

# ***PS LA 2005/3 - Authorisation to request information under the Freedom of Information Act 1982***

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# Practice Statement Law Administration

**PS LA 2005/3**

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*This law administration 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](#). ATO personnel, including non ongoing staff and relevant contractors, must comply with this law administration practice statement, unless doing so creates unintended consequences or is considered incorrect. Where this occurs, ATO personnel must follow their business line's escalation process.*

**SUBJECT:** Authorisation to request information under the *Freedom of Information Act 1982*

**PURPOSE:** To advise ATO personnel about the authorisation required by a person making a Freedom of Information request on behalf of another person.

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## STATEMENT

1. Subsection 15(1) of the *Freedom of Information Act 1982* (FOI Act) provides 'a person who wishes to obtain access to a document of an agency or an official document of a Minister may request access to the document'. Nothing in this practice statement prevents a person from requesting access to a document.
2. Documents that contain personal information or documents relating to business affairs may be exempt documents under the FOI Act unless the information is about the person applying for access.
3. We accept signed requests by individuals making Freedom of Information (FOI) requests in their own name, without requiring further identification. However, where someone purports to be applying on behalf of someone else, or acting as that other entity's agent or with their consent, authorisation will be required.
4. Authorisations properly identify those persons who can request information on behalf of the taxpayer or entity to whom the information relates. In determining whether the applicant is authorised, the secrecy provisions of legislation administered by the Commissioner must be considered.
5. For FOI applications by non-individuals, we require a signed request from the public officer in the case of a company, the trustee of a trust estate, or a partner in a partnership
6. For FOI applications by an entity purporting to be an agent (eg a solicitor, tax agent or other accepted agency arrangement) for an individual or non-individual, we require the agent to produce a signed authority from the principal (applicant).
7. Although the interests of an FOI applicant in obtaining access are not to be taken into account in deciding whether access will be granted, in some instances the identity of the applicant will be a major factor in deciding whether or not the access can be given.
8. This practice statement sets out who is an acceptable applicant in various circumstances.

## EXPLANATION

9. Many documents held by the ATO contain personal or business information to which the Privacy Act or secrecy provisions in taxation legislation apply. An awareness of these provisions is essential for the proper handling of documents containing such information.
10. Section 38 of the FOI Act allows an agency to exempt from disclosure a document, or information contained in it, where disclosure would be prohibited under a 'secrecy' provision specified in Schedule 3 to the FOI Act. For example, subsection 16(2) of the *Income Tax Assessment Act 1936* (ITAA 1936) prohibits ATO personnel from communicating information the ATO has acquired about a person under that Act to another person. It is one of the taxation provisions specified in Schedule 3.
11. The Privacy Act deals with restrictions on the use and disclosure of records of an agency that contain personal information. Information Privacy Principle 7 provides individuals with a right of access to documents containing their own personal information, (even when it is combined with another's personal information).

12. In the case of *Re Coulthard and Secretary, Department of Social Security* [1995] (56 FOIR 27) the Administrative Appeals Tribunal (AAT) allowed access to a document recording an interview with the applicant's mother, since the document contained personal information about the applicant (as well as his mother). Though disclosure was prohibited by the secrecy provisions of the *Social Security Act 1991*, the document was not an exempt document under subsection 38(1) of the FOI Act because subsection 38(2) states that the exemption cannot be used to prevent an individual obtaining access to his or her personal information.

### **Individuals**

13. The Taxpayers' Charter states that we will accept that a taxpayer may choose to have another person represent them in their dealings with the ATO. A taxpayer's representative can be someone other than a tax agent or legal practitioner.
14. It is generally appropriate to accept an FOI request in respect of the person's tax affairs made on behalf of a taxpayer by a person who clearly represents the taxpayer in his or her taxation affairs. This includes a registered tax agent, a legal practitioner, or a person who clearly 'stands in the shoes' of the taxpayer. When an individual dies or becomes incapacitated, an executor, administrator or trustee may be such a person. These requirements are discussed in more detail in paragraphs 19 to 21 of this practice statement. Disclosure to a legal agent on this basis will not breach the secrecy provisions, because the agent is not regarded as a different person from the applicant.
15. However, in any other situation, or if there is any doubt about whether the person does have the particular authority to act in connection with the FOI request, evidence of a separate authority should be requested. For example, if we have already seen that a taxpayer's authority to their tax agent expressly relates to 'lodging an objection to assessments issued by the ATO for the years 1995-98', it would not be considered sufficient authority for the separate and distinct process of access to information under FOI.
16. A signed authorisation from a person authorising their legal agent to act on their behalf to access documents under FOI will avoid problems that may arise from the operation of the taxation law secrecy provisions. Accordingly, the signed authorisation can be accepted without further investigation.

### **Incapacitated persons and infants**

17. A person who is mentally incapacitated can be represented by a guardian appointed under the relevant mental health or guardianship legislation. The guardian is said to stand in the shoes of the incapacitated person and is authorised to make an FOI request on their behalf.
18. A child may make an FOI request. However, the child must be sufficiently mature to be able to understand the making of an application under the FOI Act. Without being prescriptive, this could be from about 12 years of age. Where a child does have this maturity, a parent will not be authorised to make an application on their behalf without a court order giving them authority.
19. The situation for very young children is complex at law. It is also one which arises very rarely. Until further notice, applications purporting to be made by or on behalf of very young children should be referred to the General Law area in the Legal Services Branch for advice.

## **Deceased Estates**

20. FOI requests in respect of deceased persons who have a valid will may only be made by an executor as the legal personal representative of the deceased. The complexities which can arise when a person dies and their estate is being distributed demand that a restrictive approach be adopted as to who has authority to make an FOI request.
21. Where a person dies intestate or probate is required but has not been granted, the ATO considers that there is no person who is authorised to make an FOI request until such time as an administrator or other legal personal representative has been appointed by the relevant State or Territory Court. Death certificates will not be sufficient proof as they will not establish the identity of the legal personal representative.
22. Beneficiaries and potential beneficiaries of a deceased estate are not entitled to make FOI requests on behalf of the deceased person or their estate and should they make a request the secrecy provisions of the various Taxation Acts and section 38 of the FOI Act would apply.

## **Representation for Non-Individuals**

23. Where a non-individual is represented by a legal practitioner or registered tax agent, we require a signed authorisation from the public officer, a partner or trustee authorising the legal practitioner or tax agent to act on their behalf in FOI matters. Again, this requirement will prevent problems which could arise under the secrecy provisions. The signed authorisation can subsequently be accepted without further investigation.

## **Companies**

24. The Public Officer of a company is the appropriate person to make an FOI request. Under section 252 of the ITAA 1936 we require that a company appoints a public officer to transact the taxation business of the company.
25. Directors of a company would not ordinarily be authorised to make an FOI request on behalf of the company. However the authority to act on a company's behalf ultimately depends on the company's constitution, and any relevant resolution of the board of directors. Apparent or implied authority (eg in a managing director to undertake the day to day running of the company's business) is not sufficient for the purposes of an application for access to information under the FOI Act.
26. An FOI application on behalf of a company made by a person other than a Public Officer (or by the representative of such a person) must be supported by evidence of the company's constitution and any relevant resolution of the board of directors authorising the person to apply.
27. Shareholders are not legal representatives and are not authorised to make FOI requests on behalf of a company and should they make a request, the secrecy provisions of the various Taxation Acts and section 38 of the FOI Act would apply. Similarly, section 16 of the ITAA 1936 would operate if one company were to request documents of a related company or a parent company requested documents of a subsidiary. In such a situation documents can only be provided where the disclosure will not be a breach of the secrecy provisions. For more detail see Law Administration Practice Statement 2005/5.

### **Partnerships**

28. Any one of the partners in a partnership is authorised to make FOI requests in respect of the affairs of the partnership. A former partner is authorised to make an application for documents, but only to partnership documents that relate to the period when that person was a partner.

### **Trusts**

29. The current trustee of a trust, including but not limited to trading trusts, unit trusts and superannuation trusts, is the person authorised to make an FOI request on behalf of the trust. Where the trustee is a corporate entity, then the rules applying to corporations should determine who is authorised to make and sign the FOI request. Where the trust does not have a resident trustee, the ATO will require the appointment of a public officer in accordance with section 252A of the ITAA 1936.
30. Beneficiaries of a trust do not have any authority to make an FOI request on behalf of the trust and should they make a request, with the exception of, any distribution received by them, the secrecy provisions of the various Taxation Acts and section 38 of the FOI Act would apply.

### **Bankruptcy and Insolvency**

31. A bankrupt person is not precluded from making an FOI request in respect of their personal information. The trustee in bankruptcy does not stand in the shoes of the bankrupt and may not make a request in the name of the bankrupt without triggering the taxation secrecy provisions.
32. Where a company is under administration, in receivership or liquidation the administrator, receiver or liquidator acts on behalf of the company, including for FOI requests. The public officer, any director, or statutory office-holder cannot make a valid FOI request for the company during this time.

### **Third Parties**

33. The ATO is not permitted to release documents to a third party at the request of an applicant. An applicant cannot consent to ATO personnel releasing information to 'any other person', because the ATO would be in breach of secrecy provisions of a taxation law eg section 16 of the ITAA 1936.
34. Information will be exempt to a person other than the applicant or the person acting as their agent, eg a tax agent, legal practitioner, or legal personal representative (*Re Corrs Chambers Westgarth and Federal Commissioner of Taxation* 98 ATC 2298; 40 ATR 1191, *Re Collie and Deputy Commissioner of Taxation* 97 ATC 2058; 35 ATR 1204 and *Re Hart and Deputy Commissioner of Taxation* (2002) AATA 1190; 51 ATR 1086).
35. For example, if Applicant A asks the ATO to forward documents to Person B, A must be advised that we can only forward the documents to A and it is for A to give the documents to B if they wish to do so.

## **Powers of Attorney**

36. The holder of a registered deed that evidences the granting of a power of attorney over the affairs of an individual or an entity will be able to make FOI requests in respect of that entity, subject to the scope of the deed. Whilst the deed may not specifically cover FOI requests, if the FOI request refers to documents that cover subject matter that is covered by the deed, then the holder of the power of attorney would be authorised. The applicant should also provide a statement accompanying a copy of the deed that it has not been revoked. It will be necessary to carefully consider the scope of the deed when dealing with such requests.

### Amendment history

<b>Date of amendment</b>	<b>Part</b>	<b>Comment</b>
29 May 2014	Contact details	Updated.
29 October 2010	Paragraph 1  Various	Minor amendment to reflect wording in the FOI Act commencing 1 November 2010.  Updating 'Tax Office' to 'ATO' as per the ATO Style Guide.
2 June 2009	Various	Minor amendments to update naming conventions and provide further clarity.
7 August 2008	Contact details	Updated.

Subject references	Authorised applicants FOI requests Secrecy provisions
Legislative references	ITAA 1936 16(2) ITAA 1936 252 ITAA 1936 252A FOI Act 1982 15 FOI Act 1982 38 FOI Act 1982 Sch 3
Related public rulings	IT 2309
Related practice statements	PS LA 2005/5 Provision of third party information under the Freedom of Information Act 1982 PS LA 2005/6 Release of officers' names under the Freedom of Information Act 1982 PS CM 2005/05 (RM) Processing Freedom of Information requests in the ATO
Case references	Coulthard v. Secretary to the Department of Social Security [1995] 56 FOIR 27 Re Corrs Chambers Westgarth and Federal Commissioner of Taxation 98 ATC 2298; 40 ATR 1191 Re Collie and Deputy Commissioner of Taxation 97 ATC 2058; 35 ATR 1204 Re Hart and Deputy Commissioner of Taxation (2002) AATA 1190; 51 ATR 1086
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