

**Updated Statement of Reasons for the
Proposed Adoption of 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**

SPECIFIC PURPOSE, PROBLEM INTENDED TO BE ADDRESSED, NECESSITY, AND ANTICIPATED BENEFITS

Current Law

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.*)

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 California Code of Regulations, title 18, sections (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, for the specific purpose 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, PO 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 for the specific purpose 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.

In addition, the Department has determined that the proposed adoption of new chapter 4 and Regulations 35301 through 35305 is not mandated by federal law or regulations, and there are no federal regulations or statutes that are identical to the proposed chapter and regulations.

DOCUMENTS RELIED UPON

The Department relied upon Department staff's understanding of the Public Records Act, the Department's policies regarding access to its records, the types of public records pertaining to the tax and fee programs administered by the Department, and the public records currently available on the Department's website in proposing to adopt new chapter 4 and Regulations 35301 through 35305. The Department did not rely upon any technical, theoretical, or empirical study, report or similar document.

ALTERNATIVES CONSIDERED

The Department considered whether to begin the formal rulemaking process to adopt new chapter 4 and Regulations 35301 through 35305 at this time or, alternatively, whether to take no

action at this time. The Department decided to begin the formal rulemaking process to adopt new chapter 4 and Regulations 35301 through 35305 at this time because the Department determined that new chapter 4 and Regulations 35301 through 35305 are reasonably necessary for the reason set forth above.

The Department did not reject any reasonable alternative to new chapter 4 and Regulations 35301 through 35305, including any reasonable alternative that would lessen any adverse impact the proposed action may have on small business or that would be less burdensome and equally effective in achieving the purposes of the proposed action. No reasonable alternative to new chapter 4 and Regulations 35301 through 35305 has been identified and brought to the Department's attention that would lessen any adverse impact the proposed action may have on small business, be more effective in carrying out the purposes 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.

ECONOMIC IMPACT ASSESSMENT

The Department assessed the economic impact of proposed Regulations 35301, 35302, 35303, 35304, and 35305 on California businesses and individuals. The Department determined that the adoption of the proposed regulations may have an impact on any person that requests to inspect or copy the Department's records, including businesses, small businesses, and individuals.

However, the adoption of the proposed regulations will not have a material or quantifiable cost impact on businesses or individuals. Also, the adoption of the proposed regulations will benefit 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, but the Department does not anticipate that the benefits will be substantial, even though the Department is unable to quantify the benefits. This is because the Public Records Act currently requires persons, including businesses and individuals, to request to inspect or obtain copies of the Department's public records, it requires their requests to reasonably describe an identifiable record or records, it permits the Department to charge them fees covering the direct costs of duplication, and it permits the Department to charge them the full cost to compile or extract electronic data or perform computer programming to produce a copy of an electronic record under specified circumstances. (GC, §§ 6253 and 6253.9.) Also, the proposed regulations are consistent with the Public Records Act and the Department's current policies regarding charges for duplication and compiling or extracting electronic data or performing computer programming to produce a copy of an electronic record.

As a result, the Department 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 proposed regulations do not regulate the health and welfare of California residents, worker safety, or the state's environment. Therefore, 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.

The forgoing information also provides the factual basis for the Department's initial determination that the adoption of Regulations 35301, 35302, 35303, 35304, and 35305 will not have a significant adverse economic impact on business.

UPDATE TO THE STATEMENT OF REASONS

Notice

The Department mailed, published, and posted its notice for the proposed adoption of new chapter 4 and proposed Regulations 35301 through 35305 on September 10, 2021. The notice explained that October 25, 2021, was the deadline for written comments regarding the proposed adoption of new chapter 4 and proposed Regulations 35301 through 35305. The notice also explained that the Department had not scheduled a public hearing to discuss the proposed regulatory action, but the Department would hold a public hearing if a written request for a public hearing was received no later than 15 days before the close of the written comment period.

Request for Public Hearing

The Department received a timely written request for a public hearing from Jesse McClellan, Esq., of McClellan Davis, LLC, on September 22, 2021. Therefore, the Department scheduled a public hearing to be held on October 26, 2021, regarding the proposed adoption of new chapter 4 and proposed Regulations 35301 through 35305. The Department also provided notice of the time, date, and place of the hearing to the interested parties that filed a request for such notice with the Department.

Comments from Joe Vinatieri

The Department received a letter dated October 11, 2021, from Joseph Vinatieri, Esq., of Bewley, Lassleben & Miller, LLP, regarding the proposed regulations. In the letter, Mr. Vinatieri quoted the first sentence in subdivision (c) of Government Code section 6253, which provides that "Each agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor." Mr. Vinatieri also said that, in his firm's opinion, it is imperative that the Department incorporate that language regarding responsiveness to the public into new chapter 4.

Comments from Jessie McClellan

Mr. McClellan appeared at the public hearing on October 26, 2021, made oral comments regarding the proposed regulations, and submitted written comments regarding the proposed regulations on behalf of McClellan Davis, LLC, in a letter dated October 26, 2021. No other interested parties appeared at the public hearing or submitted timely written comments regarding the proposed regulations.

During the public hearing and in the October 26, 2021, letter, Mr. McClellan said that his firm manages and defends audits, and they regularly request that the Department provide their clients' audit and appeal files, including audit workpapers and related schedules and emails. During the public hearing, Mr. McClellan said he initially had some questions regarding the fee provisions in proposed Regulation 35303. However, he discussed those provisions with the Department prior to the public hearing and he no longer had a specific issue with the fee provisions because he understood that the Department will not charge fees to provide electronic records of the type that his firm typically requests.

During the public hearing and in the October 26, 2021, letter, Mr. McClellan said that it is common for the Department to provide audit workpapers and related schedules in the Excel format in which they are maintained, but there have been rare occasions in which the Department provided the requested documents in a PDF format, which is much less efficient to review. Subdivision (a) of Government Code section 6253.9 generally requires public records maintained in an electronic format to be provided in the form that they are made, used, and maintained, unless they are exempt from disclosure. Therefore, Mr. McClellan's firm requested that the proposed regulations clarify that documents prepared in Excel format will be provided to the public in Excel format.

Mr. McClellan also said that it is typical for the Department to provide emails related to his clients' audits and appeals, but there have been times when emails were excluded from the documents provided in response to a request for a client's file. Emails can be "public records," as defined in Government Code section 6252. Therefore, Mr. McClellan's firm requested that the proposed regulations clarify that emails are subject to disclosure, so long as they do not fall within one of the excluded categories.

Furthermore, Mr. McClellan said that there are times when the Department denies his firm's requests for specific records, his firm knows who to contact to resolve issues regarding such denials, but most people would not know. Subdivision (d)(3) of Government Code section 6253 provides that "The notification of denial of any request for records required by Section 6255 shall set forth the names and titles or positions of each person responsible for the denial." Therefore, Mr. McClellan's firm requested that the proposed regulations clarify that the public shall be informed of the names and titles or positions of each person responsible for denying requested public records, so other people know who to contact to resolve issues regarding denials.

Responses to Public Comments

The Department agrees that it is subject to the Public Records Act, including the provisions in Government Code sections 6253 and 6253.9 discussed above. However, subdivision (b) of proposed Regulation 35301 states 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 tax and fee programs administered by the Department," as required by Government Code section 15570.42. New chapter 4 expressly incorporates the entire Public Records Act by reference because subdivision (a) of proposed Regulation 35301 states that "Access to public records maintained by the Department is governed by the California Public Records Act (Government Code section 6250 et seq.)." And the Department does not believe that it is necessary for chapter 4 to generally restate the provision of the Public Records Act. Therefore, the Department does not agree that it is necessary for the Department to expressly restate the provisions of subdivisions (c) and (d)(3) of Government Code section 6253 and subdivision (a) of Government Code section 6253.9 (discussed above) in chapter 4.

Also, the Department complies with the Public Records Act. The Department's current practice is to respond to Public Records Act requests within 10 calendar days of the date they are received,¹ in accordance with subdivision (c) of Government Code section 6253. The Department's current practice is to provide copies of electronic public records or the portions thereof that are not exempt from disclosure, including Excel spreadsheets and emails, in accordance with subdivision (a) of Government Code section 6253.9. Also, if the Department denies a request for public records, its current practice is to send the requestor a letter explaining why² and include the name and title or position of the person responsible for denying the request, as required by subdivision (d)(3) of Government Code section 6253, and include the person's contact information in the letter so the requestor knows how to contact them to resolve any issues. Therefore, the Department does not agree that it is necessary to amend the proposed regulations to address the timing of the Department's responses to Public Records Act requests, the format in which it provides electronic documents in responses to such requests, or the contents of letters denying such requests.

In addition, subdivision (b)(5) of proposed Regulation 35305 already clarifies that "Memorandums, letters, or emails written by Department staff may be requested by author, date, subject, statute, or regulation [under the Public Records Act]. Confidential taxpayer or feepayer information will be redacted prior to disclosure. Documents protected from disclosure by law, including documents protected by the attorney-client privilege or attorney work product privilege, will not be disclosed." Therefore, the Department does not agree that it is necessary to amend the proposed regulations to further clarify that the Department's emails are public records that may be subject to disclosure under the Public Records Act.

Furthermore, the documents in a taxpayer's audit and appeal files generally contain confidential taxpayer information that the Department is prohibited from disclosing to the public pursuant to a Public Records Act request. (See RTC, §§ 7056, 9255, 30455, 38705, 43651, 45982, 46751, 55381, and 60609.) Therefore, when a firm, such as McClellan Davis, LLC, requests copies of its client's audit and appeal files, the Department often provides the requested documents in accordance with the procedures in the Information Practices Act (Civ. Code, § 1798 et seq.), which gives individuals the right to access their personal information, not the Public Records Act.

¹ See Publication CDTFA-854-F, *Access to California Department of Tax and Fee Administration Records*, available at <https://www.cdtfa.ca.gov/formspubs/cdtfa854f.pdf>.

² See Publication CDTFA-854-F (linked above).

So, the Department does not agree that chapter 4 is the right place to address the issues that

McClellan Davis, LLC, had with requests for its clients' audit and appeal files in the past. Moreover, Mr. McClellan's comments indicate that the Department generally provides his firm copies of its clients' audit workpapers and related schedules in Excel format and generally provides his firm copies of relevant emails in response to his firms requests for its clients' audit and appeals files. So, the Department believes that its Disclosure Office will be able to resolve any issues McClellan Davis, LLC, might occasionally have with future requests for clients' audit and appeal files, and that it is not necessary to amend the proposed regulations to specifically address those issues at this time.

However, the Department maintains a webpage³ on its website, called "Accessing the CDTFA's Records," which taxpayers and the public often look at when they need help accessing the Department's records because it explains how taxpayers can access their own records, explains how the public can request copies of the Department's public records, and contains links to the Public Records Act and Information Practices Act. The Department currently plans to update the webpage after new chapter 4 is adopted. The Department intends to include information in the update to help the public understand when they can anticipate receiving the Department's timely responses to their Public Records Act requests. The Department intends to include new information in the update to help the public understand who to contact to resolve issues when their Public Records Act requests are denied. In addition, the Department intends to continue monitoring requests for taxpayers' audit and appeal files under the Information Practices Act and may consider further updates to the webpage or other Department publications if needed to address any ongoing issues related to the format in which electronic records are provided or the omission of disclosable emails.

³ The page is located at: <https://www.cdtfa.ca.gov/public-records.htm>.