IT 2309 - Income tax : documents exempt from disclosure under freedom of information act by reason of secrecy provisions

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TAXATION RULING NO. IT 2309

INCOME TAX : DOCUMENTS EXEMPT FROM DISCLOSURE UNDER FREEDOM OF INFORMATION ACT BY REASON OF SECRECY PROVISIONS

F.O.I. EMBARGO: May be released

REF H.O. REF: J20/4 DATE OF EFFECT: Immediate

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F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1206278	FREEDOM OF INFORMATION SECRECY PROVISIONS	16 FREEDOM OF INFORMATION ACT; SECTION 38

PREAMBLE The Freedom of Information Act 1982 ("FOI" Act) provides for a legally enforceable right to every person to obtain access, in accordance with and subject to that Act, to documents other than exempt documents, of government agencies. One category of exempt documents is provided for by section 38 of the FOI Act. That section provides that:

> "A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications".

2. The Full Federal Court, in Commissioner of Taxation v. Swiss Aluminium Australia Limited, unreported, 26 May 1986, was considering the question of whether section 16 of the Income Tax Assessment Act ("the Act") was a secrecy provision to which section 38 of the FOI Act applied. There had been some doubt due to conflicting decisions of the Administrative Appeals Tribunal (e.g. Re Murtagh (1984) 6 ALD 112; cf. Re Mann (1985) 7 ALD 698). The Federal Court, in considering in other cases the application of section 38 to provisions similar to section 16 in other enactments, had stressed the need for a secrecy provision to refer specifically to the information which was prohibited from release rather than merely prohibiting officers from disclosing information generally (Kavvadias v. Commonwealth Ombudsman (1984) 52 ALR 728; News Corporation Ltd. v. National Companies and Securities Commission (1984) 52 ALR 277). The difference in views as to whether section 16 was within section 38 turned basically on whether section 16 did refer specifically to information of a certain kind.

3. A majority of the Full Federal Court in the Swiss Aluminium Case have held that section 16 does refer specifically to the information which is not to be disclosed, namely information obtained under the Income Tax Assessment Act and

relating to the affairs of another person. There was other information held by the Commissioner which was not of that kind, for example, statistics which did not relate to any particular taxpayer. It is therefore a secrecy provision to which section 38 of the FOI Act applies.

RULING 4. The decision confirms the approach which has been taken to date, namely that a document is, by section 38 of the FOI Act, exempt from disclosure under that Act to the extent to which section 16 applies to it. Where a request is lodged under the FOI Act for access to documents, section 38 should continue to be relied on as ground for denying access to those parts of the documents to which section 16 would apply. Where the Administrative Appeals Tribunal is reviewing a decision to refuse access to a document on the ground that section 16, and hence section 38 of the FOI Act, applies, it will be for the Tribunal to determine if section 16 does indeed apply. It might do so on the basis of evidence on affidavit or otherwise. However, in accordance with sub-section 64(1) of the FOI Act, it may be necessary to produce the document for inspection by the members of the Tribunal only in order that they can be satisfied that the document is exempt. In such a case, appropriate orders under section 35 of the Administrative Appeals Tribunal Act should be sought to prevent access to the document being granted to any other person including counsel for the applicant.

COMMISSIONER OF TAXATION
13 June 1986

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