Records, Value adjustment board

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Date: May 06, 2010

Subject:
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Ms. Lisa Echeverri
Executive Director
Florida Department of Revenue
5050 West Tennessee Street
Tallahassee, Florida 32399-0100

Dear Ms. Echeverri:

You have requested this office's assistance in addressing the confidentiality of tax return information and other confidential information related to property tax values and exemptions when produced during administrative review proceedings by county value adjustment boards under Chapter 194, Florida Statutes. The Florida Legislature has charged the department in section 194.011(5), Florida Statutes, with prescribing uniform procedures for hearings before the value adjustment boards and developing a uniform policies and procedures manual to be used in proceedings before value adjustment boards. You have requested our assistance in order to provide guidance to participants in value adjustment board proceedings.

While your letter raises a number of questions, the response herein consolidates these issues into four broad discussion topics. Our review of these matters indicates that more direction from the Legislature is needed to definitively address the issue of confidentiality of taxpayer information and the use of such information at value adjustment board proceedings. The following informal comments are offered in an effort to assist you. This office would strongly suggest that the department seek legislative direction that will clearly spell out the obligations of the property appraiser and the value adjustment board regarding the confidentiality of taxpayer information in the hands of each of these entities during the course of the value adjustment board process.

I. Confidentiality of records submitted by taxpayer

Generally speaking, value adjustment boards are quasi-judicial governmental bodies created pursuant to section 194.015, Florida Statutes.[1] Among other things, these boards hear appeals initiated by taxpayers contesting the denial of tax exemptions or the valuation of their properties for tax purposes by the county property appraiser. The board, after a hearing, has the power and duty to grant tax exemptions, including homestead exemptions, for those properties it determines to be eligible for such exemptions, based on established legal principles and the evidence presented.

Section 193.074, Florida Statutes, provides for the confidentiality of tax returns while in the

possession of the property appraiser and other officers:

"All returns of property and returns required by former s. 201.022 submitted by the taxpayer pursuant to law shall be deemed to be confidential in the hands of the property appraiser, the clerk of the circuit court, the department, the tax collector, the Auditor General, and the Office of Program Policy Analysis and Government Accountability, and their employees and persons acting under their supervision and control, except upon court order or order of an administrative body having quasi-judicial powers in ad valorem tax matters, and such returns are exempt from the provisions of s. 119.07(1)."[2]

In 2001, this office issued Attorney General Opinion 01-74 to the Florida Department of Revenue which discussed whether taxpayer information that is confidential under section 193.074, Florida Statutes, must be maintained as confidential if it is submitted by a taxpayer to a value adjustment board as evidence in a dispute. The opinion concluded that:

"Taxpayer information that is confidential in the hands of certain specified officers under section 193.074, Florida Statutes, is subject to the inspection and copying requirements of Florida's Public Records Law when it has been submitted by a taxpayer to a value adjustment board as evidence in an assessment dispute."

The conclusion in this opinion is based on a historical analysis of value adjustment boards, formerly known as boards of equalization. These boards were determined not to be acting under the supervision and control of any of the officers named in section 193.074, Florida Statutes.[3] Thus, while the statute allows a value adjustment board to secure otherwise confidential records for use in its proceedings, nothing in the statute extends that confidentiality to evidence received by the value adjustment board. This office continues to be of the opinion that taxpayer information is subject to the inspection and copying requirements of Florida's Public Records Law when it has been submitted to a value adjustment board as evidence in an assessment dispute.[4]

I would note that Attorney General Opinion 01-74 expressed the concerns of this office regarding the sensitive nature of taxpayer records and that the conclusion in that opinion might dissuade taxpayers from challenging assessments in an administrative proceeding. The opinion suggested that the Legislature consider amending section 193.074, Florida Statutes, to extend confidentiality to these records when they are supplied to the value adjustment board. However, no such changes to the statute have been made.

II. Authority of Property Appraiser to submit confidential records

Several of your questions relate to records produced during a challenge to an assessment filed by a taxpayer and question whether confidential information obtained by the property appraiser for use in valuation and assessment may be submitted to the value adjustment board by the property appraiser independently of a submission by the taxpayer.

Pursuant to section 196.193(5), Florida Statutes:

"(5)(a) If the property appraiser determines that any property claimed as wholly or partially

exempt under this section is not entitled to any exemption or is entitled to an exemption to an extent other than that requested in the application, he or she shall notify the person or organization filing the application on such property of that determination in writing on or before July 1 of the year for which the application was filed.
(b) The notification must state in clear and unambiguous language the specific requirements of the state statutes which the property appraiser relied upon to deny the applicant the exemption with respect to the subject property. The notification must be drafted in such a way that a reasonable person can understand specific attributes of the applicant or the applicant's use of the subject property which formed the basis for the denial. The notice must also include the specific facts the property appraiser used to determine that the applicant failed to meet the statutory requirements. If a property appraiser fails to provide a notice that complies with this subsection, any denial of an exemption or an attempted denial of an exemption is invalid.
(c) All notifications must specify the right to appeal to the value adjustment board and the procedures to follow in obtaining such an appeal. Thereafter, *the person or organization filing such application, or a duly designated representative, may appeal that determination by the property appraiser to the board* at the time of its regular hearing. In the event of an appeal, the property appraiser or the property appraiser's representative shall appear at the board hearing and present his or her findings of fact. If the applicant is not present or represented at the hearing, the board may make a determination on the basis of information supplied by the property appraiser or such other information on file with the board." (e.s.)

Thus, in the event of a challenge to the property appraiser's determination of an exemption, it is the taxpayer who must challenge that finding. The statute provides that the property appraiser "shall appear at the board hearing and present his or her findings of fact." The statute does not appear to require the property appraiser to independently introduce tax returns or financial records or sales data, but to "present his or her findings of fact."

While the statutes do not specifically set forth the evidence a property appraiser may use in making or defending his or her assessment in a value adjustment board proceeding, section 193.011, Florida Statutes, does provide the factors to be considered in deriving just valuation. These factors include such things as the present cash value of the property; the highest and best use of the property; the location of the property; the income from the property; and other relevant and statutorily specific factors.

The Florida Supreme Court addressed the confidentiality of taxpayer records and their release in *Bystrom v. Whitman,*[5] a 1986 case involving the valuation of taxpayers' property. During discovery, the circuit court compelled taxpayers to produce income information, including personal income tax returns and other financial documents. Taxpayers appealed to the appellate court which quashed the order compelling production and the property appraiser appealed. The Florida Supreme Court expressed its concerns for the equities of the situation:

"In defending its position both the adverse party and the court are entitled to the whole factual picture. (citations omitted) In light of the strong legal presumptions involved, this is particularly true in a case of a property appraiser defending a tax assessment. Yet the taxpayers appear to want the best of both worlds, challenging one portion of the valuation formula while unilaterally binding the appraiser on all other matters. Moreover, the taxpayers wish to challenge the assessment while preventing the appraiser from obtaining the information needed to defend the

assessment. Such a result would be fundamentally unjust. As this Court stated in *Hagerty v. Southern Bell Telephone & Telegraph Co.* (citation omitted): 'One cannot come into a Court . . . seeking relief and then refuse to answer questions pertaining to the matter about which relief is sought.'"[6]

The Court advised the taxpayers that "[t]his Court . . . will not allow our procedural rules to be used in such a manner as to allow one party to take unfair advantage of the other"[7] and addressed the assertion of privilege for taxpayer records:

"The taxpayers also assert that the requested information is privileged pursuant to their constitutional right to privacy. We need not address this argument directly because, even if such a privilege did exist, the taxpayers waived it when they brought the tax assessment into issue. (citation omitted) In light of our finding that the requested documents are relevant and discoverable, we need not address the other issues the property appraiser has raised."[8]

Thus, while recognizing the equities of reciprocal production of taxpayer information used in the ad valorem assessment process, the Florida Supreme Court did not recognize that a privilege existed for such information.[9]
However, while this approach would offer maximum protection for taxpayer records, your office has suggested and this office acknowledges that the disclosure of confidential communications such as husband-wife, physician-patient, or attorney-client communications in civil litigation situations has been determined by Florida courts to result in a waiver of the privilege against disclosure. As the Florida Supreme Court stated in *Savino v. Luciano*, "[w]hen a party himself ceases to treat a matter as confidential, it loses its confidential character."[10] Thus, an argument could be made that by filing a petition for administrative review of a property tax assessment by a value adjustment board the taxpayer has ceased to treat the matter as confidential and has waived the confidentiality provisions of section 193.074, Florida Statutes. Adoption of this position would allow the property appraiser and the value adjustment board maximum access to taxpayer records for use in a value adjustment board proceeding.

To summarize, taxpayer records are made confidential and exempt in the hands of the property appraiser by section 193.074, Florida Statues, among others. Although it appears that a property appraiser may use confidential records submitted to the value adjustment board by the taxpayer, it is not clear that the property appraiser may independently submit confidential material to a value adjustment board in the absence of a taxpayer's submission. Thus, it may be appropriate for the Legislature to provide additional guidance and clarify its intent regarding the requirements of confidentiality imposed on the property appraiser during the value adjustment board hearing process and provide the department with more guidance.

III. Requests for confidentiality of records

You have also asked whether a request by the property appraiser or taxpayer that information submitted to the value adjustment board be held confidential after it is received could affect the confidentiality of this information.

Article I, section 24(c), Florida Constitution, authorizes the Legislature to enact general laws creating exemptions provided that such laws "shall state with specificity the public necessity

justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law."[11] In the absence of a statutory or constitutional provision making records confidential and/or exempt from disclosure under the Florida Public Records Law, no exemption for such records exists.

A value adjustment board proceeding is a public proceeding and the records produced as evidence for consideration at these proceedings are public. To allow the maker or recipient of documents to dictate the circumstances under which the documents are to be deemed confidential would permit private parties as opposed to the Legislature to determine which public records are subject to disclosure and which are not. Such a result would contravene the purpose and terms of the Public Records Law.[12] Thus, in the absence of an exemption, these records appear to be subject to production and copying pursuant to the Public Records Law and cannot be maintained as confidential in the value adjustment board proceeding.

Section 194.011, Florida Statutes, provides a process for objections to ad valorem tax assessments leading to a hearing before the value adjustment board. This statutory scheme authorizes a taxpayer to request an informal conference with the property appraiser relating to his or her assessment and provides that:

"At this informal conference, the taxpayer shall present those facts considered by the taxpayer to be supportive of the taxpayer's claim for a change in the assessment of the property appraiser. The property appraiser or his or her representative at this conference shall present those facts considered by the property appraiser to be supportive of the correctness of the assessment. However, nothing herein shall be construed to be a prerequisite to administrative or judicial review of property assessments."[13]

If the taxpayer decides to petition the value adjustment board for administrative review of the property assessment, that petition must substantially follow the form prescribed by the Department of Revenue.[14] The statute provides that the petition to the value adjustment board must describe the property by parcel number and shall be filed with the clerk of the value adjustment board of the county.[15] The property appraiser must be promptly furnished with a copy of the petition.[16]

Section 194.011(4), Florida Statutes, requires that evidence lists be exchanged prior to the value adjustment board hearing:

"(a) At least 15 days before the hearing the petitioner shall provide to the property appraiser a list of evidence to be presented at the hearing, together with copies of all documentation to be considered by the value adjustment board and a summary of evidence to be presented by witnesses.
(b) No later than 7 days before the hearing, if the petitioner has provided the information required under paragraph (a), and if requested in writing by the petitioner, the property appraiser shall provide to the petitioner a list of evidence to be presented at the hearing, together with copies of all documentation to be considered by the value adjustment board and a summary of evidence to be presented by witnesses. The evidence list must contain the property record card if provided by the clerk. Failure of the property appraiser to timely comply with the requirements of this paragraph shall result in a rescheduling of the hearing.

As discussed above, taxpayer information is subject to the inspection and copying requirements of Florida's Public Records Law when it has been submitted to a value adjustment board as evidence in an assessment dispute. However, you express concerns about whether confidential records and information provided during the evidence exchange procedure of section 194.011(4), Florida Statutes, are public records by virtue of their use in the evidence exchange, but prior to their submission to a value adjustment board as evidence in an assessment dispute.

Section 193.074, Florida Statutes, provides that tax returns are confidential in the hands of the property appraiser and employees of that office and persons acting under their supervision and control. Once evidence is submitted to the value adjustment board, this office has determined that such information is a public record. However, this office cannot advise you that a property appraiser may independently submit confidential material to a value adjustment board.[17]

IV. Procedure for orders to produce confidential information

The value adjustment board procedures described in Part I, Chapter 194, Florida Statutes, contain no requirements for a determination of the relevance of any particular evidence presented to the value adjustment board prior to its submission.

Section 193.074, Florida Statutes, mandates the confidentiality of tax returns in the hands of the property appraiser. However, the statute acknowledges that confidential material may be produced by the property appraiser in response to an order of "an administrative body having quasi-judicial powers in ad valorem tax matters," and upon court order. While the statute does not set forth any standards for an administrative body to use in considering a request for the production of records, the considerations present in a request for documentary evidence in applying for a subpoena duces tecum may provide some guidance and offer the necessary constitutional protections.[18]

Generally, a subpoena duces tecum may be used to compel production of any proper documentary evidence which may be used as proof of a fact alleged to be relevant to the issue before the court or the officer issuing the subpoena. The evidence which is sought must be competent, relevant, and material to the cause being litigated.[19]

Rule 12D-1.005, Florida Administrative Code, authorizes the property appraiser of each county, and other specified officers, to inspect and copy financial records relating to non-homestead property which "are reasonably necessary to determine the property assessment of the property in question." The rule provides that

"[a]ccess to a taxpayer's records shall be provided only where it is determined that such records are necessary to determine the classification or value of the taxable non-homestead property."

These records, produced by the taxpayer under this rule, are considered to be confidential in the hands of the property appraiser and "shall not be divulged to any person, firm or corporation."[20] The standard for production of taxpayers' records under the department's rule is whether such records are reasonably necessary to determine the classification or value of the taxable property and it may be appropriate to extend that standard to any determination of relevance of particular evidence by the value adjustment board.

While this office cannot read into a statute requirements that the Legislature has not clearly provided, it would be advisable for a value adjustment board, in issuing an order for the production of confidential records, to be sensitive to the nature of these records and the privacy concerns of those producing the records.[21]

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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[1] *See* ss. 194.032(1)(a)1. - 4., Fla. Stat., requiring a value adjustment board to meet to hear petitions and appeals, 194.034, Fla. Stat., setting forth hearing procedures, including the swearing of witnesses, and Op. Att'y Gen. Fla. 01-74 (2001). *Cf.* Op. Att'y Gen. Fla. 82-49 (1982) (board of county commissioners, as regulatory body for water and sewer utilities, not excepted from confidentiality requirements pursuant to s. 193.074, Fla. Stat.)

[2] *See* Ops. Att'y Gen. Fla. 91-57 (1991), 95-07 (1995), and 05-04 (2005) discussing what constitutes a "return of property" under section 193.074, Fla. Stat.

[3] *Cf.* Op. Att'y Gen. Fla. 82-49 (1982) (board of county commissioners, as regulatory body for water and sewer utilities, is not excepted from confidentiality requirements for returns of property submitted by taxpayers pursuant to s. 193.074, Fla. Stat.; s. 193.074, Fla. Stat., operates to prohibit designated official custodians of property tax returns from releasing information contained in returns to any other agency or officer except upon court order or order of administrative body having quasi-judicial powers in ad valorem tax matters, such as property appraisal adjustment board).

[4] *Cf.* Op. Att'y Gen. Fla. 05-04 (2005) (absent a specific statutory exemption for assessment rolls and public information cards, such documents made or received by the property appraiser are public records subject to the Public Records Law, regardless of the confidentiality or a return that may contain information used in their creation).

[5] 488 So. 2d 520 (Fla. 1986).

[6] *Id.* at 522. *See Savino v. Luciano*, 92 So. 2d 817 (Fla. 1957), *and see generally* 51 Fla. Jur. 2d *Taxation* s. 679. *Cf. Higgs v. Good,* 813 So. 2d 178, 179 (Fla. 3d DCA 2002) ("It is inappropriate for a taxpayer to conceal an ace-in-the-hole for subsequent play against an official who is attempting to carry out his duties.").

[7] *Supra* n.5 at 523.

[8] *Id*.

[9] *Cf. Neu v. Miami Herald Publishing Co.*, 462 So. 2d 821 (Fla. 1985) ("The Sunshine Law explicitly provides for public meetings; communications at such public meetings are not confidential and no attorney/client privilege can arise therefrom."). Thus, a statute providing for attorney/client privilege did not create an exception to the Government in the Sunshine Law for attorney/client meetings.

[10] *Savino v. Luciano*, 92 So. 2d 817, 819 (Fla. 1957).

[11] *See Memorial Hospital-West Volusia v. News-Journal Corporation,* 729 So. 2d 373, 380 (Fla. 1999), in which the Court refused to "imply" an exemption from open records requirements, stating "we believe that an exemption from public records access is available only after the legislature has followed the express procedure provided in article I, section 24(c) of the Florida Constitution." *Accord Indian River County Hospital District v. Indian River Memorial Hospital, Inc.,* 766 So. 2d 233, 237 (Fla. 4th DCA 2000) ("Only after the legislature provided by general law for the exemption of records, stating with specificity the public necessity for the exemption and providing that the law was no broader than necessary, would an exemption from public records access be available.").

[12] *See National Collegiate Athletic Association v. Associated Press*, 18 So. 3d 1201, 2009 WL 3128743 (Fla. 1st DCA 2009) (a public record cannot be transformed into a private record merely because an agent of the government has promised that it will be kept private; a private party cannot render public records exempt from disclosure merely by designating information it furnishes a governmental agency confidential; the right to examine public records is a right belonging to the public, and it cannot be bargained away by a representative of the government); *Gadd v. News-Press Publishing Company*, 412 So. 2d 894 (Fla. 2d DCA 1982) (records of a utilization review committee of a county hospital were not exempt from Ch. 119, Fla. Stat., even though the information may have come from sources who expected or were promised confidentiality); *Browning v. Walton,* 351 So. 2d 380 (Fla. 4th DCA 1977) (a city cannot refuse to allow inspection of records containing the names and addresses of city employees who have filled out forms requesting that the city maintain the confidentiality of all material in their personnel files); *City of Pinellas Park, Florida v. Times Publishing Company*, No. 00-008234CI-19 (Fla. 6th Cir. Ct., Jan. 3, 2001) ("there is absolutely no
doubt that promises of confidentiality [given to employees who were asked to respond to a survey] do not empower the Court to depart from the public records law").

[13] Section 194.011(2), Fla. Stat.

[14] Section 194.011(3), Fla. Stat.

[15] *Id.*

[16] Section 194.011(3)(b), Fla. Stat.

[17] *And see* s. 194.034(1)(d), Fla. Stat., providing that testimony or evidentiary materials that were requested by the property appraiser, but denied to the property appraiser by the petitioner may not be presented for consideration to the board by the petitioner nor may the board accept such material. *Cf. Crapo v. HCA, Inc.,* 968 So. 2d 54 (Fla. 1st DCA 2007), in which the court

determined that a property appraiser was entitled to seek a *subpoena duces tecum* pursuant to s. 195.027(3), Fla. Stat., and Rule 12D-1.005, F.A.C., compelling a taxpayer to produce financial records necessary to determine the value of non-homestead property for taxation purposes.

[18] The production of documents has been held to implicate the Sixth Amendment to the federal Constitution providing for compulsory process for obtaining witnesses and the Fourth Amendment relating to search and seizure. *See*, *e.g.*, 97 C.J.S. *Witnesses* s. 25a. (1957).

[19] *See generally* 97 C.J.S. *Witnesses* s. 25e. (1957); *Vann v. State,* 85 So. 2d 133 (Fla. 1956).

[20] Rule12D-1.005(3), F.A.C.

[21] *Cf.* Ops. Att'y Gen. Fla. 90-50 (1990) and 07-21 (2007) discussing the policy considerations in posting information about law enforcement officers and their families and concluding that in the absence of a statutory or other legal duty to be accomplished by disclosure, the agency should consider whether the release of such information is consistent with the purpose of the exemption afforded by the Public Records Law.