

IRS Forms 990 and 1023 Disclosures: Intersecting Federal and State Requirements

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Background

Federal disclosure requirements for the *Annual Information Return* (IRS Form 990) and *Application for Tax Exemption* (IRS Form 1023) were effective June 8, 1999. *The Richard McKee Transparency Act of 2011*¹ (“*McKee*”) became effective January 1, 2012. These requirements -- their intersections and which might control -- continue to be the source of considerable misunderstanding and misapplication. This summary analysis should aid AOA member-organizations to better grasp and reconcile the requirements.

Under federal regulations, all auxiliary organizations are required to provide copies of the three (3) most recent Form 990 filings and the application Form 1023 filed for tax exemption status to anyone who asks for them.² See details at: <http://www.irs.gov/publications/p557/ch02.html>.

Summary Analysis

Who and What. Since June 8, 1999, Federal regulations require an auxiliary organization (by virtue of its IRC §501(c)(3) status) to provide copies of the three most recently filed Form 990 and the organization’s exemption application Form 1023 to anyone who comes into the office and asks for any or all of these documents.

These documents are “disclosable records” (with an exemption from disclosing the identity of donors) under *McKee*³, thereby setting up the problem: *which standards to apply when the public seeks access to these filings?*

When By. Generally, an organization must under *federal* standards provide the copies on the day the request is made. If unusual circumstances would place an unreasonable organization burden on the day the documents are requested, the documents must be provided no later than the next business day following the day that the unusual circumstances cease to exist or the fifth business day after the date of the request, whichever occurs first.

¹ *Cal Education Code* §89913 *et seq.*

² Generally, see IRS Publication 557 (February 2015), Chapter 2 at page 18. Primary reference: *U.S. Treasury Regulations*, 26 CFR § 301.6104(d)–3.

³ *Cal Ed Code* §§89913.5(b), 89914 and 89916.

Unusual circumstances include receipt of a volume of requests that exceeds the daily capacity to make copies, or requests received shortly before the end of regular business hours, or requests received on days when staff is conducting special duties such as student registration or attending an off-site meeting.

McKee, on the other hand, sets out a more flexible response regime involving a longer timeframe, but sets more restrictive “unusual circumstances” exceptions to the response constraints.⁴

The *federal* response limitations, being overall the more restrictive, should therefore control IRS Form 990(s) and 1023 document requests.

Even if a requester cites *McKee* as the legal basis for seeking the 990(s) and/or 1023, it seems prudent to handle the request under *federal* requirements (summarized above). In such cases, it would be well to refer to 26 CFR § 301.6104(d)–3 in the letter transmitting the documents to establish the basis for the response.

Copy Charging. A reasonable amount may be charged for making the copies (1 dollar for the first page and 15 cents for every page thereafter for example). Copies need not be provided until payment has been received.

Schedules and Attachments. *With the exception of the schedule which lists donors, all schedules, attachments, and supporting materials must be provided (unless the request is only for specific parts), along with all letters from the IRS concerning these documents. For example, if someone requests the Form 1023, it would include the articles of incorporation and bylaws, unless the request specified otherwise. Again, there is no requirement to provide the list of the names and addresses of donors on the Form 990 or 1023.*⁵

In-Person Requests to Review Documents. Prior to June 8, 1999, organizations were required to show these documents without charge to anyone who came into their office and asked to look at them. Now with the “widely available” rules analyzed below, providing copies to anyone may not be required; however, they must still be shown when in-person requests are made at the organization’s office. There are specific rules governing an in-person review of documents. The organization may have an employee present in the room during an inspection. The organization, however, must allow the individual conducting the inspection to take notes freely during the inspection. If the individual provides photocopying equipment at the place of inspection, the organization must allow the individual to photocopy the document at no charge.

⁴ *Ibid* at §89914.5.

⁵ *Ibid* at §89916(a) for parallel exemption of specified records, including donor identity.

Written Requests. Similarly, if a written request asks for document copies to be mailed to them, such a request must be honored -- again for a reasonable cost (copying charges as mentioned above plus mailing costs). A written request can be made by mail, e-mail or fax, and it must include the address to which the documents are to be sent.

Generally the copies must be mailed within 30 days of receiving the request. A copy is deemed provided on the date of the postmark of the letter in which it is sent. If sent by certified or registered mail, the date of the registration or the date of the postmark on the receipt is considered the date received.

If someone asks for only a part of the Form 1023 or 990(s) rather than the entire document, the parts asked for must be provided.

Reimbursement for Copies. As mentioned, a reasonable amount may be charged for providing copies (\$1 for the first page plus 15 cents for each additional page, plus actual mailing costs if mailed).

There is no requirement to make copies available until payment is received. There are few complications over payments when a requester makes a visit to the corporate office and asks for copies, but there can be difficulties if a request is made in writing. If no payment is required, the documents requested must be mailed within 30 days of receipt of the request.

If prepayment for copying/postage is required, there are several scenarios that might develop. If the requester does not ask about payment but payment is required in advance and a written request is received without payment (or insufficient payment), the requester must be informed about the organization's prepayment policy within 7 days of receipt of the request. This will include informing the requester of the charges for copying and mailing the application and each annual return, with and without attachments, so that the requester may include the proper payment with her request for copies. Similarly, if a potential requester asks about costs, that information must be provided within 7 days.

In circumstances where prepayment is required, the requested document(s) must be mailed within 30 days of the date of payment. Payment is presumed 7 days after the date of the postmark on the letter with which the payment was sent. If a request is made for documents without prepayment, the step of informing the requester of the prepayment policy can be avoided by sending the requester the documents asked for with a bill for charges, even if the requester had not been informed of the payment policy, so long as the bill does not exceed \$20. (This must be done within 30 days from the time the request was made.) If the bill

covering the fee charged for copying and posting exceeds \$20, a written consent from a requester must be received before providing the copies.

The “Widely Available” Alternative. All of these circumstances can be aggravating, particularly if there are a lot of requests. As an alternative, if these documents are on the organizations’ website, hard copies need not be made available. On this last point, the new rules provide that if an organization makes the 990s, etc., “widely available” through the Internet in an acceptable format (see note below on “Requirements”), it is not required to provide paper copies on request. (Even if these documents are web-site posted on the web, copies of these documents must still be shown to those appearing at the organization’s office and asking to see them.)

Website Posting. In brief, post the documents on the organization’s website or send them to a service that will post them in the name of the organization. Once posted, a request for the posted documents can be referred to the web site address (URL) where they are located.

For organizations that do not have their own website, there is a service that will post faxed documents. The service -- called *990online.com* -- charges approximately \$100 a year for this service, which if a number of requests are received each year may be worth the expense. *990online.com* will scan the material into an electronic file that will then be posted on its web site in a format that will meet IRS requirements. Find out exactly what to do by consulting *990online.com's* web site at www.990online.com. If an organization *does* have a web site, but doesn't have the expertise or tools to scan and convert these documents into the format that the regulations require, *990online.com* can perform those tasks and provide an electronic document to publish on the corporate web site.

“Widely Available” Requirements: Further Analysis. The Regulations⁶ provide that a document will be considered to be widely available only if:

“(A) the World Wide Web page through which it is available clearly informs readers that the document is available and provides instructions for downloading;

(B) the document is posted in a format that, when accessed, downloaded, viewed and printed in hard copy, exactly reproduces the image of the application for tax exemption or annual information return as it was originally filed with the IRS (except for information permitted to be withheld from public disclosure); and

(C) any individual with access to the Internet can access, download, view and print the document without special computer hardware or software required for that format (other than

⁶ U.S. Treasury Regulations CFR §301.610(d)-2(a)(2)(i).

software that is readily available to members of the public without payment of any fee) and without payment of a fee to [the] organization or to another entity maintaining a World Wide Web page.”

Note that *Guidestar* posts Form 990s of nonprofit organizations that are available to be downloaded and viewed by anyone for no charge at www.guidestar.org. However, this service does not include more than the most recent filing, so it cannot be used as a means of compliance.

McKee provides only that the requester shall bear certain costs associated with producing or reproducing disclosable records sought depending upon the record format and frequency.⁷

Failure to Comply. The penalties for failing to comply with *federal* public inspection requirements have increased and organizations should be aware that some of these penalties might apply to individual staff members of organizations required to make their documents public.

An organization that does not disclose its application for exemption (Form 1023) will be subject to an IRS fine of \$25 per day with no maximum penalty. Failure to disclose the annual information return(s) (Form 990) subjects an organization to a \$20 per day fine with a maximum penalty of \$10,000 for any one return. If the IRS determines that an organization willfully failed to comply with a request for information, the organization may be fined an additional \$5,000 for each application or return in question.

Requester Action. If an organization denies a request for documents, the requester may provide a statement (by writing, phone, or fax) to the IRS district director that describes the reasons why the requester believes that the denial was a violation of the disclosure requirements.

McKee includes right-of-records enforcement provisions involving injunctive or declaratory relief.⁸

Missing Form 1023. Unless an organization applied for tax exemption within the last few years, locating the 1023 application and all of the supporting materials may prove a challenge.

Organizations that filed the Form 1023 before July 15, 1987 and did not have a copy of the form on July 15, 1987 are exempt from the requirement of supplying or showing a copy of their Form

⁷ *Ibid* at §89915((a)(2) and (b).

⁸ *Ibid* at §§89917 and 89917.5.

1023. This is because prior to July 15, 1987 there was no requirement to show a copy of the Form 1023 to anyone, and some organizations did not retain their copy of the filed Form 1023.

For organizations that filed their 1023 application after July 15, 1987 and cannot find a copy, file an IRS Form 4506-A to:

Internal Revenue Service
Attn: Correspondence Unit
P.O. Box 2508, Room 4024
Cincinnati, OH 45201
Fax: 513-263-3434

...then when the replacement copy is received from the IRS, retain it in the permanent corporate records.

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