

64819-5

64819-5

NO. 64819-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

HARLEY H. HOPPE & ASSOCIATES, INC.,

Appellant,

v.

KING COUNTY, a political subdivision of the State of Washington;  
and SCOTT NOBLE, King County Assessor,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN CRAIGHEAD

BRIEF OF KING COUNTY

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

MICHAEL J. SINSKY  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

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## I. INTRODUCTION

Harley H. Hoppe & Associates ("Hoppe") filed this action seeking to compel the King County Tax Assessor to disclose private company tax information that is contained in a Washington State Department of Revenue tax ratio audit study. The Superior Court properly entered summary judgment dismissing Hoppe's Public Records Act claim on grounds that requested disclosure of private company tax audit material is prohibited by Washington property tax statutes and is exempt under the Public Records Act. The judgment entered in favor of the County should be affirmed on its merits.

Hoppe's appeal is, in any event, untimely. This is the second time that Hoppe has sought review of the summary judgment that was entered in this case. Hoppe's original appeal notice misidentified the matters for which review was sought and was voluntarily withdrawn. Hoppe's second appeal notice, at issue in this case, was filed only after final judgment in favor of the County was incorrectly<sup>1</sup> reentered in Superior Court. Filing of the second

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<sup>1</sup> The untimeliness of Hoppe's appeal is premised on the County's cross-appeal assertion that the Superior Court's reentry of final judgment was improper.

notice of appeal occurred after the time limit for seeking review of the original, properly entered judgment had run.

## **II. ASSIGNMENT OF ERROR**

The Superior Court erred in its January 21, 2010 order reentering judgment in favor of the County.

## **III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

Whether the Superior Court erred by reentering final judgment in favor of the County when final judgment had already been entered and the associated appeal period had already run.

## **IV. STATEMENT OF THE CASE**

Hoppe represents taxpayers in administrative property tax appeals before the King County Board of Equalization and State Board of Tax Appeals. His complaint alleges that the County violated the Public Disclosure Act by failing to provide him with a copy of a Washington State Department of Revenue personal property tax ratio audit of private company assets. CP 41-57. The tax audit at issue sets forth a detailed list of audited company assets, described by specific item, acquisition year, original cost, and depreciated value. CP 95-96; CP 91.

Due to the confidential nature of such tax audit information, both the Department of Revenue and the audited taxpayers have

advised the County of their objection to the release of the document. CP 65-67, 91-92, 96, 147-60, 1171. Without such taxpayer consent, the County correctly advised Hoppe that the County is prohibited by taxpayer confidentiality statutes from providing the requested tax audit material and that disclosure is exempt under RCW 42.56.230. CP 96, 197-98.

**A. Background to Hoppe's Public Disclosure Claim.**

Prior to the public disclosure request at issue in this case, in 2008, Hoppe's legal counsel in the law firm of Gordon Tilden Thomas & Cordell LLP made several document requests to the County Assessor regarding a Paccar Company property tax appeal that had previously been settled. CP 93-96. After a series of disclosures, requests for clarification, revised requests and meetings, these 2008 disclosure requests were fully satisfied. Id. (chronology and exhibits regarding initial requests). There is no assertion in this case that the County was anything other than fully cooperative in its responses. RP 3.

The only public disclosure request at issue in this case is Hoppe's subsequent demand for a Department of Revenue tax ratio audit. CP 87-88. See also CP 44-57 (Amended Complaint). On February 29, 2008, Hoppe submitted a letter to the County Assessor

demanding a copy of "the 2006 State Ratio Audit for Personal Property, with client name and account number(s) redacted." CP 95, 192-93.

The requested DOR tax audit details assets of a broad cross-section of literally hundreds of individual private companies that were required to participate in an audit process conducted by the State Department of Revenue. The tax audits at issue describe each company's specific assets by acquisition year, original cost, and depreciated value. CP 73, 91, 95, 1172. A detailed discussion of the DOR tax ratio audit's purposes and process is provided at pages 26 and 27 below.

The County promptly notified the Washington State Department of Revenue ("DOR") and the audited taxpayers of Hoppe's request. CP 96. The audited taxpayers objected to the release of their tax audit, noting that such information was private and confidential, and that disclosure would risk placing them at a competitive disadvantage. CP 91-92, 96, 1171-72.

The DOR likewise advised the County that disclosure of such tax audits was prohibited by RCW 84.08.210 and that the requested redaction of taxpayer name and file information would not sufficiently

safeguard taxpayers' identity or proprietary business information. CP 96, 195, 65-79.

On March 7, 2008, the County advised Hoppe that, given the audited taxpayers' objections to disclosure of their confidential taxpayer information, the County was prohibited under specified tax confidentiality statutes from providing public access such material. CP 96, 197-98. The County further noted that the material was exempt from disclosure under RCW 42.56.230 of the Public Records Act. Id. That section exempts from public inspection and copying information required of any taxpayer in connection with the assessment or collection of any tax if disclosure would (a) be prohibited under RCW 82.08.210, 82.32.330, 84.40.020 or 84.40.340 or (b) violate the taxpayer's right to privacy or result in unfair competitive disadvantage to the taxpayer.

No further request or follow-up of any kind on the request was made by Hoppe until months later, when this action was filed. CP 97.

**B. Superior Court Adjudication of Hoppe's Claim.**

Hoppe filed this case in King County Superior Court on June 23, 2008, alleging that the County violated Washington State Public Records Act by not providing him with requested copies of a Washington State Department of Revenue tax ratio audit. CP 9-31.

Several months later, the County and Hoppe filed cross-motions for summary judgment. CP199-218, 294-318. On July 20, 2009, the King County Superior Court issued a correspondence ruling which determined that Hoppe's claims were without merit. CP1221-24. The Court accordingly denied Hoppe's request for summary judgment and entered summary judgment in favor of the County.1216-18, 1219-20. The Court's July 29, 2009 Summary Judgment incorporated its correspondence ruling and

ORDERED ADJUDGED AND DECREED that King County's motion for summary judgment is GRANTED. For each of the reasons set forth in King County's motion, Hoppe's claims against the County be and hereby are dismissed with prejudice.

CP 1216-18.

**C. Stipulated Dismissal of Remaining Counterclaim.**

Independent of Hoppe's public records claim, the County had filed a counterclaim in this case, seeking to vacate a 1991 injunction that pertained to actions of a prior Assessor. CP 32-38. After the Superior Court denied the County's motion for summary judgment on that counterclaim (CP 1305-06), the County agreed not to pursue it. On November 23, 2009, a stipulated order was accordingly entered dismissing the counterclaim without prejudice or costs. CP 1324-25. At that point, no further claims or causes of

action remained to be adjudicated in the case.

**D. Hoppe's Initial Notice of Appeal.**

On December 2, 2009, within thirty days after final resolution of the case, Hoppe filed a Notice of Appeal. CP 1-8. The Notice, however, inadvertently sought "review by the Washington Court of Appeals, Division I, of the Stipulated Order of Dismissal, entered on November 23, 2009, and matters concluded thereby, in particular the Order on Summary Judgment dated November 13, 2009." Id. Significantly, the only orders designated in and attached to Hoppe's Notice of Appeal related to the County's counterclaim that was dismissed by stipulation. Hoppe did not designate or attach the July 20, 2009 Summary Judgment that dismissed its public disclosure claim. Id.

On December 23, 2009, the Court of Appeals moved *sua sponte* to determine the reviewability of Hoppe's designated orders. CP 1377. The County urged that the appeal be dismissed on grounds that the designated orders regarding dismissal of the County's stipulated counterclaim were not reviewable. CP 1351-58.

In response, on January 6, 2010, Hoppe moved the Court of

Appeals to voluntarily withdraw its appeal.<sup>2</sup> The Court of Appeals granted Hoppe's request and dismissed the appeal on January 7, 2010. CP 1379.

**E. Reentry of Judgment and Re-filed Appeal Notice.**

Hoppe then returned to Superior Court and urged the Court to reenter judgment dismissing its claim. CP 1326-42. The County opposed entry of the duplicative judgment order, pointing out that the Court's July 20, 2009 Summary Judgment ruling had already "Ordered, Adjudged and Decreed" that Hoppe's claim was dismissed with prejudice; that this summary judgment entry already constituted a final dispositive judgment, and that there was no basis in the civil rules for reentering a judgment that had already been entered. CP 1343-79.

On January 21, 2010, the Superior Court granted Hoppe's request and reentered judgment in favor of King County on plaintiff's claims. CP 1383-84. Hoppe thereupon filed its second notice of appeal in this case on January 27, 2010. CP 1385-86.

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<sup>2</sup> Before Hoppe opted to withdraw its appeal, the County made clear its position that the Summary Judgment previously entered was a final judgment as to Hoppe's claim and that it would oppose a request to reenter judgment on that claim in the Superior Court. CP 1349.

On February 9, 2010, King County cross-appealed, challenging the Superior Court's decision to reenter judgment. CP1390-94

## V. ARGUMENT

### A. Standard of Review

Court of Appeals summary judgment review is *de novo*. The Court considers the same evidence presented to the trial court. Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

While an agency's exemption determination under the Public Records Act is generally not entitled to any particular deference on review, the exempt status of the state tax ratio audit at issue in this case is grounded in part on an interpretation of applicable tax statutes which the Washington State Department of Revenue is specially charged with interpreting and administering.

The department of revenue shall, with the advice of the attorney general, decide all questions that may arise in reference to the true construction or interpretation of this title, or any part thereof, with reference to the powers and duties of taxing district officers, and such decision shall have force and effect until modified or annulled by the judgment or decree of a court of competent jurisdiction.

RCW 84.08.080. See also RCW 84.08.120.

The interpretation of the DOR regarding the exempt status of the requested tax ratio audit at issue in this case is accordingly entitled to substantial weight in this review. See Impecoven v. Department of Revenue, 120 Wn.2d 357, 363, 841 P.2d 752 (1992) ("While 'the ultimate authority' for determining a statute's meaning remains with the court, considerable deference will be given to the interpretation made by the agency charged with enforcing a statute."). Martinelli & Co., Inc. v. Washington State Dept. of Revenue, 80 Wn.App. 930, 937, 912 P.2d 521, 524 (1996).

**B. Tax Ratio Audit Exempt from Public Disclosure.**

The Public Records Act requires state and local agencies to disclose all public records upon request unless, as in this case, the record falls within a specific PDA exemption or other statutory exemption. Bellevue John Does 1-11 v. Bellevue School District, 164 Wn.2d 199, 189 P.3d 139, 144 (2008).

Information sought by Hoppe is exempt from disclosure.

RCW 42.56.230 specifies that:

The following personal information is exempt from public disclosure and copying under this chapter: ... (3) Information required of any taxpayer in connection with the assessment or collection of any tax if the disclosure of

the information to other persons would **(a)** be prohibited to such persons by RCW 84.08.210, 82.32.330, 84.40.020, or 84.40.340 or **(b)** violate the taxpayer's right to privacy or result in unfair competitive disadvantage to the taxpayer.

RCW 42.56.230. The requested tax ratio audit study falls squarely within specifically referenced taxpayer confidentiality protections of RCW 84.08.210, RCW 82.32.330 and RCW 84.40.340.<sup>3</sup> Such material is likewise exempt because its disclosure would either violate the taxpayer's right to privacy or result in unfair competitive disadvantage to the taxpayer.

- 1. Release of documents is prohibited by taxpayer confidentiality statutes.**
  - a. Disclosure is prohibited by RCW 84.08.210.**

Disclosure of tax ratio audit study information is prohibited by RCW 84.08.210 ("Confidentiality and privilege of tax information--Exceptions--Penalty"). That section provides in pertinent part:

Tax information is confidential and privileged, and except as authorized by this section, neither the department nor any other person may disclose tax information .... A violation of this section constitutes a gross misdemeanor.

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<sup>3</sup> In addition to the specially referenced taxpayer protections in RCW 84.08.210, RCW 42.56.070(1) more generally exempts documents from disclosure where, as in this case, there is an "other statute which exempts or prohibits disclosure of specific information or records."

RCW 84.08.210(2) and (4). The section goes on to broadly specify that

For purposes of this section, "tax information" means confidential income data and proprietary business information obtained by the department in the course of carrying out the duties now or hereafter imposed upon it in this title that has been communicated in confidence in connection with the assessment of property and that has not been publicly disseminated by the taxpayer, the disclosure of which would be either highly offensive to a reasonable person and not a legitimate concern to the public or would result in an unfair competitive disadvantage to the taxpayer.

RCW 84.08.210(1). Here, the tax ratio audit study plainly constitutes tax information. It consists of non-disseminated, proprietary business information, obtained by the Department of Revenue, communicated in confidence in connection with the assessment of property. CP 65-67, 73-76; 91-92, 95-96, 1171-72, 1212. Its disclosure would likewise satisfy both alternative thresholds under this section of either being highly offensive to a reasonable person and not a legitimate concern to the public, *infra* at pages 19 through 25 (discussing significant privacy implications of disclosure); or placing the taxpayer at risk of an unfair competitive disadvantage if disclosed. *Infra* at pp. 30 through 32

(discussing competitive disadvantages associated with disclosure). Disclosure of the private company tax audit material is therefore prohibited.

Hoppe's overly restrictive reading of RCW 84.08.210 is at odds with both the clear intent of this section to safeguard taxpayer confidences and the construction rendered by the DOR regarding applicability of this provision to the requested tax audit. CP 66, 73, 96, 195. As noted above, the legislature has afforded the DOR special interpretive authority over Washington property tax statutes. RCW 84.08.080. The DOR's direction to the County to treat the requested tax ratio audit as exempt under RCW 84.08.210 is accordingly entitled to substantial deference. Supra at pp. 9 - 10.

**b. Disclosure is prohibited by RCW 84.40.340.**

Disclosure of tax ratio audit study material is similarly prohibited by RCW 84.40.340. While the County's initial response to Hoppe's disclosure request clearly identified this section among the statutes prohibiting disclosure (CP 197), and while all subsequent briefing before the Superior Court similarly identified this section as a basis for nondisclosure (CP 204-6, 332, 1201); Hoppe has never addressed its applicability either in any of the

briefing provided in Superior Court (306-07, 325, 1181-82) or in the Opening Brief submitted herein.<sup>4</sup>

The section provides in pertinent part:

(1) For the purpose of verifying any list, statement, or schedule required to be furnished to the assessor by any taxpayer, any assessor or his or her trained and qualified deputy at any reasonable time may visit, investigate and examine any personal property, and for this purpose the records, accounts and inventories also shall be subject to any such visitation, investigation and examination which shall aid in determining the amount and valuation of such property. Such powers and duties may be performed at any office of the taxpayer in this state, and the taxpayer shall furnish or make available all such information pertaining to property in this state to the assessor although the records may be maintained at any office outside this state.

(2) Any information or facts obtained pursuant to this section shall be used by the assessor only for the purpose of determining the assessed valuation of the taxpayer's property: PROVIDED, That such information or facts shall also be made available to the department of revenue upon request for the purpose of

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<sup>4</sup> Appellate court rules generally prohibit parties from raising arguments that were not raised below. RAP 2.5(a). Rodriguez v. Loudeye Corp., 144 Wn.App. 709, 727, 189 P.3d 168, 177 (2008). To the extent that Hoppe has any basis for asserting that RCW 84.40.340 exemption language does not apply, King County has not seen or had any opportunity to respond to it.

determining any sales or use tax liability with respect to personal property, and except in a civil or criminal judicial proceeding or an administrative proceeding in respect to penalties imposed pursuant to RCW 84.40.130, to such sales or use taxes, or to the assessment or valuation for tax purposes of the property to which such information and facts relate, shall not be disclosed by the assessor or the department of revenue without the permission of the taxpayer to any person other than public officers or employees whose duties relate to valuation of property for tax purposes or to the imposition and collection of sales and use taxes, and any violation of this secrecy provision is a gross misdemeanor.

RCW 84.40.340 (emphasis added). The requested tax ratio audit study material was developed on the basis of taxpayer supplied information for the purpose of determining the amount and valuation of audited properties for purposes of establishing the state school tax assessment. (CP 346). Disclosure of such tax information is expressly prohibited without consent of the taxpayer, and improper disclosure is a criminal offense. RCW 84.40.340. Because audited taxpayers have clearly indicated that they do not consent to disclosure of their tax audited materials, supra at pp. 4 - 5, the County is legally prohibited from providing their tax information to Hoppe.

**c. Disclosure is prohibited by RCW 82.32.330.**

Disclosure of tax information sought by Hoppe is likewise barred by RCW 82.32.330(2).

Returns and tax information shall be confidential and privileged, and except as authorized by this section, neither the department of revenue nor any other person may disclose any return or tax information.

RCW 82.32.330(2). Tax information is broadly defined by this section to mean:

(i) a taxpayer's identity, (ii) the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability deficiencies, overassessments, or tax payments, whether taken from the taxpayer's books and records or any other source, (iii) whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, (iv) a part of a written determination that is not designated as a precedent and disclosed pursuant to RCW 82.32.410, or a background file document relating to a written determination, and (v) other data received by, recorded by, prepared by, furnished to, or collected by the department of revenue with respect to the determination of the existence, or possible existence, of liability, or the amount thereof, of a person under the laws of this state for a tax, penalty, interest, fine, forfeiture, or other

imposition, or offense: PROVIDED, That data, material, or documents that do not disclose information related to a specific or identifiable taxpayer do not constitute tax information under this section. Except as provided by RCW 82.32.410, nothing in this chapter shall require any person possessing data, material, or documents made confidential and privileged by this section to delete information from such data, material, or documents so as to permit its disclosure;

RCW 82.32.330(1)(c).<sup>5</sup> Here, the tax ratio audit studies consist of precisely the sort of confidential tax information that RCW 82.32.330 requires be kept confidential, privileged and free from disclosure. The ratio audit material sets forth the taxpayer's identity, as well as the nature, source, and amount of the taxpayer's assets. CP 65-67, 73-76; 91-92, 95-96, 1171-72, 1212. Disclosure of the document was therefore prohibited and, as with the other exemptions referenced above, is punishable as a misdemeanor. RCW 82.32.330(5).

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<sup>5</sup> RCW 82.32.410, referred to in this section, has no application here. The section pertains to the DOR's issuance of precedential written determinations, and requires that such written determinations delete names, addresses, and other identifying details of the person to whom the written determination pertains and of another person identified in the written determination.

Argument by Hoppe that the protection generally afforded to taxpayers under this provision applies only to excise tax information is without merit. Protected "tax information" is broadly defined within RCW chapter 82.32 to include, without limitation, "the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, credits, assets." RCW 82.32.330(1)(c). The provision is not restricted to excise tax information.

**d. Criminal liability for improper disclosure.**

Clear indication of the legislature's resolve to maintain confidentiality of such taxpayer information is evident not only in the number of statutory provisions that bar its disclosure, but also by the severe penalties that attach for violating such taxpayer privacy provisions. Unlike many exemptions which merely authorize the withholding of documents, each of the foregoing tax confidentiality provisions mandates such withholding and imposes criminal sanctions for disclosure. RCW 84.08.210(2) and (4); RCW 84.40.340(2); RCW 82.32.330(5). Absent consent by the taxpayer, the County thus has no lawful authority to release such documents.

If a statute classifies information as 'confidential' or otherwise prohibits disclosure, an agency has no discretion to release a record or the confidential portion of it. Op. Att'y Gen. 7 (1986).

Some statutes provide civil and criminal penalties for the release of particular 'confidential' records. See RCW 82.32.330(5) (release of certain state tax information a misdemeanor).

WAC 44-14-06002.

**2. Disclosure would violate taxpayer privacy and result in unfair competitive disadvantage.**

In addition to and independent of the statutory tax information confidentiality exemptions discussed above, disclosure of the tax audit sought by Hoppe is prohibited on grounds that release of such tax information would violate the taxpayer's right to privacy or result in unfair competitive disadvantage to the taxpayer. RCW 42.56.230(3)(b). See also pp. 12 - 13 supra (referencing alternative privacy or unfair competitive disadvantage exemption language in RCW 84.08.210).

**a. Disclosure would violate taxpayer privacy.**

Tax audit information is understood to be private and confidential, and audited companies such as Paccar and Boeing go to considerable lengths to maintain its confidentiality. CP 65-67, 73-76; 91-92, 95-96, 1171-72, 1212. Company asset information set forth in the audit study was provided to the DOR with the "critical understanding that it would remain confidential in accordance with

state public disclosure exemptions and confidential taxpayer protections." CP 92, 210.

Hoppe erroneously contends that taxpayer privacy exemptions in RCW 42.56.230(3)(b) do not apply because there is allegedly legitimate public concern in the individual company tax audit information insofar as the information has a role in calculating state school taxes.<sup>6</sup> In this public disclosure context, the term "legitimate" means "reasonable." Bellevue School Dist, 164 Wn.2d at 217. The fact that the public may have some degree of interest in a document is not sufficient to establish "legitimate" public concern. Dawson v. Daly, 120 Wn.2d 782, 799, 845 P.2d 995, 1005 (1993) (while public has some degree of interest in disclosure of prosecutor evaluations, in light of the potential harm disclosure could cause, legitimate public concern to justify disclosure is lacking). The interest must be reasonable in light of related interests in individual privacy and government administration efficiency. In this instance, they are not.

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<sup>6</sup> Hoppe's additional novel argument, not raised below, that personal privacy protections afforded under the Public Records Act do not apply to corporate taxpayers is plainly without merit. Nothing in any statute indicates any intent to exclude such a significant portion of the taxpaying population from such fundamental protections. The Bellevue School District case cited by Hoppe as support for its theory addresses whether an individual's personnel file would constitute personal information. The case does not hold that personal privacy protections are inapplicable to corporate taxpayers.

**i. Impact to taxpayer privacy and government operations cannot be overstated.**

Public Records Act directives are to be construed in a manner that is "mindful of the right of individuals to privacy and of the desirability of the efficient administration of government." Bellevue School Dist, 164 Wn.2d at 224-225; See also RCW 42.17.010(11) (disclosure goals of act considered in conjunction with rights of privacy and desirability of efficient government). Here, significant individual taxpayer privacy rights and compelling tax administration interests in fostering full, cooperative disclosure from taxpayers far outweigh whatever interest Hoppe may have in obtaining the confidential tax audit information of ratio study participants.

There can be little doubt that the sort of information gathered from audited companies by the DOR implicates fundamental taxpayer privacy interests. See e.g. DOR v. March, 25 Wn.App. 314, 321, 610 P.2d 916, 920 (1979) (tax investigations by DOR "unquestionably involve some invasion of privacy"). Such privacy interests are well recognized in tax law contexts.

The government also has an interest, asserted on behalf of its taxpayers, to ensure each individual taxpayer's right to privacy. A tax return and related

information contains many intimate details about the taxpayer's personal and financial life. An individual's tax return will contain, in addition to the nature and source of income, information about the taxpayer's family, political affiliation, health data, and union membership. Likewise, a corporate tax return will contain detailed financial information which could potentially be abused by competitors. See, e.g., *Association of American Railroads*, 371 F.Supp. 114, 116 (D.D.C.1974) ("The policy of confidentiality for income tax data encourages the full disclosure of income by taxpayers in that the individual or corporate taxpayer is assured that his neighbor or competitor will not be apprised of the intimate details of his financial life."); see generally Benedict & Lupert, *Federal Income Tax Returns-The Tension Between Government Access and Confidentiality*, 64 Cornell L.Rev. 940, 943-47 (1979) (discussing the importance of maintaining the confidentiality of tax returns). Clearly, individual taxpayers desire to keep this information confidential.

U.S. v. Richey, 924 F.2d 857, 861 (9<sup>th</sup> Cir. 1991).

While these privacy interests are significant, our laws recognize the need for taxing authorities to gather such information in order to properly administer our taxing system. This governmental interest in maintaining a workable tax system is, of course, "compelling." See Bradley v. United States, 817 F.2d 1400,

1405 (9th Cir.1987). An appropriate legislative balance is therefore struck by allowing such private information to be gathered and mandating under stringent penalty that it be kept confidential.

Most of us have agreed ... that the social benefits to be gained in these instances require the information to be given and that the ends to be achieved are worth the price of diminished privacy. ...But this tacit agreement is founded upon an assumption that information given for one purpose will not be used for another. We are prepared to tell the tax collector and the census taker what they need to know, but we are not prepared to have them make a public disclosure of what they have learned. The intrusion is tolerable only if public disclosure of the fruits of the intrusion is forbidden. This explains why many of the statutes which require us to tell something about ourselves to a government agency contain an express provision against disclosure of such information. It also explains why there are general provisions prohibiting disclosure of information of a personal nature gained in an official capacity.

Bloustein, *Privacy as an Aspect of Human Dignity, An Answer to Dean Prosser*, 39 N.Y.U.L.Rev. 962, 999 (1964). *Quoted in Rhinehart v. Seattle Times Co.* 98 Wn.2d 226, 237, 654 P.2d 673, 680 (1982). This legislative balance is reflected in the strict statutory protections against disclosure of confidential tax information that apply in this case.

Our personal property tax system could not properly function if confidentiality expectations were not adhered to. CP 344-45, 66-67. In Washington, the administration of property taxes is based on a self-reporting system in which individual taxpayers are expected to self-identify personal property that is subject to tax and to provide associated information bearing on its taxable value. CP 344-45. The effectiveness of this system would be seriously undermined if taxpayer privacy was not preserved. Id. See also CP 66-67.

The American tax structure is unique in that it is based on a system of self-reporting. *United States v. Bisceglia*, 420 U.S. 141, 145, 95 S.Ct. 915, 918, 43 L.Ed.2d 88 (1975). "There is legal compulsion, to be sure, but basically the Government depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability." *Id.* In enacting the statutory provisions guaranteeing confidentiality, including section 7213, Congress observed that "the question [has been raised] whether the public's reaction to this possible abuse of privacy would seriously impair the effectiveness of our country's very successful voluntary assessment system which is the mainstay of the Federal tax system." Sen.Rep. No. 94-938, Part I, reprinted in 1976 U.S.Code Cong. & Admin.News 3439, 3747.

U.S. v. Richey , 924 F.2d 857, 861 (9<sup>th</sup> Cir. 1991) (discussing maintenance of privacy in analogous self-reporting income tax context). See also CP 344-45.

"Requiring disclosure where the public interest in efficient government could be harmed significantly more than the public would be served by disclosure is not reasonable." Bellevue School Dist, 164 Wn.2d 199, 224-225, 189 P.3d 139, 152 (2008). Viewed within this applicable framework, the private tax information of individual audited companies is plainly not of legitimate public concern.

**ii. Hoppe's interest is far outweighed.**

Hoppe's interest in disclosure is far outweighed by these essential governmental and taxpayer privacy interests.

**aa. School tax verification does not justify.**

Hoppe essentially argues that disclosure should be required so that taxpayers can review the state's private company tax audits in order to make sure that the state school levy is properly set. Disclosure of the County's tax ratio audit information would not, however, enable any taxpayer to realistically determine whether the state school tax levy is appropriate.

Some background regarding the state's ratio audit is warranted in order to place Hoppe's state school levy argument in proper context. Article 7, section 1 of the Washington Constitution requires that property taxes be uniform within the applicable taxing district. Wash. Const. art. VII, § 1. The relevant taxing district for purposes of the state's school tax levy is thus the entire state of Washington. In order to establish the applicable state school tax rate, the DOR uniformly determines the total, statewide real and personal property values by looking initially to the assessed values developed within each of the counties. In order to account for dissimilarities in the timing of and manner by which each of the 39 counties assessed its real and personal properties, the DOR adjusts and equalizes these county assessed values through its annual ratio study.<sup>7</sup> The County's adjustment ratio for both real and personal property is determined by dividing each county's assessed

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<sup>7</sup> The procedure utilized by the DOR to develop its tax ratio audit study is described in WAC Chapter 458-53. To determine market values of real property, with certain specified exclusions, the DOR compares assessed values with values set forth in actual real estate excise tax affidavits from the many thousands of actual sales. WAC 458-53-070. To determine market values for personal property, the DOR looks to market data from the three years prior to the current assessment year. WAC 458-53-140. The DOR compares average values within specified value ranges (strata) against a representative personal property audits conducted by the DOR within such strata. WAC 458-53-140.

values by the DOR-indicated market values. WAC 458-53-135(2) and WAC 458-53-160(4). The total taxable value in the respective property classifications (real and personal) is then considered and equalized to arrive at the ultimate state levy amount. RCW 84.52.065. See also Hagen Dec. at ¶¶ 5 and 6.

In proceedings before the Superior Court, Hoppe had advised the County that it was only interested in the ratio audit of Paccar Company.<sup>8</sup> CP 87-88. As an initial, practical matter, the Paccar ratio audit has virtually no statistical bearing on the statewide school levy amount. CP 95-96. The state school levy amount is established based on the adjusted, assessed value of all taxable real and personal property within the state -- including values of all other taxpayers in the State of Washington.

Review of the entire DOR's tax ratio audit study for King County would likewise not enable Hoppe to determine whether a taxpayer's school tax amount was correctly set. As with other property taxes in Washington, an individual's state school tax is determined by its relative percentage of the total property value within the relevant taxing district. In order to determine whether an

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<sup>8</sup> The focus of Hoppe's requested audit material subsequently shifted to the entire ratio audit study.

individual's relative percentage of total property value was properly determined, one would need to consider the baseline county assessments of all real and personal properties across the state and the adjustments to these assessed values that result from each of the 39 counties' ratio audit studies. Without this body of detailed information, Hoppe could not meaningfully determine whether its state school tax was proper.

In any event, the fact that a company's tax audit could have some mathematical impact on amounts owed by other taxpayers is plainly not sufficient to override taxpayer confidentiality requirements. If impact alone was enough, there could be no taxpayer confidentiality because the assessed value of every taxpayer has some mathematical impact on every other district taxpayer's ultimate tax burden. This is so because, as noted above, Washington State utilizes a budget based property tax system in which the total amount of tax revenue is established, not by the value of the properties taxed, but by the amounts all taxing authorities have appropriately budgeted. Under this budget based system, the portion of the budgeted amount owed by an individual taxpayer is based on his or her relative percentage of the overall property value owned. This relative tax burden makes everyone's

taxes marginally dependant on the values that are determined for every other taxpayer within the taxing district.<sup>9</sup> As such, if Hoppe was correct in asserting that mere impact requires disclosure, details concerning a company's income, expenses, assets and business practices would also be subject to disclosure because such details are utilized to calculate values that impact on the tax burdens of other property tax payers. Such an absurd result was clearly not intended. The fact that one taxpayer's value may influence another's tax burden does not legally establish a sufficient interest to override the compelling interests in preserving confidentiality of tax information sought by Hoppe.

**bb. Review of basis for depreciation schedule does not justify.**

Disclosure of the tax ratio audit would similarly not further Hoppe's alternative purpose of reviewing the private tax audit to

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<sup>9</sup> By way of illustration, if everyone's assessed property values increase (or decrease) by the same percentage, the taxes owed by property owners would be the same, irrespective of their value increase. If, however, taxpayer A's property value increased by a greater percentage (or decreased by a lesser percentage) than taxpayer B through Z values, taxpayers B through Z's relative percentage of the overall taxable property value and associated tax burden would go down, however insignificantly. And, to complete the illustration, if taxpayer A's values decreased by a greater percentage (or increased by a lesser percentage) than other taxpayers, taxpayer A would pay less, and taxpayers B through Z would pay more of the overall tax burden.

determine whether other companies have been subject to more favorable treatment by the Assessor. More particularly, Hoppe argues that the tax ratio audit is needed to determine why certain Paccar company equipment was depreciated under a schedule that ordinarily applied to "Agr. M&E Tractors." Hoppe's Opening Brief at 4 - 6. The Superior Court's in camera review of the Paccar tax audit confirmed the County's assertion, however, that the audit does not purport to explain this categorization. CP1395 -1452, 1365. The state's tax audit does not contain any analysis, narrative, description, guidance, criteria or standards for determining whether the assembly classification provided for certain Paccar assets is appropriate. Cp 346.<sup>10</sup>

**b. Disclosure would place audited companies at an unfair competitive disadvantage.**

Disclosure of requested tax ratio audit study material is likewise prohibited by RCW 84.04.210 and 42.56.230(3) on grounds that disclosure of company tax audit material would place audited companies at an unfair competitive disadvantage. It takes little imagination to foresee how competitors could use confidential

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<sup>10</sup> A detailed explanation that describes why the depreciation category was used is, however, provided by the County's Assessments Section Supervisor. CP 345-47.

tax asset listings to their competitive advantage. For example, if confidentiality was not maintained, a competitor could see specific equipment listings that reveal aspects of the taxpayer's manufacturing process; could see how much the taxpayer paid for its equipment for use in its own purchase negotiations; could see aspects of the taxpayer's business model evident in purchase decisions of the company; could see how much useful life remains on the taxpayer's itemized equipment; and could see potential capability limitations or advantages of the taxpayer competitor that are evident from the nature of equipment that is or is not owned by the company. CP 91-92, 1171-72.

In addition to giving competitors such potentially significant tactical insight into the taxpayer's business operations, public dissemination of such information may well violate the company taxpayer's nondisclosure agreements, trademark-related requirements and other restrictions. CP 91-92.

Hoppe incorrectly argues that redaction of company names and account numbers would obviate any competitive disadvantage that would otherwise result from disclosure. Such redaction is, however, neither required under taxpayer-specific public disclosure provisions nor practically effective in preserving taxpayer identities.

As the Department of Revenue and Paccar point out, unique aspects of audited asset listings would enable competitors to determine taxpayer identity even without taxpayer names or account numbers. CP 66-67, 73, 92. The need for special taxpayer confidentiality protection and the reality that redactions would not adequately protect taxpayer interests is acknowledged by the legislature. Public Records Act provisions plainly specify that ordinarily applicable redaction is not required for confidential tax documents.

Certain personal and other records exempt. (1) Except for information described in RCW 42.56.230(3)(a) and confidential income data exempted from public inspection pursuant to RCW 84.40.020, the exemptions of this chapter are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought.

RCW 42.56.210 (emphasis added). For reasons discussed above, the tax ratio audit material at issue in this case consists of

information described in RCW 42.56.230(3)(a),<sup>11</sup> and is therefore not subject to redaction under RCW 42.56.210(1).

**c. County disclosure not required by RCW 84.48.080.**

Hoppe erroneously asserts that disclosure of private tax audit information is mandated by RCW 84.48.080, which requires the state DOR to keep and publish a "full record of its proceedings" to equalize the assessment of railroads and other companies that are directly assessed by the state and the assessment of those properties that are assessed by counties. **First**, most fundamentally, the publication provision in this section applies to the State Department of Revenue and does not purport to impose any publication or disclosure requirement on the County.<sup>12</sup> **Second**, the record of DOR equalization proceedings that is to be published under RCW 84.48.080 is not intended to include confidential tax information of those taxpayers who were subject to state tax ratio

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<sup>11</sup> RCW 42.56.230(3)(A), which is cross-referenced in RCW 42.56.210, exempts: "(3) Information required of any taxpayer in connection with the assessment or collection of any tax if the disclosure of the information to other persons would (a) be prohibited to such persons by RCW 84.08.210, 82.32.330, 84.40.020, or 84.40.340."

<sup>12</sup> While Hoppe also sought and was also denied a copy of the State Ratio Audit Study by the State Department of Revenue (CP 66, 73), it does not seek to compel disclosure of the state tax audit from the State under RCW 84.48.080 or otherwise.

audit. Direction for conducting county ratio studies and associated audits is provided in RCW 84.48.075. There is no indication in RCW 84.48.075 or in general publication language of RCW 84.48.080 that its general recordkeeping provisions are intended to override specific statutory tax confidentiality mandates.<sup>13</sup> Similarly, neither the public disclosure act exemptions nor tax confidentiality statutes indicate that their criminally-enforced privacy directives are so limited. The fact that companies are selected for ratio auditing does not reasonably convert their private tax information into a matters that are of legitimate public interest under RCW 82.08.210(1) or RCW 42.56.230(3)(b). **Third**, without improperly disclosing the confidential tax information of individual taxpayers, the state Department of Revenue does publish a full record of its equalization process. CP 344-1166. Nothing further is required by RCW 84.48.080.

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<sup>13</sup> This Court's summary judgment correspondence ruling correctly noted that RCW 84.48.080 does not mandate the disclosure of tax ratio audit information. Since this section was enacted, "the notion of privacy for individuals has developed significantly in this country and, not surprisingly, our Legislature has enacted other provisions assuring the confidentiality of tax information." CP 1221-24.

**C. Superior Court Erred by reentering judgment.**

The Superior Court erred by reentering judgment on Hoppe's previously adjudicated claim. The Court's July 20, 2009 Summary Judgment clearly constituted a final dispositive judgment. See In re Estate of Black, 153 Wn.2d 152, 170, 102 P.3d 796, 806 (2004) ("grant of summary judgment is a final judgment"). Indeed, in Ron & E Enterprises, Inc. v. Carrara, LLC, the Court considered a summary judgment order containing language that is, for all intents and purposes, identical to that at issue here. The Court ruled that such an order constituted a final judgment for purposes of notice of appeal requirements. 137 Wn.App. 822, 826, 155 P.3d 161 (2007). As in this case, the summary judgment in Carrara "ORDERED, ADJUDGED, AND DECREED" that defendant's motion for summary judgment was granted, and that plaintiff's claims against defendant are dismissed with prejudice. Id. Cf. CP 1216-18 (Summary Judgment). The Court of Appeals affirmed that "[t]his was a final, dispositive judgment." 137 Wn.App. at 826.

There was simply no basis in the Civil Rules for reentering judgment that has already been entered. This was not an instance where plaintiff has sought to reopen, alter or amend judgment pursuant to CR 59. Nor was this a case where additional judgment

findings were necessary under CR 54(b) to allow for immediate review while additional claims are still pending. The sole purpose of Hoppe's request for reentry of judgment was to resurrect an expired appeal period in order to remedy defects in the prior Notice of Appeal. The Superior Court's decision to reenter judgment should be reversed.

**D. Hoppe's Appeal is Untimely.**

Hoppe's second notice of appeal in this matter is untimely. A notice of appeal must be filed within thirty days after the entry of trial court decision to be reviewed. RAP 5.2(a). Where, as here, the case involves a remaining claim (or counterclaim) that was not otherwise disposed of by the decision to be reviewed, the time for seeking non-discretionary appellate review is deferred until the remaining claim is adjudicated. RAP 2.2(d).

While Hoppe's initial appeal notice was filed within RAP 2.2 time limits, the subsequent notice was not. On July 29, 2009, the Summary Judgment at issue in this case was entered dismissing Hoppe's public disclosure claims with prejudice. On November 23, 2009, a stipulated order was entered finally dismissing the only remaining claim in the case. CP 1324-25. At that point, the case was subject to appeal as no further claims or causes of action

remained to be adjudicated. Indeed, Hoppe fully understood that appellate review was then available as demonstrated by its filing of a December 2, 2009 Notice of Appeal. CP 1 - 8.

Rather than rectifying errors in the initial notice, Hoppe simply withdrew it, returned to Superior Court for reentry of judgment in favor of the County, and refiled the corrected notice of appeal at issue in this case. For reasons set forth at pages 34 through 36 above, reentry of judgment had no basis in the civil rules and did not properly give rise to a new appeal period.

Because Hoppe's Notice of Appeal was filed more than thirty days following the final adjudication of all claims before the Superior Court, the appeal is untimely and should be dismissed.

## **VI. CONCLUSION**

Absent consent of the taxpayer, disclosure of the tax audit material requested by Hoppe is exempt and prohibited under penalty of criminal sanctions. King County respectfully requests that this Court affirm the Superior Court's decisions to deny Hoppe's motion for summary judgment and to grant summary judgment to King County.

King County alternatively requests that the Court reverse the Superior Court's decision to reenter judgment in favor of the County

and dismiss Hoppe's appeal on grounds that it was filed beyond the time limitations of RAP 5.2.

DATED this 4<sup>th</sup> day of June, 2010.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG  
Prosecuting Attorney



By: \_\_\_\_\_  
MICHAEL J. SINSKY, WSBA #19073  
Senior Deputy Prosecuting Attorney  
Attorneys for King County

NO. 64819-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

HARLEY H. HOPPE & )  
ASSOCIATES, INC., A )  
WASHINGTON CORPORTION, )  
) )  
Plaintiff,, )  
) )  
vs. )  
) )  
KING COUNTY, a political )  
subdivision of the State of )  
Washington; and SCOTT NOBLE, )  
King County Assessor, )  
) )  
Defendants. )  
\_\_\_\_\_ )

CERTIFICATE OF SERVICE

I, Sherri Hosieni, hereby certify and declare under penalty of perjury under the laws of the state of Washington as follows:

1. I am a paralegal employed by King County Prosecutor's Office, am over the age of 18, am not a party to this action and am competent to testify herein.
2. On June 4, 2010, I did cause to be delivered via Legal

**ORIGINAL**

Messenger a true copy of the BRIEF OF KING COUNTY

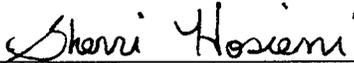
and this Certificate of Service to:

Jeffrey I. Tilden  
Gordon Tilden Thomas & Cordell LLP  
1001 4<sup>th</sup> Avenue Suite 4000  
Seattle, WA 98154-1007

I declare under penalty of perjury under the laws of Washington  
that the foregoing is true and correct.

Dated this 4<sup>th</sup> day of June, 2010 at Seattle, Washington.

DANIEL T. SATTERBERG  
Prosecuting Attorney

  
\_\_\_\_\_  
Sherri Hosieni, Paralegal to  
MIKE SINSKY, WSBA #19073  
Senior Deputy Prosecuting Attorney  
Attorneys for King County