


# ***PS LA 2005/5 - Provision of third party information under the Freedom of Information Act 1982***

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# Practice Statement

## Law Administration

### PS LA 2005/5

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**FOI status: may be released**

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*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 ATO officers unless doing so creates unintended consequences. Where this occurs ATO officers must follow their Business Line's escalation process.*

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**SUBJECT:** Provision of third party information under the *Freedom of Information Act 1982*

**PURPOSE:** To outline the procedures to be followed where an applicant requests third party information.

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#### STATEMENT

1. The object of the *Freedom of Information Act 1982* (FOI Act) is to promote open and accountable government by providing for access to information in documents held by Government. This will include information about individuals, other entities such as corporations, and about government policies and processes.
2. However release of information by the Tax Office under the FOI Act to a person other than the person to whom the information relates or from whom the information was obtained must be balanced against the Tax Office's obligations under the *Privacy Act 1988* and the secrecy provisions of the taxation laws under which we operate.
3. Material we hold is often sourced from other government agencies, commercial organisations and private individuals, usually for a specific purpose and often by means of the Commissioner's statutory information gathering powers.
4. Section 38 of the FOI Act exempts a document from disclosure to the extent to which disclosure is prohibited by the tax secrecy provisions listed in Schedule 3 to the FOI Act.
5. If information is not exempt under section 38, third party material may be exempt under another exemption provision, most commonly section 41 (unreasonable disclosures of personal information) or section 43 (business affairs) of the FOI Act.
6. Where information we are considering for release is about a third party such as a State government, a commercial organisation or an individual, before we make a decision on the disclosure of information about them we must consult with the third parties in accordance with the provisions of the FOI Act (a procedure called reverse FOI).

## EXPLANATION

### Edited copies

7. Subsection 22(1) of the FOI Act provides that where a document contains exempt information and it is possible to provide a copy of the document with deletions so that the document is no longer exempt, such documents should be released with the appropriate deletions.

### Secrecy exemption

8. Section 38 of the FOI Act provides that a document (or part of a document) is exempt from disclosure if its disclosure is prohibited under an Act specified in Schedule 3 to the FOI Act, or if another enactment expressly applies section 38 of the FOI Act to that document or information (for example, subsection 252C(11) of the *Superannuation Industry (Supervision) Act 1993*).
9. The following taxation law secrecy provisions are currently listed in Schedule 3 to the FOI Act:
  - *Fringe Benefits Tax Assessment Act 1986*, subsection 5(3)
  - *Income Tax Assessment Act 1936* (ITAA 1936), subsections 16(2), (4F), (4FA), (4JB) and (5C)
  - *Taxation Administration Act 1953*, subsection 3C(2), paragraph 8WB(1)(c) and subsection 8XB(1)
  - *Taxation Administration Act 1953*, section 355-5 in Schedule 1
  - *Taxation (Interest on Overpayments and Early Payments) Act 1983*, subsection 8(2).
10. Not all information held by the Tax Office comes within the above legislative provisions; for example, information held about personnel employed under the *Public Service Act 1999* (see *Stannard and Deputy Commissioner of Taxation* (2003) AATA 406 (2 May 2003)).
11. The effect of subsection 38(1A) of the FOI Act is to limit the use of section 38 to the terms of the particular secrecy provision involved, and the exemption is only available to the extent that the secrecy provision prohibits disclosure (*NAAO v. Secretary, Department of Immigration and Multicultural Affairs* (2002) 117 FCR 401; [2002] FCA 292).

### Application of the tax law secrecy provisions

12. The tax law secrecy provision generally operate to prohibit the 'communication' of information about one person (including bodies corporate) to any other person.
13. While there are several different secrecy provisions, section 16 of the ITAA 1936 is a typical example. Subsection 16(2) makes it an offence for an officer to:
  - make a record of
  - divulge, or
  - communicate.

Information respecting the affairs of another person they have acquired in the performance of functions under the income tax laws.

14. If documents are provided to the Tax Office for the purpose of the administration of the tax laws, then staff should consider the application of the secrecy provisions before disclosing any information, noting that in many cases relevant exemptions (discussed in details below) may apply to allow the disclosure of information.

#### **Disclosure to 'another' person**

15. Consent is not a basis for disclosure under taxation secrecy laws. Three decisions of the AAT state that subsection 38(2) of the FOI cannot be relied on to overcome the operation of the secrecy provision in section 16 of the ITAA 1936, even with the consent of the third party: *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).
16. It is the Tax Office view, that the secrecy provisions do not prevent the disclosure of information to the person to whom it relates. This can also include entities who can properly be treated as 'standings in the shoes' of the taxpayer or other person whom the information is about. Most commonly this will include properly authorised tax agents, solicitors, executors of a deceased estate etc. Disclosure in these circumstances is not considered a disclosure with consent.
17. Subsection 38(2) of the FOI Act provides that the exemption does not apply to documents in so far as they contain personal information about the applicant either solely or jointly with some other individual (*Re Forrest and Department of Social Security* (1991) 23 ALD 649). In cases of joint personal information where subsection 38(1) of the FOI Act is not available because of the operation of subsection 38(2), exemption on the basis of unreasonable disclosure of personal privacy (under section 41 of the FOI Act) should be considered (*Re VXV and the Department of Social Security and VXW* (1992) 27 ALD 362).
18. In *Re Coulthard and Secretary to the Department of Social Security* (1995) 56 FOIR 27 the Administrative Appeals Tribunal (AAT) rejected a claim for exemption under section 38 of the FOI Act in respect of a file note a conversation with the applicant's mother. Although it was a document to which the secrecy provisions of the *Social Security Act 1991* applied, and therefore came within Schedule 3 to the FOI Act, the file note contained personal information relating to the applicant and therefore subsection 38(2) of the FOI Act applied.
19. Subsequent decisions in the AAT have further considered the application of subsection 38(2) and joint or mixed information (*Richardson and Commissioner of Taxation and Anor* [2004] AATA 367 and *Petroulias and Ors and Commissioner of Taxation* [2006] AATA 333). In these cases it was held that subsection 38(2) is limited to personal about the applicant requesting the document. If the information about the applicant can be separated then subsection 38(2) applies and that information be released. However, if the information is so inextricably interwoven that separation is not possible then exemption under subsection 38(1) was upheld even though some of the material may relate to the applicant.
20. The position in the later AAT cases should be taken until a Federal Court rules to the contrary.

## Exemptions to the prohibition on disclosure

21. The taxation law secrecy provisions allow disclosure in certain circumstances such as where the information relates to the applicant, where a specific exemption exists to allow for the disclosure, or where disclosure is in the performance of an officer's duties under a particular act.
22. The scope of the performance of duties exception (for example, subsection 16(2A) of the ITAA 1936) is to be interpreted broadly so as to encompass not only FOI disclosure but any disclosures linked to these duties or functions (*Canadian Pacific Tobacco Co. Ltd. v. Stapleton* (1952) 86 CLR 1) and *Young and Commissioner of Taxation* [2008] AATA 115. For a disclosure to be in the performance of duties, there must be a direct link between the disclosure of the information and the administration of the tax laws.
23. In the FOI context, information is often sought applicants to assist them understand decisions we have made about their tax affairs. The disclosure of information to a taxpayer for this purpose will generally be within the performance of an officer's duties.

## Examples

24. *A taxpayer provides documents to the Tax Office for the purpose of the office reviewing their tax affairs. Among the documents is a bank statement detailing the transactions in taxpayers account. It is possible to identify some third parties from the bank statement.*
25. Returning the document is a 'communication' of information collected for the purposes of administering the tax laws, so consideration needs to be given to the application of the tax law secrecy provisions. The document is being returned to the person to whom the information relates – that is, it is information about who has been paid from, or paid to the taxpayers account. The disclosure of information to the person to whom it relates is not a breach of the tax law secrecy provisions, so section 38 cannot be relied on to exempt the production of the document.
26. The application of section 41 should be considered in relation to personal information.
27. *An entity provides a letter containing details of a particular transaction it has entered into. It is signed by the company's tax manager, and contains the manager's business contact details.*
28. Returning the document would be a 'communication' of information collected for the purposes of administering the tax laws, so consideration needs to be given to the application of the tax law secrecy provisions, the information in the document, including the name and contact details of the accountant, is information about the company and its release is not prohibited by the secrecy provisions.
29. The application of section 41 should be considered in relation to personal information.
30. *A Tax Office file contains the name and contact number of the employee we have been dealing with in relation to an audit of the company.*
31. Disclosing the document would be a 'communication' of information collected for the purposes of administering the tax laws, so consideration needs to be given to the application of the tax law secrecy provisions,. The disclosure of the information about a company's employee (in their capacity as an

- employee) to the company would not be prohibited by the tax law secrecy provisions as it is information that concerns the tax affairs of the company.
32. The application of section 41 should be considered in relation to personal information.
  33. *A letter from a third party contains information that was relevant to the Tax Office's consideration of an entity's tax affairs.*
  34. The document was collected for the purposes of administering the tax laws, so consideration needs to be given to the application of the tax law secrecy provisions, If the information was used by the Tax Office in coming to a conclusion about the taxpayer's affairs, then the disclosure of information would be within the 'performance of an officer's duties' and would not be prohibited by the tax law secrecy provisions. Section 38 would not exempt the production of the document.
  35. Depending on the nature of the information, all or part of the document may be exempt under sections 40, 41 and 45.

### **Where disclosure is required under the FOI Act**

36. Where the secrecy provisions will not prohibit the disclosure by a tax officer of information, section 38 cannot be relied on to exempt the information. If no other exemptions apply the information must be disclosed.
37. Where required by the FOI Act, disclosure will not be a breach of secrecy provisions in taxation legislation (*Re Actors Equity Association of Australia and Australian Broadcasting Tribunal* (1984) 6 ALD 68). For example, under section 16(2) of the ITAA 1936, the prohibition on disclosure would extend to disclosure to A of information about B and A jointly. Because of subsection 38(2) of the FOI Act, that information cannot be exempted under subsection 38(1).
38. In such cases, if no other exemption applies, the information would have to be released notwithstanding the section 16(2) of the ITAA 1936 prohibition. However, as it is the Tax Office and not the individual officer which makes disclosure under FOI, there is no breach of the secrecy provision.

### **Statutory consultation with third parties – reverse FOI**

39. In the case of third party information held by the Tax Office which is not subject to the taxation law secrecy provisions (for example because it concerns action taken under the *Public Service Act 1999*, is a tender to provide services to the Tax Office or contains detail of negotiations with States), it is important to obtain the views of the person whom the information is about.
40. Where information the Tax Office is considering for release is about a third party such as a State government, a commercial organisation or an individual, before we make a decision in relation to the disclosure of information about them we must consult with these third parties in accordance with the provisions of the FOI Act (a procedure called reverse FOI).
41. The requirement is to give the third parties a reasonable opportunity to object to disclosure. FOI decision-makers must consider any objections made and, if the decision is to disclose notwithstanding an objection, must inform the third party of the intention to release and of their rights to seek review of the decision.

42. The mechanism by which this is done differs depending on whether the information concerns a state or territory government, a third party's business affairs or an individual, according to sections 26A, 27 and 27A of the FOI Act respectively. In each case the material must not be released until:
- the period within which the third party can seek an internal review or lodge an appeal with the AAT has expired
  - where the third party has made a request for an internal review-the review has been finalised, or
  - where the third party has lodged an appeal with the AAT-the appeal has been finally determined.

### **Commonwealth/State Relations**

43. Where it appears that disclosing information would adversely affect Commonwealth/State relations, section 26A of the FOI Act requires consultation with the State concerned. Here, 'State' includes the Australian Capital Territory and the Northern Territory.
44. A decision maker must take into account any reasons put forward by the State as to possible exemption on the basis that disclosure could cause damage to Commonwealth/State relations or divulge information communicated in confidence to the Commonwealth (subsection 33A(1) of the FOI Act). In any event, the decision must be based on an independent assessment of the merits of the exemption claim in the particular circumstances. This is a consultation not a consent process.
45. If the State appeals our decision, it may only assert section 33A of the FOI Act as a basis for exemption from disclosure even if the section has not been relied on in our decision (*Re Parisi and Australian Federal Police and Queensland* (1987) 14 ALD 11).

### **Business affairs**

46. Subsection 27(1) of the FOI Act provides that no decision to grant access to business affairs information of a third party is to be made without consultation with the third parties.
47. Unlike section 27A of the FOI Act (see below), consultation is not restricted to where it appears the third party might reasonably wish to make a contention of exemption. Contentions made by the third parties consulted under this section are limited to issues of trade secrets, information having commercial value, or where disclosure would have an unreasonable adverse effect on business affairs etc (under subsection 43(1) of the FOI Act, *Mitsubishi Motors Australia Ltd v. Department of Transport* (1986) 12 FCR 156).

### **Personal Information**

48. Section 41 of the FOI Act provides that a document will be exempt from production if it would result in an unreasonable disclosure of a personal information about any person.

### ***What is unreasonable***

49. If the Tax Office proposes to release personal information about a third party individual, and it appear that the personal might reasonably wish to contend

that disclosing the document would result in an unreasonable disclosure of personal information, then an officer should not make a decision to grant access unless, where it is reasonably practicable to do so, it has given the potentially affected individual a reasonable opportunity to contend that the document, so far as it contains personal information, is exempt under subsection 41(1) of the FOI Act.

50. Although section 27A of the FOI Act does not require consultation unless we are inclined to disclose the personal information and it appears the person affected might reasonably wish to contend the document is exempt, it is strongly advised to consult if there is any possibility. Consultation will provide information to assist the making of an objective decision and pre-empt criticism from an external reviewer (*Mitsubishi Motors Australia Ltd v. Department of Transport* (1986) 12 FCR 156).

### **Tax Office staff details**

51. The Government's policy guidelines in the Department of Prime Minister & Cabinet FOI Guidelines Exemption Sections suggest that, usually, it would not be reasonable for ATO officers to contend that their names when associated with their work are exempt under subsection 41(1). This issue is the subject of a separate practice statement, PS LA 2005/6.

### **The Consultation Process**

52. Subsection 27(1A) provides a series of facts that a decision maker must have regard to when determining whether they are required to consult under subsection 27(1AA). These include:
- the extent to which the personal information is well known
  - whether the person to whom the personal information relates is known to be associated with the matters dealt with in the document
  - the availability of the personal information from publicly accessible sources, and
  - such other matters considered relevant.
53. There are three aspects to the process of consultation:
- 'where reasonably practicable to do so'  
It may not be reasonably practicable if the individual's whereabouts cannot be ascertained using reasonable effort, or where consultation cannot be undertaken in the extended time limit (60 days where the applicant has been properly notified under subsection 15(6) of the FOI Act) or the volume of work associated is too great. The latter is particularly relevant if the information is innocuous and its release unlikely to be unreasonable.
  - 'a reasonable opportunity to contend'  
We must give the individual consulted sufficient information about the documents to allow the individual to make such a contention. This will usually, but not always, require that a copy of the information be shown to the individual, who is to be given a reasonable time to respond. If a document contains information about other persons, deletions may be necessary to protect their privacy. Where there is

joint personal information, consultation will often be needed with the other person concerned.

- 'that the document is exempt under subsection 41(1) of the FOI Act'

The individual's right to make a contention is restricted to subsection 41(1) that is, that disclosure of personal information would be unreasonable (*Re McKinnon and Powell and Department of Immigration and Ethnic Affairs* (1995) 40 ALD 343).

54. This is a consultation not a consent process. We must take into account any contention of unreasonable disclosure under subsection 41(1) of the FOI Act but must still make our own decision (*Searle Australia Pty Ltd v. Public Interest Advocacy Centre and Another* (1992) 36 FCR 111). However, the objection to disclosure is always a relevant consideration.
55. Consultation extends the time for processing the original FOI request. The FOI Act allows further time (30 days) to make a reverse FOI decision (subsection 15(6)), but no extension of time is available at internal review. In addition, if the individual objects to disclosure, this is a factor which, with others, may be sufficient to constitute unreasonable disclosure.
56. Consultation with third parties is to be undertaken by writing to the third party attaching, where possible and appropriate, the documents concerned. Factors that will determine whether it is appropriate or possible to attach the material concerned include:
  - the sensitivity of the material
  - its length, or
  - the extent to which there will be disclosure of material relating to another party.
57. Where a document contains third party information and other information, it is only necessary to consult about that third party information. Therefore, we need to provide only the third party information as part of the consultation. Information which does not relate to that third party can be deleted from the copy provided. In some cases it may be necessary to make up a composite document. Where it is not appropriate or possible to attach the FOI actual material, (for example, the information may be inextricably intertwined with other information) an adequate description of the documents will need to be provided.
58. For further discussion on consultation see paragraphs 6.29 to 6.33 of FOI Guidelines: Fundamental principles and procedures (formerly Attorney-General's Department FOI Memoranda No. 19).

### **Examples**

59. *A tax office file note contains the name and work number of a company's staff member who was the contact point for an audit and that company makes a request for information.*
60. Looking at the factors in subsection 27(1A) it is not reasonable for a person would contend that the release of their work contact information to their employer would be unreasonable, so consultation would not be required.
61. Information unlikely to be exempt under section 41.
62. *An email contains details about a tax officer's domestic situation such as child care arrangements or family details.*

63. If the information is relevant to the request, and disclosure is to be considered, then consultation is recommended.

#### **Disclosure of applicant's name**

64. At the consultation stage it is generally not necessary or appropriate to disclose to the third party the name of the individual making the FOI request without that individual's consent. There are occasions when a third party's decision regarding disclosure could be influenced by the identity of the applicant; for example, journalists requesting information about senior taxation officers.
65. Disclosure of the name could mislead the third party into believing they are consenting (or objecting) to disclosure to the particular applicant, or for a particular purpose. This could affect future applications for the same information by other persons when consultation would not normally be needed.
66. Where the applicant consents to disclosure of his or her name, the third party should be advised of the general application of their response for future requests for the same information by other people. This approach to the disclosure of the applicant's name should not be confused with the relevance of the identity of the applicant which will be a relevant consideration in some cases. For example, it may not be unreasonable to disclose personal information about a young child to the child's parent.
67. Where third party consultation is being undertaken, we must inform the applicant as soon as practicable that the time for processing the request has been extended in accordance with subsection 15(6) of the FOI Act.
68. Where a decision is made to disclose information contrary to the third party's contention, the FOI applicant is not to be granted access until the time limit has expired for the third party to seek a review, or, if the third party has sought a review of the decision, until the review has been finally determined.
69. In practice, at least 30 days is to be allowed after the third party receives a notice of the decision before the relevant material is released to the FOI applicant. The third party should be contacted prior to release of the information, to ensure that they do not intend to seek a review of the decision to disclose.

Subject references	FOI third party information
Legislative references	<p><i>Freedom of Information Act 1982</i> sections 15, 22, 26A, 27, 27A, 38, 41, 43 and Schedule 3</p> <p><i>Fringe Benefits Tax Assessment Act 1986</i> subsection 5(3)</p> <p><i>Income Tax Assessment Act 1936</i> subsections 16(2) (4F), (4FA), (4JB) and (5C)</p> <p><i>Privacy Act 1988</i></p> <p><i>Sales Tax Assessment Act (No. 1) 1930</i> subsection 10(2)</p> <p><i>Sales Tax Procedure Act 1934</i>, subsection 4A(3)</p> <p><i>Sales Tax Assessment Act 1992</i>, subsection 110(2)</p> <p><i>Taxation Administration Act 1953</i> subsection 3C(2), paragraph 8WB(1)(c) and subsection 8XB(1)</p> <p><i>Taxation (Interest on Overpayments and Early Payments) Act 1983</i>, subsection 8(2)</p> <p><i>Public Service Act 1999</i></p>
Related public rulings	
Related practice statements	<p>PS CM 2005/05 (RM) Processing Freedom of Information requests in the Tax Office</p> <p>PS LA 2005/3 Authorisation to Request Information under the <i>Freedom of Information Act 1982</i></p> <p>PS LA 2005/4 Fees and charges under the <i>Freedom of Information Act 1982</i></p> <p>PS LA 2005/6 Release of Officers' Names under the <i>Freedom of Information Act 1982</i></p>
Case references	<p><i>Mitsubishi Motors Australia Ltd v. Department of Transport</i> (1986) 12 FCR 156</p> <p><i>NAAO v. Secretary, Department of Immigration and Multicultural Affairs</i> (2002) 17 FCR 401; [2002] FCA 292.</p> <p><i>Canadian Pacific Tobacco Co. Ltd v. Stapleton</i> (1952) 86 CLR 1</p> <p><i>Hart and the Commissioner of Taxation</i> [2004] AATA 1060</p> <p><i>Re Actors Equity Association of Australia and Australian Broadcasting Tribunal</i> (1984) 6 ALD 68</p> <p><i>Re Collie and Deputy Commissioner of Taxation</i> 97 ATC 2058; 35 ATR 1204</p> <p><i>Re Coulthard and Secretary to the Department of Social Security</i> (1994) 56 FOIR 27</p> <p><i>Re Corrs Chambers Westgarth and Commissioner for Taxation</i> (1998) 98 ATC 2298; 40 ATR 1191</p> <p><i>Re Fallon Group Pty Ltd and Commissioner of Taxation</i> (1995) 31 ATR 1164; 95 ATC 2134</p> <p><i>Re Forrest and Department of Social Security</i> (1991) 23 ALD 649</p> <p><i>Re Hart and Deputy Commissioner of Taxation</i> (2002) AATA 1190; 51 ATR 1086</p> <p><i>Re Mann and Commissioner of Taxation (Cth)</i> (1987) 12 ALD 738</p> <p><i>Re McKinnon and Powell and Department of Immigration and Ethnic Affairs</i> (1995) 40 ALD 343</p> <p><i>Re Parisi and Australian Federal Police and Queensland</i> (1987) 14 ALD 11</p> <p><i>Re The Fallon Group Pty Ltd and Federal Commissioner of</i></p>

	<i>Taxation</i> (1995) 31 ATR 1164 <i>Re Scholes and Australian Federal Police</i> (1996) 44 ALD 299 <i>Re VXV and the Department of Social Security and VXW</i> (1992) 27 ALD 362 <i>Searle Australia Pty Ltd v. Public Interest Advocacy Centre and Another</i> (1992) 36 FCR 111 <i>Stannard and Deputy Commissioner of Taxation</i> (2003) AATA 406
Other references	Attorney –General’s Department FOI Memoranda Nos. 19, 94
File references	TRIM 05-972
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Other Business Lines consulted	All
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