

PS LA 2005/23 - The disclosure of information respecting the affairs of a taxpayer to the Commonwealth Department of Treasury (Treasury).

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Practice Statement Law Administration

PS LA 2005/23

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FOI status: may be released

This practice statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by tax officers unless doing so creates unintended consequences. Where this occurs tax officers must follow their Business Line's escalation process.

SUBJECT: The disclosure of information respecting the affairs of a taxpayer to the Commonwealth Department of Treasury (Treasury)

PURPOSE: To explain Australian Taxation Office (ATO) policy concerning disclosure of taxpayer information to Treasury

TABLE OF CONTENTS	Paragraph
STATEMENT	1
EXPLANATION	9
Division 355 and protected information	9
Disclosing protected information in performing duties as a taxation officer	15
Disclosing protected information under section 355-65	21
<i>Disclosing protected information for the purpose of the Takeovers Act</i>	22
<i>Disclosing protected information for the purpose of estimating or analysing taxation revenue or estimating the cost of policy proposals</i>	26
Disclosing publicly available information	29
Tax file numbers (TFNs)	33
Operation of the <i>Privacy Act 1988</i> (Privacy Act)	35
Questions about disclosure	36

STATEMENT

1. Taxation officers are bound by the secrecy provisions in Division 355 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).¹
2. The secrecy provisions apply to 'protected information', which is information that was disclosed or obtained under or for the purposes of a taxation law (other than the *Tax Agent Services Act 2009*) and which identifies, or is reasonably capable of being used to identify, any entity.
3. Note that 'Protected information' to which Division 355 applies is not equivalent to the 'Protected' security classification of information as defined under the 'ATO guide to information security'. 'Protected information' for the purposes of Division 355 will generally be classified as in-confidence, although information about some taxpayers may be classified as 'protected' for security classification purposes. All references to protected information in this practice statement refer to this term as defined in Division 355.
4. Protected information may only be disclosed to Treasury if the disclosure is within the strict limits set out in Division 355. Division 355 permits a taxation officer to disclose protected information to Treasury:
 - in performing their duties as a taxation officer – specifically, under item 7 in the table in subsection 355-50(2),
 - for the purpose of briefing the Treasurer in relation to a decision the Treasurer may make under the *Foreign Acquisitions and Takeovers Act 1975* (Takeovers Act) under table item 7 in subsection 355-65(4), or
 - for the purpose of Treasury estimating or analysing taxation revenue or estimating the cost of policy proposals, provided that the information disclosed does not include the name, contact details or ABN of an entity under table item 8 subsection 355-65(4).
5. Information that in no way identifies an entity is not protected information and it may be disclosed to Treasury without further reference to Division 355.
6. Protected information that is already available to the public (so long as it was not made public as a result of a breach of Division 355) may also be disclosed to Treasury without further reference to Division 355.
7. Note that formal ATO advice on matters of taxation policy and law design is generally provided to Treasury by way of a formal Minute. For further information on the correct procedures for providing information to Treasury please refer to Corporate Management Practice Statement [PS CM 2003/14 \(CGR\)](#): Provision of Formal ATO Advice to Treasury.
8. Disclosing taxpayer information to Treasury should be distinguished from disclosing taxpayer information to a Minister. For information on disclosure of protected information to the Treasurer, the Assistant Treasurer and Minister for Financial Services & Superannuation, or any other Minister, please refer to the Law Administration Practice Statement [PS LA 2004/9](#): Disclosure to Ministers of information about the affairs of taxpayers.

¹ All legislative references in this practice statement are to Schedule 1 of the TAA unless otherwise indicated.

EXPLANATION

Division 355 and protected information

9. The secrecy provisions in Division 355 apply to protected information. Protected information is defined in subsection 355-30(1) as information that:
- was disclosed or obtained under or for the purposes of a taxation law (other than the *Tax Agent Services Act 2009*),
 - relates to the affairs of an entity, and
 - identifies, or is reasonably capable of being used to identify, any entity.
10. Therefore, if information does not identify any entity, and it is not possible to identify any entity from the information even by a process of deduction, that information is not protected information, and it may be disclosed to Treasury without further reference to Division 355.
11. It should be noted that simply removing a taxpayer's name from information will often not be enough to prevent the information from being protected information.
12. The Explanatory Memorandum to the Tax Law Amendment (Confidentiality of Taxpayer Information) Bill 2010 (Explanatory Memorandum) explains, in Example 2.11 at paragraph 2.20, that even aggregate data may be protected information for the purposes of Division 355. The example is based on a hypothetical 'haysnorkel' industry:

Example 2.11

The ATO collects information on the volume of production of haysnorkels in Australia. Because haysnorkel production is a very specialised industry, only three firms manufacture haysnorkels in Australia. One major producer, meeting the needs of most of the Australian market, and two very much smaller boutique producers manufacture only a small number of haysnorkels each year. If the ATO were to disclose information on the aggregate production of haysnorkels in Australia, then it would be possible for anyone with a general knowledge of the haysnorkel market to deduce (with a fair degree of accuracy) how many haysnorkels were being manufactured by each producer. In this case, the disclosure of aggregate production information would, though not explicitly identifying a particular taxpayer, allow a particular haysnorkel producer to be identified. Such aggregate information would therefore be protected information.

13. Protected information (whether or not it includes names and other apparent identifiers) can only be recorded and disclosed in circumstances permitted by Division 355. It is an offence for a taxation officer to record or disclose protected information in other circumstances (subsection 355-25(1) sets out the offence provision that applies to taxation officers).
14. Division 355 permits a taxation officer to disclose protected information to Treasury:
- in performing their duties as a taxation officer – specifically, under item 7 in the table in subsection 355-50(2), and
 - for the purposes and to the extent permitted under items 7 and 8 in table 3 in subsection 355-65(4).

Disclosing protected information in performing duties as a taxation officer

15. Taxation officers may disclose protected information in performing their duties as a taxation officer (section 355-50).

16. Subsection 355-50(2) contains a table of disclosures which can lawfully be made by a taxation officer in performing their duties.
17. Item 7 in that table permits a taxation officer to disclose protected information to Treasury, but not including the name, contact details or ABN of any entity, for the purpose of the design or amendment of a taxation law.
18. Only names, contact details and ABNs need to be removed from information disclosed to Treasury under this table item. It is not necessary to take any further steps to anonymise the information.
19. Paragraph 5.66 of the Explanatory Memorandum explains that
 - ‘contact details’ refers to the address, telephone, email or other such details of an entity and [does not include] very broad information such as the State or Territory.
20. Whether or not the disclosure of any particular item of protected information will be for the purposes of taxation law design or amendment is a question of fact that should be carefully considered in each instance.

Disclosing protected information under section 355-65

21. Table 3 in subsection 355-65(4) of Schedule 1 to the TAA permits a taxation officer to disclose protected information to Treasury:
 - for the purpose of briefing the Treasurer in relation to a decision the Treasurer may make under the Takeovers Act (table item 7), or
 - for the purpose of Treasury estimating or analysing taxation revenue or estimating the cost of policy proposals, provided that the information disclosed does not include the name, contact details or ABN of an entity (table item 8).

Disclosing protected information for the purpose of the Takeovers Act

22. The Takeovers Act gives the Treasurer powers in relation to certain foreign investment proposals. These powers include making decisions to prohibit, or propose conditions on, a proposal on the basis that it is not in the national interest. What the Treasurer can take into account in determining the national interest is broad, and may include revenue impacts of a particular proposal.
23. Item 7 in table 3 in subsection 355-65(4) permits a taxation officer to disclose protected information to Treasury for the purpose of briefing the Treasurer in relation to a decision he or she may make under the Takeovers Act.
24. Unlike the other disclosure provisions discussed in this practice statement, this table item does not require any particular data items such as name, contact details and ABN to be excluded from the information.
25. Whether or not the disclosure of any particular item of protected information will be for the purposes of a Takeovers Act decision is a question of fact that should be carefully considered in each instance.

Disclosing protected information for the purpose of estimating or analysing taxation revenue or estimating the cost of policy proposals

26. Item 8 in table 3 in subsection 355-65(4) permits a taxation officer to disclose protected information to Treasury for the purpose of Treasury:
 - estimating or predicting revenue flows or

- estimating the cost of a policy proposal whether it is tax-related or not provided that the information disclosed does not include the name, contact details or ABN of any entity.
27. Only names, contact details and ABNs need to be removed from information disclosed to Treasury under this table item. It is not necessary to take any further steps to anonymise the information.
 28. As discussed in paragraph 19 'contact details' refers to the address, telephone, email or other such details of an entity and does not include very broad information such as the State or Territory where they are located.

Disclosing publicly available information

29. Section 355-45 states that it is not an offence for a taxation officer to disclose protected information if it is already available to the public (other than as a result of breach of one of the offence provisions in Division 355).
30. Information is available to the public if it is in open court records, books, newspapers and other sources that are generally available to the public (note that speculation or unconfirmed reports do not constitute information for these purposes). The Explanatory Memorandum explains at paragraph that 'information does not cease to be 'publicly available' if a member of the public has to pay a fee to access that information'.
31. A taxation officer may disclose information of this kind to any entity, including to Treasury, without further reference to Division 355.
32. It is important to note, as the Explanatory Memorandum explains at paragraph 4.37, that publicly available information being disclosed in accordance with section 355-45 must not be supplemented or qualified by non-public protected information.

Tax file numbers (TFNs)

33. Tax file numbers are not protected information for the purposes of Division 355. TFNs cannot be disclosed under any of the exceptions in Division 355, including the exceptions discussed in this practice statement under which protected information may be disclosed to Treasury.
34. TFNs can only be disclosed by a taxation officer in accordance with the specific TFN rules in section 8WB of the TAA.

Operation of the *Privacy Act 1988* (Privacy Act)

35. Information Privacy Principle (IPP) 11 in section 14 of the Privacy Act regulates the disclosure of personal information (that identifies a living individual) by an agency such as the ATO. IPP 11.1(d) permits the disclosure of personal information where the disclosure 'is required or authorised by or under law.' Where a disclosure of protected information which is also personal information is permitted by one of the provisions in Division 355, the disclosure will be authorised by law for the purposes of IPP 11.1(d). Therefore the disclosure will be lawful under the Privacy Act.

Questions about disclosure

36. If an officer has queries about providing certain information to Treasury, they are advised to consult their Manager or the Tax Design Branch of Corporate

Relations. Further advice may also be obtained from the General Counsel Unit, Legal Services Branch, through [General Counsel Requests](#).

Amendment history

Date of amendment	Part	Comment
4 February 2011		Updated as a result of Division 355 of Schedule 1 of the <i>Taxation Administration Act 1953</i>
7 August 2008		Contact details updated

Subject references	protected information privacy disclosure of protected information performing duties as a taxation officer secrecy tax file numbers
Legislative references	TAA 1953 8WB TAA 1953 Sch 1 TAA 1953 Sch 1 Div 355 TAA 1953 Sch 1 355-25(1) TAA 1953 Sch 1 355-30(1) TAA 1953 Sch 1 355-45 TAA 1953 Sch 1 355-50 TAA 1953 Sch 1 355-50(2) TAA 1953 Sch 1 355-65 TAA 1953 Sch 1 355-65(4) Privacy Act 1988 14 Foreign Acquisitions and Takeovers Act 1975 Tax Agent Services Act 2009
Related public rulings	
Related practice statements	Law Administration Practice Statement, PS LA 2004/9 – Disclosure to Ministers of information about the affairs of taxpayers Corporate Management Practice Statement, PS CM 2003/13 (CGR) – Provision of Services to the Treasurer and Minister for Revenue and Assistant Treasurer
Case references	
Other references	ATO/Treasury Protocol Explanatory Memorandum to the Tax Law Amendment (Confidentiality of Taxpayer Information) Bill 2010
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