

PRIVACY IN THE AGE OF THE CORPORATE TRANSPARENCY ACT:

Helping Clients Purchase Real Estate Anonymously and Ethically

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Real Estate Privacy Practices

- I. Outsider Inquiry Types: Individual/Property, and Ownership/Residency.
 - a. Individual-Ownership: Where does that individual own property?
 - b. Individual-Residency: Where does that individual live?
 - c. Property-Ownership: Who owns that property?
 - d. Property-Residency: Who lives there?
- II. Client Motivations for Privacy in Real Estate Ownership.
 - a. Safety.
 - i. Victims of domestic violence; spousal, sibling, or parent abuse. Some clients have been targeted as victims of violence and may face potential threats of ongoing violence.
 - ii. Individuals with high-risk or controversial occupations. Other clients may be inherent targets because of who they are or what they do. This might include politicians, criminal justice officials, or writers whose topics maybe controversial.
 - iii. Swatting. There is an alarming increase in frequency of a particular form of harassment known as “swatting” that involves calling emergency services to report an incident of violence, such as an active shooter, at the residence of the harassment victim.
 - iv. Foster Care or Adoption. Some foster parents, adoptive parents and their children are targets of violence by former parents or guardians
 - b. Avoidance of publicity.
 - i. High profile clients. Executives, entertainers, and philanthropists or often objects of interest to the public in their own right.
 - ii. Risk of nuisance. High profile clients may desire privacy for several reasons. Real estate privacy deters unwelcome visitors, who could be a nuisance to themselves and to neighbors.
 - iii. Avoidance of solicitations. High profile clients and others prefer to minimize solicitations mailed to their properties.
 - c. Inherent privacy disposition.

- i. Correlation with industries. Cryptocurrency, marijuana, and video game professionals tend to demonstrate a privacy orientation.
 - ii. Privacy for privacy's sake. Some clients may aspire to maintain privacy independently of they are concerned for discreet risk of nuisance or unwanted attention.
- d. *Not for laundering money.
 - i. Mind RPCs and criminal law.
 - ii. Implement appropriate know-your-client review.

III. Disclosure Avenues.

- a. Public records.
 - i. County recorder's database. Most of us consider the county recorder to be the primary source of information about the owners of real estate. Increasingly, counties make their records databases searchable by party name, date, address, parcel number, and other criteria, making it relatively easy and quick for anyone to determine who owns a particular property or what properties are owned by that person or entity.
 - ii. State/local property tax database. Some jurisdictions' county treasurer or assessor also maintains an online property tax database. These records may independently reveal the name and address of the recipient of tax notices, the property's assessed value, and the taxpayer's payment history.
 - iii. Secretary of State/Department of Corporations entity databases. State databases may also identify the names and addresses of entities and their officers or managers.
 - iv. Local public permitting applications. An often-overlooked public record that can disclose the identity of a property owners is a local planning commission, which may make available permitting applications and hearing minutes.
 - v. Voter registration and political contributions. The address and birthdate of each voter is publicly available in Washington, though obtaining the information is moderately difficult. Political contributors, however, are often revealed in internet searches.

b. Government, non-public reporting.

i. FinCEN.

1. The Financial Crimes Enforcement Network of the U.S. Treasury requires title companies to report the beneficial owners of legal entity purchasers in certain real estate acquisitions executed without outside financing in certain jurisdictions. This reporting obligation supports Treasury's efforts to identify transactions that may involve money laundering. It identifies King County, Washington, as one of dozens of U.S. counties, cities, and boroughs subject to the FinCEN Geographic Targeting Order. The FinCEN GTO is routinely updated; the most recent version prior to submission of these materials is applicable to transactions dated April 19, 2024 to October 15, 2024 and available at <https://www.fincen.gov/sites/default/files/shared/RRE-GTOs-Phase-18-Order.pdf>.
 2. Starting January 1, 2024, the Corporate Transparency Act authorizes FinCEN to require many types of legal entities to report their beneficial ownership.
 3. On February 16, 2024, FinCEN issued a Notice of Proposed Rulemaking to expand the scope of the previous GTOs and require reporting of the parties involved real estate transactions on a far broader scale. In particular, the proposed rulemaking would require (a) a broader range of parties obligated to report (including lawyers), (b) reporting of beneficial owners of trusts (in addition to legal entities), and (c) reporting for all transfers (not only purchases). More information available at <https://www.fincen.gov/news/news-releases/fincen-proposes-rule-combat-money-laundering-and-promote-transparency>.
- ii. Tax authorities. Some local and state tax collection agencies may require reporting of beneficial owners of real estate to support tax collection efforts. Where permissible, clients may prefer to satisfy their tax obligations through entities so that their identities are not disclosed.
- iii. New York State ownership disclosure requirements. As one example, in September 2019, New York State amended its tax law and administrative code to require reporting of beneficial owners of entities acquiring real estate.

- c. Private parties involved in acquisition.
 - i. Realtors, both on the seller and buyer side, may be eager to disclosure their participation in high profile transactions.
 - ii. Sellers may insist on knowing the identity of the buyer before accepting an offer for sale, or they may learn the buyer's identity as the buyer inspects the property.
 - iii. Sellers' lawyers may ask for the identity of the buyer for conflicts of interest purposes.
 - iv. Homeowner's associations or co-op boards may require disclosure of the identity of beneficial owners or residents of properties.
 - v. Lenders require significant information about a buyer's identity to close a transaction, and lender employees may be enticed to disclose high profile clients or purchasers of high-profile properties.
 - vi. Title company employees, likewise, have access to significant information about property purchasers and may disclose purchaser identity.
- d. Post-Acquisition parties involved with property.
 - i. General contractors or subcontractors engaged to renovate a property may learn the identity of the property owner incidentally, whether through direct contact, through contracts for services, or by the contents of the residence.
 - ii. Public school registration requires providing the address of children. School employees may have access to that information, and without care, the address may be disclosed on class or PTA lists.
 - iii. Voter registration obviously requires disclosure of residency, and registration lists are now readily available to political campaigns and their volunteers and, in some cases, to the public.
 - iv. Utilities, financial institutions, delivery services, automobile registrations, subscriptions, and the plethora of other third parties that require or request a client's physical address risk database breaches that could result in disclosure.
 - v. Eventually, neighbors may learn of a client's identity, by receiving mis-delivered mail or package shipments, overhearing household employees, or by peeking over the fence.

- vi. Client missteps are often to blame for unintended disclosure beyond real estate privacy planning, and social media has made such slip-ups common. Postings of photographs or descriptions that make the client's residence easy to identify, or even posting geotagged photographs, may effectively publish the client's address to the public.

IV. Privacy Concerns Supplemental to Real Estate Ownership

a. Address Confidentiality Program

- i. Washington maintains an address confidentiality program, through which certain victims of violence or threats of violence or criminal justice employees may use a state-provided mailing address and forwarding service. <https://www.sos.wa.gov/acpl>. The program seems to be of limited utility for protecting confidentiality of real property ownership.
- ii. Anyone who is a target for illegal threats or harassment and any family members residing with such person may apply to the secretary of state to have an address designated by the secretary of state serve as the person's address or the address of the minor or incapacitated person. RCW 40.24.030.
- iii. Applicant must submit a sworn statement, under penalty of perjury, that the applicant has good reason to believe that the applicant is a victim of domestic violence, sexual assault, trafficking, or stalking and that the applicant fears for his or her safety or his or her children's safety.

b. Voter Registration

- i. Washington Constitution, Article VI, Section 1: All persons of the age of eighteen years or over who are citizens of the United States and who have lived in the state, county, and precinct thirty days immediately preceding the election at which they offer to vote, except those disqualified by Article VI, section 3 of this Constitution, shall be entitled to vote at all elections.
- ii. Article VI, Section 4: For the purpose of voting and eligibility to office no person shall be deemed to have gained a residence by reason of his presence or lost it by reason of his absence, while in the civil or military service of the state or of the United States, nor while a student at any institution of learning, nor while kept at public expense at any poor-house or other asylum, nor while confined in public prison, nor while engaged in the navigation of the waters of this state or of the United States, or of the high seas.

iii. RCW 29A.08.010, Voter Registration Requirements:

(1) The minimum information provided on a voter registration application that is required in order to place a voter registration applicant on the voter registration rolls includes: (a) Name; (b) Residential address; (c) Date of birth; (d) A signature attesting to the truth of the information provided on the application; and (e) A check or indication in the box confirming the individual is a United States citizen.

(2) The residential address provided must identify the actual physical residence of the voter in Washington, as defined in RCW 29A.04.151, with detail sufficient to allow the voter to be assigned to the proper precinct and to locate the voter to confirm his or her residence for purposes of verifying qualification to vote under Article VI, section 1 of the state Constitution...

iv. RCW 29A.04.151, Residence:

"Residence" for the purpose of registering and voting means a person's permanent address where he or she physically resides and maintains his or her abode...

c. USPS Mail Forwarding

- i. USPS generally discloses change of address filings. No wonder mailboxes are inundated with marketing materials shortly after new residents move in.
- ii. National Change-of-Address Linkage system maintains dataset of 160 million change-of-address records available to companies licensed by USPS. <https://postalpro.usps.com/mailing-and-shipping-services/NCOALink>.
- iii. Technically, the USPS discloses addresses only to third parties who knew the resident's previous address, as a service to enable third parties to correct mailing addresses on their own. In practice, large-scale direct marketers have a database of virtually every resident in the U.S. and therefore know every new resident's prior address.

V. Transaction Strategies. Several strategies for maintaining privacy in real estate acquisitions abound, as do innumerable hybrids of these strategies.

- a. Trusts. Acquiring property through trusts may be the primary alternative to an individual purchasing real property outright. They can be relatively simple and can serve ancillary estate planning functions, but they also demonstrate some limitations.

i. Structure

1. The client, or another trust or entity controlled by the client, establishes a trust. The trust may be revocable or irrevocable depending on the client's objectives. Revocable trusts are most common, but irrevocable trusts may be useful for clients who wish to combine a property acquisition with a wealth transfer plan.
2. The lawyer or other another person or entity unidentifiable with the client serves as trustee of the trust.
3. The trust title bears no relation or identifiable connection to the client.
4. The trustee executes closing documents on behalf of the trust.
5. After the acquisition and any related post-transaction permitting activity, the trustee might resign in favor of the client or a close associate of the client so that the client may manage the trust without the independent trustee's involvement. The independent trustee might be reappointed prior to any subsequent public filings, such as further permitting activity or a subsequent sale.

ii. Advantages

1. Trusts are relatively inexpensive to establish and maintain. They require no annual registration fee or franchise tax and no ongoing entity maintenance.
2. Trusts have long provided property owners, including property owners without privacy concerns, with continuity of ownership and property maintenance while avoiding probate administration on the death of a beneficial owner.
3. Irrevocable trusts may protect the property from the creditors of the client or the client's beneficiaries. Irrevocable trusts may also facilitate wealth transfer planning.
4. Cash purchases through trusts seem to attract less scrutiny from FinCEN than do cash purchases by entities (until adoption of proposed rulemaking requiring reporting of trusts).
5. Trust purchases are not subject to Corporate Transparency Act filings.

6. Trust purchases do not change the character of the property owned post-purchase (real estate vs. intangible asset) which can have estate and income tax implications.

iii. Disadvantages

1. Trusts still require some limited disclosure in the form of trust certifications.
2. Revocable trusts generally do not protect the grantor's other assets from liabilities arising from the property itself.
3. Revocable trusts under which the grantor is not a trustee often may be subject to additional review by lenders or may limit lending options.
4. Irrevocable trusts generally face higher borrowing costs than individual purchasers.
5. Cash purchases may become subject to FinCEN GTO reporting.

- b. Entities. LLCs seem to have emerged as the entity of choice for private real estate ownership, in no small part due to the flexibility that their structure permits.

i. Structure

1. The client, or the client's trust, or another LLC owned by the client, creates a new LLC with a name not identifiable with client to take title to new property.
2. The lawyer or another person or entity unidentifiable with client serves as manager or may be designated as authorized agent to transact on behalf of the LLC.
3. The manager or the authorized agent may serve only for the transaction or for longer periods and, if removed, may be reinstated prior to any subsequent public activity of the LLC.
4. LLCs may be employed in tiers, such that one holding LLC is the sole member/owner of one or more LLCs created to take title to the property. The holding LLC, likewise, may be owned by the client's revocable trust or a privacy trust.

ii. Advantages

1. LLCs may offer stronger privacy protection than trusts, which must provide trust certifications.
2. LLCs may transact more easily with third parties, especially businesses, which may be more accustomed to dealing with LLCs than with trusts.
3. LLC ownership of property in ancillary jurisdictions may avoid probate proceedings in those jurisdictions, and if the LLC is held by a trust, probate may be avoided in the client's domicile.
4. According to the Washington Department of Revenue, non-Washington real property owned by a Washington resident through an entity is treated as an intangible asset subject to Washington state estate tax.
5. LLC ownership provides a great deal of flexibility, allowing for later wealth transfer planning involving transfers of LLC membership interests.
6. LLCs may protect owners from liability arising from the properties themselves.
7. Lenders are more accustomed to lender to LLCs than irrevocable trusts.

iii. Disadvantages

1. LLCs do require initial and annual registration fees, which can be relatively significant.
2. Managers must tend to entity maintenance, including maintaining books and records.
3. Cash purchases within entities require FinCEN reporting under GTO.
4. Purchase through an LLC changes the character of the property from real estate to an intangible asset which can have negative income and estate tax implications depending on the owner's domicile and the situs of the property.
5. Corporate Transparency Act reporting obligations; see below.

- c. Straw Persons. A relatively unusual property acquisition strategy involves the purchase by a straw person, or nominee, who serves as an agent for the client but who does not disclose the agency identity.

i. Structure

1. A person unidentifiable with the client establishes a private agency relationship with the client by contract and serves as the client's agent and purchases property on client's behalf in the agent's own name.
2. The straw person purports to be the beneficial owner in every respect and does not disclose the agency relationship unless failing to do so would constitute a fraudulent or illegal misrepresentation.
3. The client funds the purchase, either directly or as lender (through an LLC not identifiable to the client) with a secured or unsecured note.
4. Private contractual agreements with the client establish the rights and obligations of the parties.

ii. Advantages

1. In some instances, use of an undisclosed agent on behalf of the client may avoid unwanted inquiries that a privacy trust or LLC might otherwise attract.
2. An individual purchaser may also avoid some of the disclosure otherwise required of trusts or LLCs.

iii. Disadvantages

1. Identifying a straw person who (1) is a plausible buyer of high value property, (2) commands the high degree of the client's trust necessary to be suitable for the acquisition, and (3) is not publicly identifiable with the client can be quite difficult.
2. A variety of logistical and procedural complications may arise if the arrangement is not likely to be brief, including proper income tax reporting of a property sale, the bankruptcy of the straw person, or the death of the straw person.

- d. Decoy Residence.
 - i. Options
 1. One alternative is to rent a mailbox at a mailbox service that offers a physical address, though such services often prohibit use of such addresses as a residential address.
 2. Some clients may use the address of a willing friend or family member who lives nearby.
 3. Others may lease or even purchase decoy residential property nearby and the property address as the primary residential address.
 - ii. Risks. Depending on the purpose for which the address is requested, use of a decoy address may be unlawful, such as for voter registration, public school registration, income tax residency, or automobile registration.

Privacy in Light of Corporate Transparency Act

VI. Corporate Transparency Act - Overview and Procedure

- a. The Corporate Transparency Act was enacted in 2021 and became effective as of January 1, 2024. It largely eliminates the anonymity of the beneficial owners, officers, and control persons of a legal entity with respect to the federal government. Its stated purpose is to combat illicit finance.
- b. Most corporations, LLCs, and other entities formed by filing a document with a government office must file a FinCEN beneficial owner report.
- c. The report must identify the entity and its beneficial owners, officers, control persons, and company applicants, and it must include the names, addresses, dates of birth, and copies of a driver's license, passport, or certain other government identification.
- d. Individuals may obtain a FinCEN Identifier to provide for beneficial ownership report purposes in lieu of providing reporting entities with personal identifying information.
- e. More information is available at <https://fincen.gov/boi/toolkit>.

VII. Ethical Obligations Advising Clients under CTA - Generally

- a. Competence. Model Rule 1.1 requires a lawyer to have the legal knowledge and skill necessary to provide competent representation to a

client. The lawyer must remain current on the rapidly evolving reporting and disclosure requirements when advising on the formation and use of legal entities in planning generally and in privacy planning in particular.

- b. Lawyer as gatekeeper. The CTA now imposes reporting obligations on lawyers when lawyers act in an officer or manager capacity for an entity.
 - i. Avoiding fraudulent or criminal activity. Model Rule 1.2(d) prohibits a lawyer from assisting a client in conduct that the lawyer knows is criminal or fraudulent. A lawyer may be subject to a heightened standard when assisting with privacy planning to ensure that the planning is not facilitating crime or fraud.
 - ii. Confirming beneficial ownership. When assisting a client with beneficial ownership reporting, a lawyer generally may rely on the client's representations of fact, but in some circumstances, a lawyer may have a responsibility to engage in due diligence when actively assisting a client with privacy planning.
- c. Notifying clients of reporting obligations. Model Rule 1.4 requires a lawyer to keep a client reasonably informed about the strategy by which the client's objectives may be accomplished, including the reporting obligations a client will assume in conjunction with a particular strategy.
- d. Balance of obligations under Corporate Transparency Act and confidence and trust with clients.
- e. Ricks of collecting beneficial owner information, FinCEN identifiers, and filing beneficial owner reports. In addition to the lawyer's obligation make reasonable efforts to prevent the inadvertent or unauthorized disclosure of confidential client information under Model Rule 1.6, the lawyer should be aware of other legal obligations to safeguard confidential client information, which may vary by jurisdiction.
- f. Ethical and practical implications of lawyer's participation as officer, manager, or trustee of trust that owns entity.
 - i. Agreements between lawyer and client. While a lawyer serving as officer, manager, or trustee for a client would generally be well-advised to enter into an agreement setting forth the terms of the lawyer's service and limiting the lawyer's liability in such role, the lawyer should ensure such agreement complies with the limitations in Model Rule 1.8.
 - ii. Updating engagement letter. Unless the original engagement letter with the client contemplates the lawyer's service in this capacity, the engagement letter might be amended or restated to incorporate this possibility and fee arrangement for such service.

- iii. Separate agreements regarding lawyer involvement. When a lawyer is executing documents in the lawyer's capacity as officer, manager, or trustee for the client but is not otherwise representing the client in the underlying transaction, the lawyer may need to ensure that third parties to the transaction understand the lawyer's role. Unique conflicts issues may arise in this context if, for example, a third party is a client of the lawyer's firm.
- g. Insurance coverage issues. Lawyer malpractice policies may limit coverage or impose special requirements on a lawyer when advising on privacy planning or serving in an officer, manager, or trustee capacity.

VIII. Implications for Privacy

- a. Required disclosure of beneficial ownership to government.
 - i. Risk of government leaks. While Corporate Transparency Act beneficial ownership reports are not publicly available, the risk of illegal disclosure is not a theoretical one, as evidenced by unauthorized leaks of private income tax returns of thousands of individuals. See <https://www.irs.gov/newsroom/irs-statement-as-part-of-the-resolution-of-kenneth-c-griffin-v-irs-case-no-22-cv-24023-sd-fla>.
 - ii. Risk of future change in law to require public disclosure. The possibility of a future change in the law to make beneficial ownership reports public is also not out of the realm of possibility.
- b. Required disclosure to company regarding certain owners. Reporting companies handling private information of its beneficial owners are themselves subject to data breaches and disclosure.
- c. Firm or lawyer data management. Lawyers and other advisors who receive beneficial owner information in the process of assisting with the filing of CTA reports constitute additional leak risks, as law firms are victimized by data breaches with increasing frequency.
- d. Trust vs LLC. As relative benefits and drawbacks of using trusts and LLCs or other entities evolve, and the optimal strategy for a client will continue to evolve with the client's particular circumstances.
- e. Benefit of use of FinCEN identifier. While a leaked beneficial ownership report may disclose the fact of an individual's relationship to an entity, use of a FinCEN identifier may mitigate the risk of disclosure of the individual's personal information in the event of a leak.

Practice Tips

IX. Practice Tips for Consideration When Engaging in Client Privacy Work

- f. Inform clients. Advise them of the avenues for disclosure, the options to minimize risk of disclosure, and the complexity of maintaining privacy.
- g. Vet clients. Ensure motivation for privacy is not fraudulent or criminal.
- h. Ascertain client objectives. Ensure they know what is and is not within your control and that privacy cannot be guaranteed.
- i. Analyze all strategies to enable client to select optimal course.
- j. Select names and agents carefully. Avoid titles and individuals who would inadvertently reveal a connection to your client.
- k. Clarify the advisors' responsibilities. If lawyer is serving as fiduciary but is not advising on the transaction, make that explicit.
- l. Be prepared to act quickly if acting as fiduciary. Real estate transactions can unfold quickly. Expect the client to insist on prompt responses and document execution.
- m. Communicate early and often. Realtors, loan officers, title officers, and others involved in an acquisition should know the importance of the client's privacy wishes in advance so that they understand the structure of the transaction and have plenty of time to resolve any problems.
- n. Beware shortcuts. Third parties may encourage clients to disregard a critical aspect of the privacy strategy in order to close more quickly, at lower cost, or with a lower interest rate, which can derail the entire strategy.
- o. Remind clients of post-closing disclosure risks. Voter registration and USPS mail forwarding may quickly reveal the client's residency.

II. Professional Considerations. In part because of the abundance of pitfalls involved in this planning, the lawyer advising clients in this area should consider the role that the lawyer is willing to play and the risks associated with such role.

- a. Lawyers taking on additional fiduciary roles with clients, such as trustees, managers, and agents, may create new avenues for liability to the clients. Lawyers may be held to heightened standards of care, and contractual provisions that purport to reduce that standard to one with which the lawyer is comfortable may not be enforceable.

- b. The lawyer might consult with the lawyer's malpractice insurance carrier to understand the extent and limitations of coverage.
- c. The Rules of Professional Conduct, especially those regarding competence, conflicts of interest (with respect to sellers, lenders, and parties to nondisclosure agreements), and misconduct, continue to be applicable to engagements involving real estate privacy transactions.
- d. Finally, lawyers might recognize that clients engaging in criminal conduct may find real estate privacy strategy especially appealing, and lawyers must protect themselves against unwittingly becoming involved in criminal activity themselves.