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FEATURED NEWS

NEWS ANALYSIS

***Live Free and Be Censored:
What's New Hampshire Hiding?***

by Cara Griffith — cara_griffith@tax.org

In January William Hoke, the owner of a subscription-based website that provides information about New Hampshire's tax system,¹ received a disturbing letter from the New Hampshire Office of the Attorney General. The letter threatened legal action if Hoke did not give the Department of Revenue Administration (DRA) access to his website within two weeks. The AG's letter came at the request of the DRA, which apparently was concerned that the website disclosed "Department confidential proprietary information and/or confidential taxpayer information."²

Hoke is familiar with the DRA's operations. Although he spent the early part of his career as a reporter and bureau chief for Dow Jones, he worked as a DRA audit manager for nine years. He left the DRA in May 2010 under legislatively mandated, seniority-based layoffs. Facing unemployment, he decided to combine his tax and journalism experience to develop a website that offers in-depth information on tax administration in New Hampshire. His site publishes news stories and offers guidance for taxpayers trying to navigate the state's tax rules. But Hoke's efforts to get the website off the ground have been stymied by the DRA, which is attempting to dictate what information Hoke can provide.

The information the DRA is attempting to hide is nothing more than a general discussion of its practices and procedures.

Hoke eventually gave the DRA one month of access so it could review the information on his website. Hoke assumed he had nothing to worry about because most information on the site was derived from publicly available data and included no confidential taxpayer information. The DRA reviewed hundreds of posted documents and found no

disclosures of confidential taxpayer information. However, it did determine that seven documents contained information confidential and proprietary to the DRA under New Hampshire law (RSA 21-J:14) and requested that the information be removed from the website.

Hoke is concerned about the DRA's allegations and rightly so. Every violation of RSA 21-J:14, the statute providing for the confidentiality of the department's records, carries criminal penalties. But the DRA's arguments are shaky. The information it's attempting to hide is nothing more than a general discussion of its practices and procedures. It's unclear what caught the DRA's attention, but it is clear the department wants full access to and control over the website's content.

The DRA's Objections

The seven documents the DRA objected to are titled:

- "Audit and Settlement Agreements";
- "Step Up in Basis-Settlement Agreements";
- "BET and NOL Carryforwards-Settlement Agreements";
- "Pro-Forma Returns";
- "Audit Selection";
- "DRA Retention Policy"; and
- "Collections Division."

The first three documents involve settlements. The DRA asserted that Hoke's website improperly makes "representations regarding the confidential and proprietary internal practices of the Department and the content of confidential settlement agreement documents."³

The department also asked Hoke to remove the "Audit Selection" document, which has a section on the DRA's possible use of program-based audits, because it objected to the allegation that it has undertaken program-based audits. It argued that it does not publish its audit selection methods and that if Hoke "learned about the selection criteria or audit programs undertaken in the past, disclosure of that information would be both a violation of RSA 21-J:14 and a violation of the Department's employment policies and contracts."⁴

Peter Guffin of Pierce Atwood LLP, who represents Hoke, countered that Hoke's website acknowledges that the DRA does not publish how it selects taxpayers for audit and that the information on the site is the product of Hoke's

¹See <http://www.nhtaxadv.com>.

²Letter from DRA Revenue Counsel Caroline K. Delaney to Peter Guffin, attorney for Hoke (Apr. 21, 2014).

³Letter from Delaney to Guffin (May 23, 2014).

⁴*Id.*

personal conclusions based on court filings and press reports.⁵ Further, Hoke's website clearly indicates that his conclusions are speculation, stating, "There have been spurts of what appear to have been program-based audit activity covering certain areas that prompted some affected taxpayers to appeal tax notices and/or publicly complain that they were part of a group being targeted for review."

Perhaps more strangely, the DRA also objected to the page discussing pro forma returns. Even though use of the term "pro-forma returns" is not limited to New Hampshire, the DRA alleges that the mere "disclosure of the phrase and its use by the Department is the disclosure of confidential and proprietary information."

Pro forma is Latin for "as a matter of form" or "for the sake of form," and pro forma returns are used in many circumstances. In the tax and accounting world, those kinds of returns may be completed to project income and expenses or to determine the tax consequences of any given scenario. They may also be used by revenue departments to collect additional information from taxpayers.

The DRA uses pro forma returns under RSA 77-AL8, which provides that the commissioner may require a supplemental return if she believes additional information is needed. If no return is filed, the commissioner is authorized to prepare a return and assess the amount due based on the available information.

If the DRA is authorized by statute to use pro forma returns, it is unclear how it can assert that revealing that it is authorized to use those returns is somehow confidential. The fact that the statute doesn't use the term "pro-forma return" doesn't render the term confidential, even if the DRA uses the term informally.

Transparency

The DRA's assertion that any of the documents on Hoke's website contain information confidential and proprietary to the department is absurd. RSA 21-J:14 does not apply to department policies and procedures, providing instead that "notwithstanding any other provision of law, and except as otherwise provided in this chapter, the records and files of the department are confidential and privileged."⁶

The department is using the statute as a shield to hide its actions, but the likely purpose of the law is to maintain the confidentiality of documents in the DRA's control. That type of statute goes hand in hand with maintaining taxpayer confidentiality. As evidence of that, the statute goes on to provide that the information deemed confidential and privileged includes information received from the IRS or other states as part of an information sharing agreement. But records or files deemed confidential and privileged do not include tax-related "statistics, reports, summaries or other

data prepared by the department which do not identify, or permit identification of, particular tax returns, reports, or related documents."⁷

Hoke's website contains no confidential taxpayer information or even any information that could be used to identify a taxpayer — which the department concedes. Yet the DRA is attempting to use a heavy hand to ensure that some of its policies and procedures are not made public. The only real question is why. Why is the department objecting to a website that provides information one would expect to see in an audit manual (although the DRA does not make audit manuals publicly available)? Why would it go so far as to say that Hoke is in violation of a statute that carries criminal penalties?

Why is the department objecting to a website that provides information one would expect to see in an audit manual?

The answers to those questions are unclear, but taxpayers should be concerned that the DRA is intent on monitoring and controlling the information on Hoke's website. The DRA is resisting transparency in the administration of its tax system and is willing to attempt to silence the public dissemination of information about how it performs its functions. That level of resistance is worrisome. Taxpayers have a right to know what the tax laws are and how they will be enforced.

Proprietary

The DRA has repeatedly used the phrase "confidential and proprietary" when describing the information allegedly subject to protection under RSA 21-J:14. However, the word "proprietary" does not appear in the New Hampshire statute and generally is not well defined by any statute; in fact, it is not defined in the U.S. code. Proprietary information is often thought of in terms of business trade secrets, so definitions of trade secrets are often used to define what is proprietary. However, the means by which a government operates is not proprietary.

Proprietary information and trade secrets are frequently involved in government contracts. As a result, the Federal Acquisition Regulation provides:

Contractors may have a legitimate proprietary interest (e.g., a property right or other valid economic interest) in data resulting from private investment. Protection of such data from unauthorized use and disclosure is necessary in order to prevent the compromise of such property right or economic interest, avoid jeopardizing the contractor's commercial position, and preclude impairment of the Government's ability to obtain access to or use of such data.⁸

⁵Letter from Guffin to Delaney (June 3, 2014).

⁶RSA 21-J:14(I).

⁷RSA 21-J:14(IV)(b).

⁸48 CFR 27.402.

Under that definition, the government is often tasked to protect the proprietary information of a government contractor, but it is not frequently considered to be holding proprietary information. Proprietary information is often thought of as giving a company a competitive advantage or even being necessary for success — it's information so significant that it carries with it a property right.

The DRA's general practices and procedures do not rise to the level of being proprietary. Withholding information about how the New Hampshire tax system works does not give the DRA any competitive advantage (it has no competitors) and is not necessary for the success of the department. In fact, actively working to prevent taxpayers from understanding how the tax system works impedes the department's success.

While separate from the concept of proprietary information, government agencies have been able to protect their deliberative process from public disclosure. Yet while public records laws acknowledge situations in which the deliberative process of an agency may preclude disclosure of documents, the information on Hoke's website wasn't gleaned as a result of a public records request, and the DRA isn't attempting to invoke a deliberative process exemption. Even if it were, those exemptions typically extend to the highest levels of an agency and to records reflecting deliberations on how an agency establishes broad policy objectives. Statements of an agency's legal position do not rise to a level that would be protected under a deliberative process exemption.⁹

First Amendment

Given that the website does not reveal confidential taxpayer information and doesn't publish the type of information that could be protected from disclosure by an extension of a deliberative process theory, it follows that the DRA is seeking to impermissibly control the website's content. Taken one step further, an argument could be made that the DRA's actions have a chilling effect on the freedom of press protections of the First Amendment.

Although the standard has evolved over time, the freedom of the press protects the publication of information and opinions without fear of government censorship or punishment — that is, the government may not examine publications and prohibit the use or publication of information simply because it finds the information offensive.

The DRA can be opposed to the website all it wants. That doesn't give it the right to monitor the website or demand modifications to its content.

That appears to be the case in New Hampshire, where the department has said, "Frankly, [the] DRA is opposed to the

entire website"¹⁰ and that it "has some concerns about the editors modifying the [New Hampshire Tax Advantage] website going forward and the Department's ability to monitor the site."¹¹

The DRA can be opposed to the website all it wants. That doesn't give it the right to monitor the website or demand modifications to its content. Even so, the DRA is going one step further. Not only is it attempting to prohibit the use and publication of information about its general policies, it's also attempting to impose criminal penalties on someone who is publishing truthful information regarding a matter of public concern.

Conclusion

Bruce Coville said, "Withholding information is the essence of tyranny. Control of the flow of information is the tool of the dictatorship." The New Hampshire DRA has crossed the line into tyranny by attempting to suppress information regarding how it administers the state's tax system. The tax community shouldn't stand by while the DRA shrouds itself in secrecy and threatens to punish those who exercise their First Amendment rights. ☆

¹⁰E-mail from Delaney to Guffin (May 5, 2014).

¹¹E-mail from Delaney to Guffin (May 23, 2014).

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⁹*Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997).