court did not abuse the discretion granted to it by Government Code Section 6255, and Evidence Code Section 1040, subdivision (b) (2). [Cf. Pacific Tel. & Tel. Co. v. Superior Court, 2 Cal.3d 161, 171 (84 Cal. Rptr. 718, 465 P.2d 854].)

The Division argues to the contrary that it can best perform its statutory responsibility of making the employment of every employee in this state safe (see Lab. Code, §6307) only if the employers and employees with which its personnel work know that anything disclosed by them to the Division, or observed by the Division's personnel, is completely confidential. The Division points out that both employers and employees may refuse to cooperate fully with the Division if they think that any adverse information concerning them in the Division's files may be discoverable and used against them elsewhere.

We think, nevertheless, that the possibility of later discovery of adverse information in the Division's file may have the opposite effect in terms of achievement of the basic objective of the Division's operations--namely, industrial safety in California. Employers may be more careful of the safety of their employees and employees more mindful of any violations by their employers of safety requirements once employers and employees have learned that the violation of such requirements in an appropriate case may have adverse consequences for employers beyond those within the Division's jurisdiction. Moreover, the Division itself may be more zealous in enforcing safety requirements if it knows that parties to tort actions may

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6/ Government Code Section 6255, so far as here relevant reads:
"The agency shall justify withholding any record by demonstrating…that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."
Evidence Code Section 1040, subdivision (b) (2), in relevant part, reads:
"(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:
"(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice;….In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered."

discover within the Division's files material relevant to the charges of negligence made in such actions provided such material is not protected by the official information privilege. Finally, we are not convinced that the Division's sources of information will "dry up" if such discovery is permitted. Employers and their agents who fail to respond to the Division's requests for information are guilty of a misdemeanor. (Lab. Code, §6314, subd. (b).) As to their employees, specific provisions of the Labor Code protect them from employer retaliation for reports to the Division. (Lab. Code, §§6310-6312.) Therefore, we agree with the trial court that on balance "the public interest will be better served by the limited disclosure ordered here." 7/

The alternative writ of mandate heretofore issued is discharged. A peremptory writ of mandate will not be issued.

Allport, J. and Loring J., * concurred.

A petition for a rehearing was denied December 10, 1974, and petitioner's application for a hearing by the Supreme Court was denied January 23, 1975.

7/ We leave to the trial court for initial determination the question of how best to give effect to the conditional privilege recognized in this opinion. (See Evid. Code, §915, subd. (b).)

* Assigned by the Chairman of the Judicial Council.

ATTORNEY GENERAL OPINION 84-1104

OFFICE OF THE ATTORNEY GENERAL
State of California

JOHN K. VAN DE KAMP
Attorney General

Opinion	:	
	:	
of	:	No. 84-1104
	:	
JOHN K. VAN DE KAMP Attorney General	: :	
	:	JULY 30, 1985
ANTHONY S. DA VIGO Deputy Attorney General	: :	

THE HONORABLE JAMES B. LINDHOLM, JR, COUNTY COUNSEL, COUNTYOF SAN LUIS OBISPO, has requested an opinion on the following question:

Must the county assessor, pursuant to an administrative summons issued by the Internal Revenue Service under title 26 of the United States Code, Section 7602, either (a) produce or (b) produce only in compliance with a specific court order, information contained in property tax records made confidential under Section 408, 451 and 481 of the Revenue and Taxation Code?

CONCLUSION

The county assessor is required, pursuant to an administrative summons issued by the Internal Revenue Service under title 26 of the United States Code, Section 7602, to produce information contained in property tax records made confidential under Sections 408, 451 or 481 of the Revenue and Taxation Code, where the federal interest in disclosure outweighs the state interest in confidentiality, but is prohibited from producing such information where the state interest prevails. Such information must be produced in any case in compliance with a specific court order.

ANALYSIS

Title 26, United States Code, Section 7602, subdivision (a), provides as follows:

> "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity

> of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized--
>
> "(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> "(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons, and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> "(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry." (Emphasis added.)

Such power granted to the Commissioner of Internal Revenue is inquisitorial in nature and has been analogized to that vested in a grand jury. (United States v. Cortese (3 Cir. 1976) 540 F.2d. 640; Falsone v. United States (5 Cir. 1953) 205 F.2d 734, 737, cert. den. 346 U.S. 864.) Unlike the report of a grand jury, the tax investigation is reported to the commissioner rather than to a court (Falsone v. United States, supra), and may not be used for criminal purposes except where a parallel civil investigatory purpose exists (United States v. Civella (8 Cir. 1981) 666 F.2d. 1122; United States v. First National Bank of Atlanta (5 Cir. 1980) 628 F.2d 871).

The initial inquiry is whether a county assessor must, pursuant to such an administrative summons, produce information contained in property tax records which are subject to the following provisions of the Revenue and Taxation Code: 1/

> "Sec. 408:
>
> "(a) Except as otherwise provided in subdivisions (b) and (c) any information and records in the assessor's office which are not required by law to be kept or prepared by the assessor, and homeowners' exemption claims, are not public documents and shall not be open to public inspection. Property receiving the homeowners' exemption shall be clearly identified on the assessment roll. The assessor shall maintain records which shall be open to public inspection to identify those claimants who have been granted the homeowners' exemption.

1/ Hereinafter, unidentified section references are to said code.

> ". . . . . .
>
> "(c) The assessor shall disclose information, furnish abstracts or permit access to all records in his office to law enforcement agencies, the county grand jury, the board of supervisors or their duly authorized agents, employees or representatives when conducting an investigation of the assessor's office pursuant to Section 25303 of the Government Code, the State Controller, inheritance tax referees, the State Board of Equalization and other duly authorized legislative or administrative bodies of the state pursuant to their authorization to examine such records.
>
> ". . . . . .
>
> "Sec. 451:
>
> "All information requested by the assessor or furnished in the property statement shall be held secret by the assessor. The statement is not a public document and is not open to inspection, except as provided in Section 408."
>
> "Sec. 481;
>
> "All information requested by the assessor or the board pursuant to this article or furnished in the change in ownership statement shall be held secret by the assessor and the board. The statement is not a public document and is not open to inspection, except as provided in Section 408." 2/

In our view, these confidentiality provisions constitute an integral aspect 3/ of the state's sovereign power 4/ to collect taxes.

2/ Each of the quoted statutes expressly declares that the records referred to are not public documents. Hence it is clear that they do not fall within the purview of the California Public Records Act. (Cf. Gov. Code, §6252, subd. (d); Statewide Homeowners, Inc. v. Williams (1973) 30 Cal.App.3d 567, 569-570.)

3/ All of the documents made confidential under Sections 408, 451 and 481 are sources of information the accuracy of which is essential to the fair and efficient administration of the tax laws. (Cf. Roberts v. Gulf Oil Corporation (1983) 147 Cal.App.3d 770, 785, n. 9; Gallagher v. Boller (1964) 231 Cal.App.2d 482.) Such considerations are typical of numerous instances in which public policy and interest require the curtailing of an open and unrestricted inspection of documents. (Cf. 15 Ops.Cal. Atty. Gen. 242, 244 (1950).)

4/ The collection of taxes is not the mere collection of a debt, but a sovereign act of the state to be exercised as prescribed by the Legislature. (People v. Central Pac. R. R. Co. (1895) 105 Cal. 576, 588-589, affd. 162 U.S. 91.)

No single clear line of authority is found in the federal cases. In related contexts, for example, state officers were not compelled to disclose official communications which were privileged under state law. In In re Reid (D.C. Mich. 1906) 155 F. 933, the court held that a city assessor could not be compelled in bankruptcy proceedings before a referee to disclose, in violation of a prohibitory Michigan statute, certain tax statements. The court noted that the purpose of the state statute was:

> "…plainly to promote the collection from each taxpayer of his just share of state, county, and municipal taxes, and to that end to require from each property owner the full disclosure of all his taxable property under the state's pledge that the statement shall be kept inviolate, save to the officials for whose information and guidance it was made. To permit that information to become public would defeat the plain purpose of the statute by deterring the taxpayer from revealing what frequently could not be learned from any other source." (Id., at 935.)

(Similarly, In re Valecia (7th Cir. 1917) 240 F. 310 -- state tax commissioner; cf. Herman Brothers Pet Supply, Inc. v. N.L.R.B. (6th Cir. 1966) 360 F.2d 176 -- unemployment compensation claims.)

In a more recent case, however, United States v. Martin (D. Kan. 1982) 542 F. Supp. 22, the government brought an action to enforce a summons issued under Section 7602 of the Internal Revenue Code on the Director of Property Valuation for the State of Kansas. Statutes of the State of Kansas directed that the information sought by the summons not be disclosed.

> "Defendant relies on K.S.A. §58-2223b to satisfy its burden. Defendant cannot prevail with this argument. The United States Constitution provides that 'This Constitution, and the laws of the United States which shall be made in Pursuance thereof;…shall be the supreme law of the Land…..' U.S. Const. art VI, cl. 2. State laws which substantially interfere with the execution of federal laws are preempted by the operation of the Supremacy Clause. Aronson v. Quick Point Pencil Company (1979) 440 U.S. 257, 262. In general, state laws in conflict with the execution of federal internal revenue statutes have been made to yield. U.S. v. Dallas National Bank, 152 F.2d 582 (5th Cir. 1946); U.S. v. City of Greenville, 118 F.2d 963 (4th Cir. 1941); U.S. v. Pettyjohn, 84 F.Supp. 423 (W.D. Mo. 1949). State laws impeding the enforcement of IRS summons have not been excepted from the operation of the Supremacy Clause. U.S. v. Gard, 76-1 U.S.T.C. §9314 (E.D. Cal. 1976); U.S. v. Interstate Bank, 80-1 U.S.T.C. §9272 (N.D. I11. 1980)." (Id., at 23.)

In our view, however, and for the reasons hereinafter set forth, this ultra simplistic supremacy approach is analytically insufficient.

Rule 501 of Title 28, United States Code, enacted in January 1975 (Pub. L. 93-595, 88 stat. 1933) as part of the Federal Rules of Evidence 5/, provides:

> "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." (Emphasis added.) 6/

Thus, the issue in any case is whether the state nondisclosure statute should be recognized as a privilege "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." 7/

5/ It is assumed for purposes of this analysis that the conduct of investigations under the statute in question is subject to the same testimonial privileges as judicial proceedings. (See Falsone v. United States, supra, 205 F.2d at 738; McMann v. Securities & Exchange Com. (2d cir. 1937) 87 F.2d 377, 378; 2 Am. Jur.2d Administrative Law, §267.) It has been said that while administrative proceedings are not generally governed by the Federal Rules of Evidence, the ancient and widely recognized rules of privilege probably apply. (McMorrow v. Schweiker (1982) 561 F.Supp. 584, 586; see Wearly v. FTC (1978) 462 F.Supp. 589, vacated as not ripe, 616 F.2d 662 (3rd Cir. 1980), cert. den, 449 U.S, 822, after remand, 503 F.Supp. 174 (1980); and see rule 1101, subd. (c) – "The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.")

6/ The second sentence is designed to require the application of state privilege law in "diversity" cases (28 U.S.C. §1332) governed by Erie R. Co. v. Tompkins (1938) 304 U.S. 64 (See, e.g., Credit Life Ins. Co. v. Uniworld Ins. Co. (S.D. Oh., W.D. 1982) 94 F.R.D. 113 – state law applied to discovery of tax returns)

7/ Proposed Federal Rules of Evidence, Rule 502, not accepted by Congress, would have recognized a specific privilege for records required by local law not to be disclosed. Its rejection has no compelling significance since the courts remain free under the more general provisions of rule 501 to recognize a privilege in a proper case. (In re Hampers (1st Cir. 1981) 651 F.2d 19, 21, n. 2; United States v. King (E.D. N.Y. 1976) 73 F.R.D. 103, .104-105; In re Grand Jury Empanelled Jan., 21, 1981 (D. N.J. 1982) 535 F. Supp. 537, 540.)

In this regard, the court in Schafer v. Parkview Memorial Hospital, Inc. (N.D. Ind. 1984) 593 F.Supp. 61, 62-63, observed:

> Because Rule 501 of the Federal Rules of Evidence speaks in terms of 'reason and experience,' most courts, even in federal question cases, look to state law to see if a privilege 'should be applied by analogy or as a matter of comity.' Ott v. St. Luke Hospital of Campbell County, 522 F.Supp. 706, 708 (E.D.Ky., 1981); Robinson, supra; United States v. King, 73 F.R.D. 103 (E.D.N.Y., 1976). Thus, where a state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule,' Lora v. Board of Education, 74 F.R.D. 565 (E.D.N.Y., 1977) because 'comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy.' King, supra at 105."

In balancing the competing interests between the need for disclosure and the need to protect confidentiality, the Schafer court invoked the well established "four factor test" (Id., at 64):

> "Adopting the four factor test for recognition of a testimonial privilege recognized in cases such as American Civil Liberties Union of Mississippi, Inc. v. Finch, 638 F.2d 1336 (5th Circ. 1981) and In re Hampers, 651 F.2d 19 (1st Cir. 1981), other courts have applied those factors to a claimed privilege under peer review statutes. See, Ott v. St. Luke Hospital of Campbell County, 522 F.Supp. 706 (D. Ky. 1981). The four factors to be taken into consideration include:
>
> "1. The communications must originate in a confidence that they will not be disclosed.
>
> "2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> "3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> "4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigations.
>
> "Finch, supra, at 1344; Ott, supra, at 710."

Specifically, it remains to be determined whether Revenue and Taxation Code Sections 408, 451, and 481 present a "proper case" for the recognition of a privilege under Section 501 of the Federal Rules of Evidence. 8/ In re Hampers, supra, 651 F.2d 19, involved the issuance by a federal special grand jury investigating an arson-insurance fraud scheme of a subpoena duces tecum directing the Commissioner of Revenue for Massachusetts to produce documents relating to the sales tax on meals and beverages owed to the commonwealth at the time of the fire which destroyed a restaurant. A motion to quash was predicated upon a state statute prohibiting the disclosure of tax return information.

Approaching the inquiry whether the state's asserted privilege was "intrinsically meritorious in our independent judgment" (American Civil Liberties Union of Miss. v. Finch (5th Cir. 1981) 638 F.2d 1336), the Hampers court adopted the four part test (Id., at 23):

> "…The first is whether the communications originate in a confidence that they will not be disclosed. The answer is and for a long time has been 'Yes'. The second is whether this element of confidentiality is essential to "the full and satisfactory maintenance of the relation between the parties.' Id. at 1344. On this issue each side overargues. The United States blithely asserts that criminal and other sanctions provide more than enough teeth to guarantee continued compliance with the tax laws. The Commonwealth invokes the specter of Doomsday if the slightest enforced breach of confidence occurs. Our view is that while selective disclosure in cases where rigorous criteria have been met would most probably have little or no effect on the state's reporting system, easy and automatic recourse to tax return information by federal grand juries or--if there were no privilege whatsoever--by competitors, creditors, prospective purchasers or other litigants in Federal court might eventually have an adverse impact on the state-taxpayer relationship. That such a relationship, to address Wigmore's third test briefly, is a vital one, which ought to be sedulously fostered' Id. at 1344, would seem to be beyond dispute.

8/ Inasmuch as the state's interest in confidentiality is presented in the context of the federal agency's interest in disclosure, it should be noted at the outset that the operative federal statute, 26 United States Code Section 7602, does not "otherwise require" the disclosure of confidential information within the meaning of Rule 501, but is silent with respect to rules of evidence and procedure. (Compare §19254, subd. (c), infra: "The Franchise Tax Board may issue…subpoenas duces tecum, which….may be served on any person for any purpose.") While such statutory language is broad in form, it does not purport to supersede established rules of privilege. It has been held, for example, that Rule 501 governs over the broad subpoena authority of a grand jury. (In re Grand Jury Empanelled Jan. 21, 1981, supra, 535 F.Supp. at 539-540; and see Branzburg v. Hayes (1972) 408 U.S. 665, 688.)

> "Wigmore's fourth inquiry is whether 'the injury that would inure to the relation by the disclosure of the communications [would be] greater than the benefit thereby gained for the correct disposal of litigation.' Id. at 1344 (emphasis in Finch). This is the query that drives us to seek a more particularistic answer than the macrocosmic one that effective federal criminal law enforcement is more important than state tax collection. We can easily see that if a state tax return contained the only key to resolving a serious federal crime, the balance would tilt in favor of the federal government. See In re Grand Jury Subpoena for N.Y. State Income Tax, 468 F.Supp. 575 (N.D.N.Y. 1979). But if a return contained information that would be easily obtained elsewhere and at best would constitute only cumulative evidence impeaching one of several witnesses, we might have second or third thoughts.
>
> "Being charged as we are under Rule 501 to look to reason and experience in charting a federal evidentiary common law, we think the key has already been forged by the Congress in legislating in 26 U.S.C. §6103(i)(1) the conditions under which federal tax information may be made available to federal officials for non-tax criminal purposes. The deliberate judgment of the legislature on the balancing of the societal interests in detecting, preventing, and punishing criminal activity, in safeguarding individuals' interests in privacy, and in fostering voluntary compliance with revenue reporting requirements, seems to us a legitimate if not compelling datum in the formation of federal common law in this area. See Moragne v. State Marine Lines (1970) 398 U.S. 375, 390-91, Landis, Statutes and the Source of Law, in Harvard Legal Essays 213, 226-27 (1934).
>
> "We see no reason why, if federal prosecutions are not unduly hindered by the restraints of §6103, they would be so hindered by applying the same rules to state tax returns. We see a positive virtue in avoiding either any circumvention of §6103 or inconsistency in rules of access to federal and state tax information. And we see value in preserving in this small area the postures of comity and deference arising from federalism."

The court held that the Massachusetts Commissioner of Revenue enjoyed a qualified privilege under Rule 501 because of the state nondisclosure statute, subject to an adequate showing by the federal grand jury of an overriding contravening interest.

In re Grand Jury Empanelled Jan. 21, 1981, supra, 535 F.Supp. 537, involved the issuance by a federal grand jury investigating racketeering of a subpoena duces tecum directing the New Jersey Division of Taxation to deliver copies of certain franchise tax returns of a named company. A motion to quash was predicated upon a state statute prohibiting disclosure by the division of its records and files.

The court observed (Id., at 541) that the motivating factor underlying New Jersey's legislation was a desire to encourage accurate and complete reporting by providing a measure of qualified confidentiality for the information submitted, that this was a laudable legislative objective, and that the means chosen were reasonably calculated to achieve that goal. Moreover, "the principles of comity suggest generally that the federal courts should recognize state privileges 'where this can be accomplished at no substantial cost to federal substantive and procedural policy.' (Citation.)" (Id.) The court adopted, as a matter of federal common law under Rule 501 a qualified privilege for the disclosure of state tax returns patterned on 26 United States Code Section 6103(i) (1) respecting proceedings to enforce federal laws not relating to tax administration. (Id., at 542.)

Thus, where an asserted state privilege is based on the confidentiality of tax returns, 26 United States Code Section 6103(i) (1) sets the standard where information is sought in connection with nontax criminal matters. It is assumed for purposes of this analysis, on the other hand, that the administrative summons issued by the Internal Revenue Service, which is the subject of the present inquiry, would be in connection with a civil or criminal tax related investigation.

United States v. King, supra, 73 F.R.D. 103, concerned an investigation of a taxpayer for failure to declare as income the proceeds of extortion from high-level narcotics dealers. The United States Attorney issued a subpoena duces tecum directing the Department of Finance of the City of New York to furnish city income tax returns reflecting filing records and payments. A motion to quash was predicated upon a provision of the New York City Administrative Code (having the force and effect of state law) prohibiting the disclosure of any report or return.

The court observed preliminarily that Rule 501 "does not rigidly circumscribe the form or extent of the rules of privilege applicable in federal criminal cases. Courts may continue to develop accepted privileges, as well as to formulate new privileges on a case by case basis." Applying the four part test, the court described generally the federal interest:

> "Of the four factors to be weighed, the need for full revelation of pertinent evidence to the trier is the most powerful and least variable.
>
> ". . . . . .

"Only recently the Supreme Court emphasized the strong policy in favor of full development of the facts in federal litigations to the end that justice be served. It observed in United States v. Nixon (1974) 418 U.S. 683, 709:

" 'We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be found on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.' "

With respect to the state interest the court observed:

"The secrecy statute involved in this case is but one of several thousand enactments and regulations in the United States which 'make confidential in varying degree sundry matters required by law to be recorded or to be reported orally or in writing to various administrative officials.' 8 Wigmore, Evidence §2377 at 781 (McNaughton rev. 1951). These statutes, both state and federal, generally represent legislative policies of significant dimension. See Advisory Committee's Notes to Proposed Federal Rule of Evidence 502, 56 F.R.D. 183, 235 (1972)). In effect, the government promises secrecy as an inducement for the creation of the communication to the state on the assumption that the communicator will be motivated to make a more honest and candid revelation. As Wigmore points out:

" 'Where the government needs information for the conduct of its functions and the persons possessing the information need the encouragement of anonymity in order to be induced to make full disclosure, the protection of a privilege will be accorded… [Many] situations exist where…information can best be obtained only from the person himself whose affairs are desired to be known by the government. An attempt to get it by mere compulsion might be tedious and ineffective; and a concession of anonymity in this context would be meaningless. Thus, where alternative methods of getting needed information are impracticable enough, it is expedient for government to promise to cloak the information in some special degree of secrecy in exchange for ready and truthful disclosure.'"

The court interrelated the respective interests in part as follows:

> "A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy. Cf. Apicella v. McNeil Laboratories, Inc. (E.D.N.Y. 1975) 66 F.R.D. 78. In this connection we recognized that the benefit of a state's promise of protection from divulgence is greatly attenuated when those who must choose whether to communicate or not in reliance on the local privilege know that the federal authorities may force public revelation at will. The imperative need of the states and their subdivisions to efficiently administer their own fiscal operations militate strongly against action by a district court that might interfere with a state tax program, in the absence of a showing of genuine government need for subpoenaed material. Cf. Tully v. Griffin, Inc. (1976) 429 U.S. 68, 73 (recognition of state procedures for challenging state tax decisions as reason for federal courts to abstain from granting injunction." 9/

It is apparent, in view of the necessary balancing of respective interests in each case, that a categorical answer may not be given abstractly without reference to specific facts and circumstances. Moreover, it is not clear whether a federal appeals court would analyze a case involving a tax related investigation without reference to the correlative standards of 26 United States Code Section 6103; it is not immediately apparent why the corresponding federal criteria would be significant only in nontax-related proceedings. Subdivision (h) of that section pertains to the disclosure of federal tax information for purposes of tax administration. Subparagraph (4) concerns disclosure in judicial and administrative proceedings:

> "--A return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only--

---

9/ Applying the pertinent tests to the particular facts of the case, the court ruled in favor of disclosure. Primary among the considerations was the indication that the principal objective of the New York nondisclosure provision was not to foster secrecy so as to encourage candor and cooperation by the taxpayers, but to induce other taxing authorities, including the United States, to furnish information upon the basis for selective reciprocity.

> "(A) if the taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayers civil or criminal liability, in respect of any tax imposed under this title:
>
> "(B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding:
>
> "(C) if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding; or
>
> "(D) to the extent required by order of a court pursuant to Section 3500 of title 18, United States Code, or Rule 16 of the federal Rules of Criminal Procedure, such court being authorized in the issuance of such order to give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in this title.
>
> "However, such return or return information shall not be disclosed as provided in subparagraph (A), (B), or (C) if the Secretary determines that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation."

While we make no prediction as to the future federal judicial determinations in the premises, it is at least a reasoned hypothesis that if disclosure for tax related purposes of federal tax information is not, in the federal view, a significant impairment of the general policy of confidentiality (see §6103, subd. (a)), a similar view would be adopted with respect to local nondisclosure provisions.

A corresponding variable lies in the state nondisclosure policy which is propounded as the basis for the asserted privilege. It is a reasonable inference that if such state policy itself contains an exception for tax related purposes, disclosures for concomitant federal purposes are less likely to be viewed as such an increased impairment of general state policy as to override a countervailing federal interest, especially where such interest is found to be substantial and sufficiently supported. It remains to be examined, therefore, the extent to which the nondisclosure policy of this state provides for tax related disclosures to outside agencies. In our view, such an exception would constitute a strong factor in the balance of the state-federal equation whether or not reference is made in the total analysis to the provisions of 26 United States Code Section 6103.

Of the three statutes prescribing the nondisclosure of this state with respect to the county assessor, Sections 408, 451 and 481 which are the subject of this discussion and set forth at the outset, each is expressly subject to the exceptions contained in Section 408. Subdivision (c) of Section 408 provides for disclosure to law enforcement agencies, the county grand jury, the board of supervisors, the State Controller, inheritance tax referees, staff appraisers of the Department of Transportation, the State Board of Equalization, and "other duly authorized…administrative bodies of the state pursuant to their authorization to examine such records." With respect to the authority of the Franchise Tax Board to examine such records, Section 19254 provides:

> "(a) The Franchise Tax Board, for the purpose of administering its duties under this part, including ascertaining the correctness of any return; making a return where one has been made; determining or collecting the liability of any person in respect of any liability imposed by this part (or the liability at law or in equity of any transferee in respect of such liability); shall have the power to examine any books, papers, records, or other data, which may be relevant to such purpose.
>
> "(b) The Franchise Tax Board may require the attendance of the taxpayer or of any other person having knowledge in the premises and may take testimony and require material proof for its information and administer oaths to carry out the provisions of this part.
>
> "(c) The Franchise Tax Board may issue subpoenas or subpoenas duces tecum, which subpoenas must be signed by any member of the Franchise Tax Board and may be served on any person for any purpose."

Thus, the state policy provides for disclosure to another state tax agency for tax related purposes. It is not significant that the state statute makes no provision for disclosure to a federal tax agency. The salient factor is rather that the state does not view its own policy to be so compelling as to preclude disclosure for that type of designated purpose for which disclosure is sought by the federal agency.

In any event, it is clear that all of the four established factors should be weighted in the balance. In the absence of a complete recitation of all of the material averments of a particular case, whether actual or hypothetical, it must be concluded generally that the county assessor may or may not be required, pursuant to an administrative summons, to produce information contained in property tax records which are subject to the state nondisclosure statutes, depending upon the balance of respective state and federal interests in any given case. Such a determination may, of course, be made by a federal court pursuant to a motion to quash. But where the motion is simply denied, leaving the assessor with neither an express court order to comply with the summons nor a determination of an appellate court, or where the balance in favor of disclosure is not within the realm of dispute and no such motion is made, the question

remains whether the assessor is required, even without the issuance of an express court order pursuant to an enforcement action by the Internal Revenue Service, 10/ to produce such information.

Article III, Section 3.5, of the California Constitution provides that an administrative agency has no power to refuse to enforce a statute on the basis that federal law prohibits the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law. 11/ Section 3.5 does not operate to preclude compliance with a direct order of a lower court. Thus, it has been held when a superior court issues a writ directed to an administrative agency to not enforce a statute because it is unconstitutional, the administrative agency must obey that mandate with respect to the individual petitioner or specific class of petitioners to which it pertains. (Fenske v. Board of Administration (1980) 103 Cal.App.3d 590, 595.) We are now concerned, however, with the assessor's duty in the absence of such an order, where no privilege exists under rule 501.

Where no such privilege against disclosure is available, Sections 408, 451 and 481 would clearly conflict with title 26 United States Code Section 7602. Article III, Section 3.5, would operate to preclude the assessor from complying with an administrative summons issued pursuant to that federal statute, since no appellate court has determined that enforcement of the conflicting state restrictive statutes is prohibited by federal law.

10/ The assessor may elect to await such an order particularly where an independent determination by an assessor as to the balance of respective interest is particularly infeasible.

11/ That section provides in its entirety:

> "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power;
>
> "(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> "(b) To declare a statute unconstitutional;
>
> "(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

Article VI, Section 2, of the United States Constitution provides:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Similarly, Article III, Section 1, of the California Constitution provides that "[t]he State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land."

Thus, the Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every state owes allegiance, whether in his individual or official capacity. (Ex parte Siebold (1879) 100 U.S. 371, 392.) The supremacy clause requires that every state provision, including those enacted by ballot and accorded state unconstitutional stature, conform to federal constitutional standards. (Mulkey v. Reitman (1966) 64 Cal.2d 529, 533, 542.) Consequently, both the constitution and laws of a state, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. (Chae Chan Ping v. United States (1889) 130 U.S. 581, 605; Ex parte Siebold, supra, at 376.)

To the extent, therefore, that the federal statute, title 26 United States Code Section 7602, conflicts with Sections 408, 451 and 481, it is the obligation of the county assessor to act in accordance with the federal law and to disregard conflicting state constitutional and statutory provisions. Such action provides no basis for state law sanction. (In re Hampers, supra 651 F.2d at 21; In re Grand Jury Subpoena, May, 1978 at Baltimore (4th Cir. 1979) 596 F.2d 630, 632.) Article III, Section 3.5 of the state constitution, on the contrary, would by its express terms interpose a material condition precedent to compliance with the supreme law, i.e., an appellate court determination which may require years to transpire. The Constitution of the United States permits no such impediment. Hence, in our view, Section 3.5 itself falls, to the extent of inconsistency, upon the bedrock of federal supremacy.

It is recognized that some state appellate courts have referred to Section 3.5 in the context of a federal constitutional issue. 12/ However, the matter of federal supremacy in connection with executive compliance with an unconstitutional state statute has not been examined in any supreme or appellate court decision, perhaps due to the relative insignificance of the issue once the statute has been declared unconstitutional by the appellate court deciding the case.

12/ In Valdes v. Cory (1983) 139 Cal.App.3d 773, 780, the court noted summarily, as a supplemental basis for its determination that an action was properly initiated in the appellate court, that the named respondents were under a duty imposed by Section 3.5 to comply with a constitutionally contested statute until an appellate court had declared it invalid.

In any event, cases in which Section 3.5 has been noted generally concerned a constitutional challenge to a state statute in the course of an administrative adjudicatory proceeding. (Regents, etc. v. Public Employment Relations Board (1983) 1139 Cal.App.3d 1037, 1042 – PERB properly declined to decide the question whether the claimed statutory right to use the internal mail system is unforceable by reason of preemptive federal postal law; Lewis-Westco & Co. v. Alcoholic Bev. Cont. App. Bd. (1982) 136 Cal.App.3d 829, 840, n. 12 – assumed, arguendo, that Section 3.5 would prohibit an adjudication by the board that a state statute violated the federal Sherman Act; Chev. Motor Div. v. New Motor Veh. Bd. (1983) 146 Cal.App.3d 533, 539 – the Board could not have granted relief from a statute prescribing its composition in violation of procedural due process; see also Dep. Alc. Bev. Cont. v. Alcoholic Bev. Cont. App. Bd. (1981) 118 Cal.App.3d 720, 725; Leek v. Washington Unified Sch. Dist. (1981) 124 Cal.App.3d 43, 53.)

Of course, Section 3.5 does not affect the powers of the California courts to consider constitutional claims. (Dash, Inc. v. Alcoholic Bev. Cont. App. Bd. (9th Cir. 1982) 683 F.2d 1229, 1234.) It has been universally held that while a constitutional issue as to the validity of a state statute may not be cognizable under Section 3.5 in an administrative proceeding, it may either be raised for the first time on judicial review (Westminster Mobile Home Park Owners' Assn. v. City of Westminster (9185) 167 Cal.App.3d 610, 619-620; Chev. Motor Div. v. New Motor Veh. Bd., supra, 146 Cal.App.3d at 539; Capitol Industries-EMI, Inc. v. Bennett (9th Cir. 1982) 681 F.2d 1107, 1116-1117) or nevertheless presented and preserved for judicial review (Southern Pac. Trans. V. Publ Util. Com., etc. (9th Cir. 1983) 716 F.2d 1285, 1291; Leek v. Washington Unified Sch. Dist., supra, 124 Cal.App.3d at 53). Thus, in the contest of administrative adjudication, the application of Section 3.5 would not require the agency to act unconstitutionally; its sole effect is to refer the parties to the superior court for judicial disposition. We are not concerned here with an interim decision in an extended adjudicatory process, but with the effect of Section 3.5 upon the purely executive act of a county assessor 13/ seeking to comply with a statutorily authorized valid federal summons in the absence of any privilege or other objection which would warrant judicial intervention or delay. In such a case, and for the reasons hereinabove set forth, Section 3.5 would be "absolutely void" and of no force or effect.

13/ Inasmuch as section 3.5 would not apply in any event, it is not necessary to engage in a detailed analysis as to whether the county assessor is an "administrative agency" within the meaning of the section. (Cf. 62 Ops.Cal.Atty.Gen. 809, 811 (1979); 62 Ops.Cal.Atty.Gen 788, 790-791 (1979).) Section 3.5 has been considered in connection with local agencies (Schmid v. Lovette (1984) 154 Cal.App.3d 466, 473-474 -- local school district; Westminster Mobile Home Park Owners' Assn. v. City of Westminster, supra, 167 Cal.App.3d at 619 -- city arbitrator; 64 Ops.Cal.Atty.Gen 690, 694-695 (1981 -- county board of equalization) and with agencies headed by an officer as distinguished from a commission (Valdes v. Cory, supra, 139 Cal.App.3d at 780 -- State Controller, Director of Finance; cf. 62 Ops.Cal.Atty.Gen 365, 367 (1979) -- Secretary of State). We do not, however, reach the question for purposes of this analysis.

It follows that, pursuant to a valid federal summons, a county assessor is required to produce information contained in property tax records which are subject to the state nondisclosure statutes, where the federal interest in disclosure outweighs the state interest in confidentiality. Considerations which would weight in favor of disclosure would include, but are not limited to, the following;

1) the importance of the federal proceeding;

2) the information would directly affect the resolution of a primary issue;

3) under similar circumstances, disclosure by the federal government of federal tax information would be permitted;

4) under similar circumstances, disclosure by the state to another state taxing agency would be permitted by state law;

5) the taxpayer whose records are sought to be disclosed is a party or is directly interested in the investigative proceeding.

However, the county assessor is prohibited from producing such information where the state interest in confidentiality outweighs the federal interest in disclosure. Considerations which would weigh in favor of nondisclosure would include, but are not limited to, the following:

1) the information sought may be readily acquired from another source;

2) the information sought would be cumulative of other competent evidence acquired or available;

3) the disclosure of information not otherwise a matter of public record or knowledge would constitute a substantial invasion of privacy or impairment of competitive advantage;

4) disclosure of information would have a substantial adverse effect upon voluntary compliance with revenue reporting requirements:

5) disclosure of information would identify a confidential informant or impair a state investigation in progress.

Such information must be produced in any case in compliance with a specific court order. It is, of course, the responsibility of the assessor to proffer in connection with any such judicial proceeding any state interest in nondisclosure which may outweigh the federal interest in disclosure.

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