

**ANALYSIS OF AMENDED BILL**

Author: Horton Analyst: Anne Mazur Bill Number: AB 1029  
 Related Bills: None Telephone: 845-5404 Amended Date: June 13, 2005  
 Attorney: Patrick Kusiak Sponsor: SEIU

**SUBJECT:** Ex Parte Communication Regarding BOE Adjudicatory Matters.

**SUMMARY**

This bill would add a section to the Government Code that would limit certain ex parte communication with respect to adjudicatory matters before the Board of Equalization (BOE).

This bill would make other changes to the Government Code relating to the BOE. These changes do not affect the department and are not discussed in this analysis.

**SUMMARY OF AMENDMENTS**

The June 13, 2005, amendments deleted language that would have amended the Government Code relating to the acquisition of new technology and use of common taxpayer identification numbers among the three tax administration agencies and replaced it with amendments to the Government Code relating to the BOE. This is the department's first analysis of this bill.

**PURPOSE OF THE BILL**

According to the author's staff, the purpose of this bill is to add more transparency in the administrative adjudication process.

**EFFECTIVE/OPERATIVE DATE**

This bill would become effective and operative on January 1, 2006.

**POSITION**

Pending

**ANALYSIS**STATE LAW

BOE is a constitutional body that is an agency-equivalent not reporting to the Governor. The five-member BOE consists of the State Controller and four elected members.<sup>1</sup> BOE administers the sales and use tax and various excise taxes; sets values for property for state-assessees; monitors the

<sup>1</sup> For this purpose, the state is divided into four districts. One member is elected from each district.

Board Position:

<u>      </u> S	<u>      </u> NA	<u>      </u> NP
<u>      </u> SA	<u>      </u> O	<u>      </u> NAR
<u>      </u> N	<u>      </u> OUA	<u>  X  </u> PENDING

Department Director

Will Bush

Date

07/21/05

property tax assessment practices of county assessors; reviews, equalizes and adjusts assessments of certain land owned by local government; and hears appeals from FTB actions on personal income tax, franchise tax, and HRA matters. A taxpayer who objects to a determination made by BOE with respect to tax programs it administers may petition the BOE for redetermination (i.e., administrative review).

Current state law generally precludes lawyers, judges, and judicial officers, directly or indirectly, in the absence of opposing counsel, from communicating regarding the merits of a contested matter pending before that judge or judicial officer. In addition, except in unusual circumstances, a lawyer may not, without furnishing a copy to opposing counsel, address a written communication to a judge or judicial officer regarding the merits of a contested matter pending before that judge or judicial official. Communications in violation of this rule are generally referred to as "ex parte communications." The prohibition on ex parte communications does not expressly apply to adjudicatory proceedings before the BOE.

### THIS BILL

This bill would require disclosure of any "ex parte communication" between a BOE member and any "interested party" to any matter pending before the BOE for adjudication. The disclosure must be made by that BOE member on the record of the BOE proceedings at the beginning of the hearing on that matter. The disclosure must include the name and position of each interested party, the date, the subject matter discussed, and the information provided to the member.

The term "ex parte communication" would be defined as any oral or written communication between a BOE member and an interested person about an adjudicatory matter before the BOE that does not occur in a public hearing, workshop, or other official proceeding, or on the official record of the proceeding on the matter. Ex parte communications would not include communications that are purely procedural in nature.

The term "interested party" would be defined as any person who has a direct or indirect interest in the outcome of the adjudicatory matter before the BOE, regardless of whether the interest is financial. An interested party includes, but is not limited to, the taxpayer, the taxpayer's representatives, and any other person who intends to influence the decision of a BOE member on a matter before the BOE.

The bill would further provide that all information relevant to a matter set for an adjudicatory hearing before the BOE must be provided to all parties to the matter, as well as to board proceedings staff, at least 14 days prior to the hearing. If any relevant information is provided by the taxpayer that was not made available to the parties to the proceeding, including board proceedings staff, the hearing must be postponed at least 14 days from the date that information is provided to all such parties. Postponement may be waived if the parties to the matter determine that it is not necessary for the fair resolution of the matter.

### IMPLEMENTATION CONSIDERATIONS

The department has identified the following implementation concerns. Department staff is available to work with the author's office to resolve these and other concerns that may be identified.

FTB staff has a longstanding administrative policy of not engaging in ex parte communications with BOE members or staff on pending adjudicatory matters, even though FTB staff is not, as a matter of law, expressly prohibited from doing so. As a result, the provisions of this bill would not have a significant impact on the department's programs. Department staff notes the following for the author's consideration:

- This bill does not define the term "adjudicatory proceeding."
- This bill would require that all relevant information on any matter set for hearing be provided to all parties to the matter at least 14 days prior to the hearing. It appears this requirement would apply to oral testimony in addition to written evidence.

### TECHNICAL CONSIDERATIONS

The bill uses both the terms "interested *party*" and "interest *person*" when describing ex parte communication. The term "party" generally refers to a party to a matter and the term "interested person" generally refers to anyone with an interest in the matter. Therefore, the bill should be amended to use term "interested person" anywhere that "interested party" is expressed.

### **FISCAL IMPACT**

This bill would not significantly impact the department's costs.

### **ECONOMIC IMPACT**

This bill would not impact the state's income tax revenue.

### **POLICY CONCERNS**

The bill would require a postponement of a hearing if any relevant information is offered or provided by "the taxpayer" that was not made available in a timely manner. The bill does not require a similar postponement if any other person, such as the state agency, offers or provides the information.

### **LEGISLATIVE STAFF CONTACT**

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