

TITLE 18. CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION

The California Department of Tax and Fee Administration

**Proposes to Adopt Chapter 4, *Access to Public Records Maintained
by the California Department of Tax and Fee Administration*, and
Sections 35301, 35302, 35303, 35304, and 35305 in Chapter 4
of Division 5 of Title 18 of the California Code of Regulations**

NOTICE IS HEREBY GIVEN that the California Department of Tax and Fee Administration (Department), pursuant to the authority vested in it by sections 6253.4, 15570.40, subdivision (a), and 15570.42 of the Government Code, proposes to adopt chapter 4, *Access to Public Records Maintained by the California Department of Tax and Fee Administration*, and Sections (Regulations) 35301, 35302, 35303, 35304, and 35305 in chapter 4 of division 5 of title 18 of the California Code of Regulations. The Department proposes to adopt chapter 4 and new Regulations 35301, 35302, 35303, 35304, and 35305 to establish procedures and guidelines to access the Department's public records, provide for maximum public accessibility to the Department's public records, and specifically identify and describe the types of public records pertaining to the tax and fee programs administered by the Department.

AUTHORITY

Government Code sections 6253.4, 15570.40, and 15570.42.

REFERENCE

Regulation 35301: Government Code sections 6250, 6251, 6252, and 6253.

Regulation 35302: Government Code sections 6250, 6251, 6252, 6253, 6254, 6254.20, 6255, and 15570.84, Revenue and Taxation Code sections 7056, 9255, 30455, 38705, 43651, 45982, 46751, 55381, and 60609.

Regulation 35303: Government Code sections 6253 and 6253.9.

Regulation 35304: Government Code sections 6253 and 6253.1.

Regulation 35305: Government Code sections 6250, 6251, 6252, 6253, 6253.1, 6254, 6254.20, 6255, and 15570.84, Revenue and Taxation Code sections 7056, 9255, 30455, 38705, 43651, 45982, 46751, 55381, and 60609.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Summary of Existing Laws and Regulations

Public Records Act

The Public Records Act (Gov. Code (GC), § 6250 et seq.) provides that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.” (GC, § 6250.) As relevant here, the Public Records Act defines the term “public records” 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.” (GC, § 6252, subd. (e).) The Public Records Act provides that public records are open to public inspection and that every person has a right to inspect any public record, unless exempt from public disclosure, and any “reasonably segregable portion of a record” after deletion of the portions that are exempt from public disclosure. (GC, § 6253, subd. (a).)

The Public Records Act generally requires state agencies to help the public make effective requests for public records. (GC, § 6253.1, subd. (a).) The Public Records Act also authorizes a state agency to “adopt regulations stating the procedures to be followed when making its records available in accordance with” the Public Records Act. (GC, § 6253.4, subd. (a).)

The Public Records Act authorizes a state agency to charge a person requesting public records “fees covering direct costs of duplication.” (GC, § 6253, subd. (b).) The Public Records Act generally requires state agencies to make public records that are maintained in electronic format available in electronic format when requested and authorizes state agencies to charge a person requesting any public record in electronic format for the “direct cost of producing a copy of a record in an electronic format.” (GC, § 6253.9, subd. (a).) Also, when a request for a public record requires data compilation, extraction, or programming to produce the record, the Public Records Act generally authorizes a state agency to charge the person making the request for “the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record.” (GC, § 6253.9, subd. (b).)

In addition, the Public Records Act provides several exemptions from public disclosure, including, but not limited to exemptions for preliminary drafts of interagency and intra-agency memorandums or other documents not retained by an agency in the normal course of business (GC, § 6254, subd. (a)), records pertaining to pending litigation (GC, § 6254, subd. (b)), personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy (GC, § 6254, subd. (c)), test questions, scoring keys, and other data regarding licensing, employment and academic examinations (GC, § 6254, subd. (g)), and records the disclosure of which is exempted or prohibited pursuant to federal or state law. (GC, § 6254, subd. (k).) The Public Records Act does not require the disclosure of records that relate to electronically collected personal information, as defined by Government Code section 11015.5, received, collected, or compiled by a state agency. (GC, § 6254.20.) Also, a state agency may justify withholding a public record from disclosure under the Public Records Act when the public interest served by not disclosing the record clearly outweighs the public interest served by the disclosure of the record. (GC, § 6255, subd. (a).) A response to a written request for inspection or copies of public records that includes a determination that the request is denied, in whole or in part, is required to be made in writing. (GC, § 6255, subd. (b).)

California Department of Tax and Fee Administration

On June 27, 2017, the Governor approved Assembly Bill No. (AB) 102 (Stats. 2017, ch. 16), which added part 8.7 (commencing with section 15570) to division 3 of title 2 of the Government Code (part 8.7). As relevant here, part 8.7 established the California Department of Tax and Fee Administration (Department). (GC, § 15570). Part 8.7 transferred most of the State Board of Equalization's (Board's) former duties, powers and responsibilities to the Department, operative July 1, 2017 (GC, § 15570.22), including, but not limited to the Board's former duties, powers, and responsibilities related to the administration and enforcement of the Sales and Use Tax Law (Rev. & Tax. Code (RTC), § 6001 et seq.), Use Fuel Tax Law (RTC, § 8601), Cigarette and Tobacco Products Tax Law (RTC, § 30001 et seq.), Timber Yield Tax Law (RTC, § 38101), Hazardous Substances Tax Law (RTC, § 43001 et seq.), Integrated Waste Management Fee Law (RTC, § 45001 et seq.), Oil Spill Response, Prevention, and Administration Fees Law (RTC, § 46001), Fee Collection Procedures Law (RTC, § 55001 et seq.), and Diesel Fuel Tax Law (RTC, § 60001 et seq.), which each contain a statute prohibiting the Department and its staff from disclosing specified information. (See RTC, §§ 7056, 9255, 30455, 38705, 43651, 45982, 46751, 55381, and 60609). Part 8.7 also provides that "whenever any reference to the [Board] appears in any statute, regulation, or contract, or in any other code, with respect to any of the functions transferred to the [Department], it shall be deemed to refer to the [Department]." (GC, § 15570.24).

In addition, part 8.7 authorizes the Department to adopt regulations to carry out the purposes of part 8.7. (GC, § 15570.40, subd. (a).) It requires the Department to adopt regulations to establish procedures and guidelines to access public records. (GC, § 15570.42.) It also requires those regulations to facilitate maximum public accessibility to the Department's public records, and specifically identify and describe the types of public records pertaining to the tax and fee programs administered by the Department. (*Ibid.*)

Effect, Objective, and Benefits of the Proposed Regulations

There is an issue (or problem within the meaning of GC, § 11346.2, subd. (b)(1)) because the Department has not yet adopted regulations to establish procedures and guidelines to access its public records as required by part 8.7. Therefore, the Department is proposing to adopt Regulations 35301, 35302, 35303, 35304, and 35305, which establish procedures and guidelines to access the Department's public records, provide for maximum public accessibility to the Department's public records, and specifically identify and describe the types of public records pertaining to the tax and fee programs administered by the Department to have the effect and accomplish the objective of addressing the issue (or problem). The Department is also proposing to codify Regulations 35301 through 35305 in new chapter 4, *Access to Public Records Maintained by the California Department of Tax and Fee Administration*, to be added to division 5 of title 18 of the California Code of Regulations.

Proposed Regulation 35301, *Purpose and Scope*, explains that access to public records maintained by the Department is governed by the California Public Records Act. Proposed Regulation 35301 explains that the purpose of new chapter 4 is to facilitate public access to the Department's public records and provide a better understanding of the types of public records available that pertain to the Department's tax and fee programs. It also incorporates the definition of "public records" from the

Public Records Act into new chapter 4 and expressly defines the term “Department” to mean the California Department of Tax and Fee Administration for purposes of chapter 4.

Proposed Regulation 35302, *Disclosure Policy*, sets forth the Department’s policy to provide the public access to public records that are not exempt from disclosure by state or federal law, and permit the inspection and copying of any reasonably segregable portion of a public record after deletion of the portions that are exempt from disclosure. Proposed Regulation 35302 explains that the Department’s public records may be inspected and copied pursuant to the procedures set forth in the Public Records Act and proposed Regulations 35301, 35302, 35303, 35304, and 35305. Proposed Regulation 35302 also provides a non-exhaustive list of examples of records that the Department deems exempt from public disclosure, including tax and fee information that must be kept confidential under state or federal laws, confidential legal advice, records prepared in connection with litigation, preliminary drafts of intra-agency memorandums or other documents not retained by Department staff in the normal course of business, personnel, medical or similar files, and test questions, scoring keys, and other data regarding licensing, employment and academic examinations.

Proposed Regulation 35303, *Cost for Copies of Public Records*, provides that the Department’s general policy is to require any person making a request for copies of public records to reimburse the Department for the cost of duplication. Proposed Regulation 35303 provides that the copying fee may be waived if the cost for the records is less than ten dollars (\$10). Proposed Regulation 35303 also provides that if the Department must compile or extract electronic data or perform computer programming to produce a copy of an electronic record, it may charge its full costs.

Proposed Regulation 35304, *Procedure for Requesting Public Records*, describes the procedures to follow to request to inspect or obtain copies of the Department’s public records. It directs the public to submit written requests to inspect or obtain copies of public records to the Department’s Disclosure Office by email at Disclosure.Office@cdtfa.ca.gov, by fax at (916) 324-5995, or by mail at California Department of Tax and Fee Administration, Disclosure Office, P.O. Box 942879, MIC: 82, Sacramento, CA 94279. This regulation also requires requests to provide a sufficiently specific description to allow the Department to identify the requested records, and explains that the Disclosure Office will assist the public in making focused and effective requests that reasonably describe an identifiable record or records.

Proposed Regulation 35305, *Public Records Available*, specifically identifies and describes the types of public records pertaining to the tax and fee programs administered by the Department. Subdivision (a) of the proposed regulation specifically identifies the public records that are available on the Department’s website where they can be downloaded or printed by the public. Subdivision (b) of the proposed regulation specifically identifies the public records that can be requested by making a request to the Department’s Disclosure Office.

The Department has determined that the adoption of new chapter 4 and proposed Regulations 35301 through 35305 is reasonably necessary to have the effect and accomplish the objective of addressing the issue (or problem) discussed above by adopting regulations to establish procedures and guidelines to access the Department’s public records as required by part 8.7. The Department anticipates that the new chapter and proposed regulations will benefit members of the public, including businesses and individuals, by helping them better identify, request, and obtain copies of the Department’s public records, including public records pertaining to the tax and fee programs administered by the

Department. The Department also anticipates that the new chapter and proposed regulations will benefit the Department by making it more likely that future requests for public records will be more focused and effective and contain a sufficiently specific description to allow the Department to more easily identify the requested records.

The Department has performed an evaluation of whether new chapter 4 and proposed Regulations 35301 through 35305 are inconsistent or incompatible with existing state regulations and determined that the new chapter and proposed regulations are not inconsistent or incompatible with existing state regulations because the proposed regulations are the only regulations that establish procedures and guidelines to access the Department's public records as required by part 8.7.

In addition, the federal Freedom of Information Act (FOIA) (5 U.S.C. § 552) provides access to federal agencies' records and the Internal Revenue Service (IRS) has adopted a regulation (26 C.F.R. § 601.702) that prescribes the procedures for accessing IRS records in accordance with FOIA. The Department has determined that some provisions in FOIA and the IRS regulation are comparable to provisions in proposed Regulations 35301 through 35305, which prescribe the procedures to access the Department's public records in accordance with the PRA, and that some of the provisions in proposed Regulations 35301 through 35305 differ substantially from their comparable provisions in FOIA and the IRS regulation due to differences in federal and state law and differences between the Department and the IRS. The following is a brief description of the significant differences:

- Access to the Department's public records is governed by the PRA, not FOIA or the IRS regulation;
- The term "public record," as defined in the PRA, is different than the term "record," as defined in FOIA (5 U.S.C. § 552(f)(2));
- There are different exemptions from disclosure under the PRA and FOIA (5 U.S.C. § 552(b));
- There are different requirements for requesting records and responding to those requests under the PRA and FOIA (5 U.S.C. § 552(a)(3)) and the IRS regulation (26 C.F.R. § 601.702(c));
- There are different limits on agencies' charges for searching and duplicating records under the PRA and FOIA (5 U.S.C. § 552(a)(4)(A));
- The Department and IRS administer different taxes and maintain different types of records pertaining to their tax programs; and
- The IRS regulation does not identify and describe the types of public records pertaining to the tax programs administered by the IRS.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Department has determined that the adoption of new chapter 4 and proposed Regulations 35301, 35302, 35303, 35304, and 35305 will not impose a mandate on local agencies or school districts, including a mandate that requires state reimbursement under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

ONE-TIME COST TO THE DEPARTMENT, BUT NO OTHER COST OR SAVINGS TO STATE AGENCIES, LOCAL AGENCIES, AND SCHOOL DISTRICTS

The Department has determined that the adoption of new chapter 4 and proposed Regulations 35301, 35302, 35303, 35304, and 35305 will result in an absorbable \$436 one-time cost for the Department to update its website after the proposed regulatory action is completed. The Department has determined that the adoption of new chapter 4 and proposed Regulations 35301, 35302, 35303, 35304, and 35305 will not result in any other direct or indirect cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, no other non-discretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State of California.

NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Department has made an initial determination that the adoption of new chapter 4 and proposed Regulations 35301, 35302, 35303, 35304, and 35305 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of new chapter 4 and proposed Regulations 35301, 35302, 35303, 35304, and 35305 may affect small business.

NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

ECONOMIC IMPACT ASSESSMENT

The Department assessed the economic impact of proposed Regulations 35301, 35302, 35303, 35304, and 35305 on California businesses and individuals and determined that the proposed regulatory action is not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000. The Department also determined that the adoption of proposed Regulations 35301, 35302, 35303, 35304, and 35305 will neither create nor eliminate jobs in the State of California nor result in the creation of new businesses or the elimination of existing businesses within the state and will not affect the expansion of businesses currently doing business within the State of California. Furthermore, the Department determined that the adoption of proposed Regulations 35301, 35302, 35303, 35304, and 35305 will not affect the benefits of the regulations to the health and welfare of California residents, worker safety, or the state's environment.

NO SIGNIFICANT EFFECT ON HOUSING COSTS

The adoption of new chapter 4 and proposed Regulations 35301, 35302, 35303, 35304, and 35305 will not have a significant effect on housing costs.

DETERMINATION REGARDING ALTERNATIVES

The Department must determine that no reasonable alternative considered by it or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.

CONTACT PERSONS

Questions regarding the substance of proposed Regulations 35301, 35302, 35303, 35304, and 35305 should be directed to Ms. Kimberly Willy, Tax Counsel III (Supervisor), by telephone at (916) 323-3078, by e-mail at Kimberly.Willy@cdtfa.ca.gov, or by mail at California Department of Tax and Fee Administration, Attn: Kimberly Willy, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Written comments for the Department's consideration, written requests to hold a public hearing, notices of intent to present testimony or witnesses at the public hearing, and other inquiries concerning the proposed regulatory action should be directed to Ms. Kim DeArte, Regulations Coordinator, by telephone at (916) 309-5227, by fax at (916) 322-2958, by e-mail at CDTFARegulations@cdtfa.ca.gov or by mail at California Department of Tax and Fee Administration, Attn: Kim DeArte, MIC:50, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0050. Ms. DeArte is the designated backup contact person to Ms. Willy.

WRITTEN COMMENT PERIOD

The written comment period ends on October 25, 2021. The Department will consider the statements, arguments, and/or contentions contained in written comments received by Ms. DeArte at the postal address, email address, or fax number provided above, prior to the close of the written comment period, before the Department decides whether to adopt new chapter 4 and proposed Regulations 35301, 35302, 35303, 35304, and 35305. The Department will only consider written comments received by that time.

However, if a public hearing is held, written comments may also be submitted at the public hearing and the Department will consider the statements, arguments, and/or contentions contained in written comments submitted at the public hearing before the Department decides whether to adopt new chapter 4 and proposed Regulations 35301, 35302, 35303, 35304, and 35305.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Department has prepared copies of the text of new chapter 4 and proposed Regulations 35301, 35302, 35303, 35304, and 35305 illustrating the express terms of the proposed action. The new chapter and proposed regulations are not illustrated in underline or italics because California Code of

Regulations, title 1, section 8, subdivision (b), provides that underline or italic is not required for the adoption of a set of regulations if the text otherwise clearly indicates that all of the text is being added to the California Code of Regulations.

The Department has also prepared a statement of reasons for the adoption of new chapter 4 and proposed Regulations 35301, 35302, 35303, 35304, and 35305. These documents and all the information on which the proposed regulations are based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of new chapter 4 and proposed Regulations 35301, 35302, 35303, 35304, and 35305 and the statement of reasons are also available on the Department's website at www.cdtfa.ca.gov.

PUBLIC HEARING

The Department has not scheduled a public hearing to discuss the proposed adoption of new chapter 4 and Regulations 35301, 35302, 35303, 35304, and 35305. However, any interested person or his or her authorized representative may submit a written request for a public hearing no later than 15 days before the close of the written comment period, and the Department will hold a public hearing if it receives a timely written request.

SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Department may adopt new chapter 4 and proposed Regulations 35301, 35302, 35303, 35304, and 35305 with changes that are non-substantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Department will make the full text of the proposed regulations, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulations will be mailed to those interested parties who commented on the original proposed regulations orally or in writing or who asked to be informed of such changes. The text of the resulting regulations will also be available to the public from Ms. DeArte. The Department will consider written comments on the resulting regulations that are received prior to adoption.

AVAILABILITY OF UPDATED STATEMENT OF REASONS

If the Department adopts Regulations 35301, 35302, 35303, 35304, and 35305, the Department will prepare an updated statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Department's website at www.cdtfa.ca.gov.