



# ***PS LA 2005/6 - Release of employees' names under the Freedom of Information Act 1982***

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**PS LA 2005/6**

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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: Release of employees' names under the *Freedom of Information Act 1982***

**PURPOSE: To advise how Freedom of Information decision-makers will deal with Tax officers' names when handling Freedom of Information requests**

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## STATEMENT

1. The names of Tax officers will generally be released if they appear in documents to be provided by the Tax Office under Freedom of Information (FOI), subject to their relevance to the request and to some limited exemptions under the *Freedom of Information Act 1982* (FOI Act). This means the majority of names will be released.
2. In the case of a document bearing the name of a Tax officer, FOI decision-makers must consider the possible exemptions and 'reverse FOI' issues outlined in this practice statement before deciding whether or not to release the person's name in conjunction with any release of the document.
3. Exemption from release will be considered where release would endanger the physical safety of officers and/or affect operations of the agency (discussed in more detail in paragraphs 19-25 below). In addition to situations where express or direct threats have been made, this might occur, for example, if:
  - release would allow an otherwise undisclosed connection to be made between the officer named and the fact they are engaged in, or are connected with, an area performing sensitive, high risk compliance work
  - release of names could effectively provide a list of personnel working in such areas, or
  - the request relates to one or more cases involving such work.
4. While this will not mean names of all officers in a particular work area will always be exempt, exemption will ordinarily be claimed for names of officers dealing with matters such as undercover or covert activities, organised crime

and fraud. This is most likely to apply to officers working directly in the Serious Non-Compliance area, but could extend to other officers working in connection with such matters, for example on some Promoter Task Force or Aggressive Tax Planning activities.

5. As discussed further in paragraphs 26-32 below, information may also be exempted from release where:
  - it is reasonable to assume that it could be combined with other available information in ways which would lead to personal information of officers being revealed and accessible
  - an FOI request seeks, or has the effect of seeking, a list of names of officers by reference to personal criteria, such as gender, age, location, or
  - the context in which the name of the officer or other personal information appears is not in the official capacity of the person as an officer.
6. It should be noted that, even where exemption under FOI has been or could be claimed, it is possible that the Tax Office could be ordered to produce documents showing officers' names. This could happen if exemption under FOI is successfully contested in the Administrative Appeals Tribunal (AAT) or a court, or for example where a relevant document is the subject of a subpoena issued by a court.
7. Release or exemption of material under FOI may be made only by an authorised FOI decision-maker (that is, a member of the FOI stream reporting to the ATO General Counsel – part of the Law and Practice business line), not the case officer dealing with a particular file.

## EXPLANATION

8. The Department of Prime Minister & Cabinet Freedom of Information Guidelines - Exemption sections in the FOI Act, 31 December 2005, provides a detailed discussion of the way in which the exemptions of the FOI Act have been considered on review and provides guidance as to how such exemptions are to be applied by Commonwealth agencies. This document should be referred to in addition to this policy if material is being considered for exemption.
9. The Freedom of Information Memorandum No 98 issued by the Attorney-General's Department in June 2000 provides a detailed discussion of the way in which the exemptions of the FOI Act have been considered on review and provides guidance as to how such exemptions are to be applied by Commonwealth agencies. This document should be referred to in addition to this policy if material is being considered for exemption.
10. The FOI manual discusses the exemptions in the context of the Tax Office's policies, practices and procedures. It will be of assistance when considering a request for names of Tax officers.

11. The Joint Report of the Administrative Review Council (ARC) Report No 44 and the Australian Law Reform Commission (ALRC) Report No 77 (1995) *Open Government, A review of the federal Freedom of Information Act 1982* said:

'10.14 . . . Individuals do not forfeit all right to privacy when they become employees of the government. It is clear, however, that in light of the objectives of the FOI Act, public servants are entitled to less privacy protection than other citizens in relation to their official duties. The Act cannot serve its purpose if it is administered in a way that maintains the traditional anonymity of public servants. This is recognised by the Privacy Commissioner.'

'The disclosure of personal information of public servants as it relates to the performance of their duties for the government does not unduly threaten personal privacy and reflects the democratic objectives of FOI ... However, there would be situations which would warrant non-disclosure, for example, there could in some situations be reasonable security or other concerns which would justify non-disclosure of an officer's identity' (*Privacy Commissioner's submission to the Review*).

12. Rights of access and countervailing exemption provisions are designed to give a correct balance of the competing public interests involved. The Tax Office generally approaches any FOI request with a view that a relevant document should be provided unless real harm would follow its disclosure. This approach is in line with the Taxpayers' Charter (Access to Information) which refers to the objectives of the FOI Act and reiterates our commitment to be a fair, open and approachable organisation.
13. The existence of officers' names in a document is not of itself a reason for release or non-release – *News Corporation Ltd and Others v National Companies and Securities Commission* (1984) 52 ALR 277 and *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Another* (1992) 108 ALR 163. Hence, for example, names on file notes, names of officers making decisions about specific taxpayers' files, names of email authors and addressees and 'cc' addressees etc will generally be released.

### **Deletion of Officers' Names**

14. A document is not exempt just because it contains the name of a Tax officer. Section 22 of the FOI Act requires the release of document, subject to deletions. Deletion of officers' names from a document which comes within the terms of an FOI request will be permissible only if the names are irrelevant or a specific exemption provision applies. The document will then be regarded as partially exempt (to the extent of the deletion). A discussion of the provisions of the FOI Act which may allow for exempting officers' names appears below.

### **Irrelevant Material**

15. The FOI Act does not provide for the exemption of officers' names because officers were not actively involved in a matter or were not dealing directly with taxpayers. Rather, the test to be applied is whether the material could reasonably be regarded as irrelevant to the request.

16. It is possible that the terms of a request do not cover the names of officers mentioned in the relevant documents. For example, a request for details of the amount paid by the Tax Office for a particular consultant's report may contain the name of the officer who approved the payment. That officer's name is irrelevant to that request and may be deleted under section 22 of the FOI Act on that basis, rather than by claiming a specific exemption.

### **Possible exemptions**

17. Because of the nature of our work in connection with some sensitive and high-risk areas of tax compliance, particularly where criminal elements may be involved, the Tax Office recognises that it is prudent to take steps to protect the identity of some officers. This includes exempting officers' names from disclosure in some instances. For FOI purposes this must still be done by reference to permissible exemptions under the FOI Act. Depending on the circumstances of the case a range of possible exemptions can be claimed for this purpose.
18. In some instances referred to below (for example in connection with 'physical safety' and 'operations of the agency') it may be appropriate for FOI decision-makers to claim an exemption without consultation with named officers, but in others (for example where 'personal privacy' is concerned) consultation may be appropriate.

### ***Endangering Physical Safety***

19. If the disclosure of information would 'endanger the life or physical safety' of an officer, an exemption can be claimed under paragraph 37(1)(c) of the FOI Act. Where there has been an actual threat or there are facts that may cause an officer to reasonably perceive a threat to his or her physical safety, their name should be exempted under this provision. We need not wait for each individual affected officer to suffer an actual threat or harm. Instead it will be sufficient if there has previously been a threat or harm to officers working in a similar way, or after disclosure of similar information, or if the attributes of the person to whom the information is, or is likely, to be provided give rise to the real possibility that harm is a likely consequence (for example if the person has a history of intimidatory or violent behaviour).
20. FOI decision-makers should clearly document the basis for their decision to exempt material pursuant to this section. Further, there must be cogent evidence that there is a real apprehension of danger. Usually mere verbal abuse will not be sufficient (*Dykstra and Centrelink* [2002] AATA 659 and *Dykstra and Centrelink* (No.2) [2003] AATA 202).
21. The operation of this provision has been considered by a number of courts and tribunals. Where an FOI applicant has a documented history of physical violence towards officers or property of an agency, documents revealing the name of an officer and security arrangements in place in respect of the applicant may be exempted, see *Re Matthews and Department of Social Security* (Unreported, AAT, N90/364, 21 December 1990).
22. The decision in *Re Boehm and Department of Industry, Technology and Commerce* (1985) 7 ALN N186 indicates that while there must be a reasonable apprehension of danger, the risk of danger does not have to be significant. However, an irate phone call from a member of the public will not usually, on its own, be sufficient to warrant an exemption under this section (see *Re State of Queensland v Albietz* (1996) 1 QdR 215).

## ***Effect on Operations of the Agency***

23. Subsection 40(1) of the FOI Act provides for the exemption of documents the disclosure of which would have a 'substantial adverse effect' on the:
- management or assessment of personnel by the Commonwealth or by an agency - paragraph 40(1)(c)
  - proper and efficient conduct of the operations of an agency - paragraph 40(1)(d), or
  - conduct by or on behalf of the Commonwealth or an agency of industrial relations - paragraph 40(1)(e)
- unless disclosure would be in the public interest.
24. In *Hudson and Child Support Registrar* (1998) 55 ALD 225, the AAT held that an agency that claims an exemption under paragraphs 40(1)(c), (d) or (e) of the FOI Act must establish that any adverse effect on the activities of the agency must be substantial. In this case, the AAT upheld the exemption for the names of officers not dealing directly with the applicant, because of the very sensitive and emotional work of the Child Support Agency.
25. The word 'substantial' has been the subject of judicial consideration: see *Harris v. Australian Broadcasting Commission and Others* (1983) 50 ALR 551, *Re Thiess and Department of Aviation* (1986) 9 ALD 454 at 463, and *Tillmann's Butcheries Pty Ltd v. Australasian Meat Industry Employees Union* 27 ALR 367. From these cases, it appears that the exemptions under subsection 40(1) of the FOI Act can be relied upon only in exceptional circumstances. The FOI manual provides further guidance on the meaning of *substantial adverse effect*.

## ***Personal Privacy***

26. Section 41 of the FOI Act is a provision which has not been commonly relied upon by the Tax Office to exempt officers' names, but an FOI decision maker can rely on that provision to protect the privacy of Tax officers where such protection is warranted. This section allows for the exemption of material which, if released, would involve 'an unreasonable disclosure of personal information' about an individual.
27. The factors to be taken into account when considering whether or not a disclosure of material which is otherwise personal would also be unreasonable are outlined in *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALN N257. These factors are the nature of the information, the circumstances in which it was obtained, its current relevance and whether there is a reasonable objection to its disclosure. For example information specifically linked to personal criteria such as gender, age or location would be exempt under this provision.
28. This provision may also be used in circumstances where Tax officers are likely to be subject to harassment or intimidation. The harassment does not have to be significant particularly where the information will not shed light on the workings of government to the least degree (*Colakovski v. Aust Telecommunications Corp* (1991) 100 ALR 111). FOI decision makers should consider whether the facts of a specific case where harassment or intimidation of Tax officers is alleged or proven are such that the material is more appropriately exempted under section 37 of the FOI Act.

29. There are several AAT decisions where the AAT has made quite strong statements that it would not be unreasonable to provide information in the work environment (that is, personal information about officers engaged in work activities) and that it would be an exceptional case for it to be unreasonable disclosure (see for example, *Schlegal and DTRS* (2002) AATA 1184, *Re Subramanian and Refugee Review Tribunal* (1997) 44 ALD 435, *Lalogianni and ANU* (2001) AATA 347 and *Gould and Comcare* 23 AAR 19). The Government's policy guidelines in the FOI Guidelines – Exemptions sections in the FOI Act say that usually it would not be reasonable for officers to contend that their names when associated with their work, are exempt under subsection 41(1) of the FOI Act.
30. Tax officers working in sensitive and high-risk areas of the type referred to in paragraph 4 above may require extra protection of their privacy. It will ordinarily be appropriate for the disclosure of documents which contain the names of officers in such areas to be exempted, but FOI decision-makers should consider, on a case by case basis, whether a particular document requested contains a name that is already known in the context in which the document is sought. For example if a taxpayer requests documents relating to an audit carried out by an officer who routinely provides their name to taxpayers during audits, it is unlikely that we would exempt the officer's name from documents relating to the audit.

### ***'Mosaic effect'***

31. The AAT has recognised that in some circumstances, when combined with other information which may reasonably be available to an FOI applicant (whether because it is publicly available or known to the applicant by some other means), non-exempt information can effectively become exempt.
32. For example if it was evident from the Commissioner's Annual Report that in one region the Tax Office had a large office in the capital city and one other small site, where only three people worked, a request for access to certain details of all officers in the region not based in the capital city office could have the effect of identifying the three officers. Disclosure of the information, coupled with the publicly available information, is likely to be an unreasonable disclosure of personal information as it is intimately linked to a personal criterion, namely location.

### **Consultation**

33. An FOI decision-maker may need to consult with officers to assist the decision-maker to determine if a name should be released or not, for example including discussing the manner in which personal safety or circumstances substantially adverse to the operations of the Tax Office are said to arise. However, consultation with officers is not mandatory. For example it may not be practicable to contact all officers whose names appear in a document relevant to the FOI request if that document is an email copied to many addressees. This Practice Statement may be relied on by the FOI decision maker in his/her consideration on whether to consult with an ATO officer.
34. Sometimes an FOI decision-maker may propose to provide information, including a name, to an FOI applicant, but believe that an officer might reasonably wish to contend that the document containing it is exempt because its disclosure would be an unreasonable disclosure of personal information (that is, specifically under section 41 of the FOI Act).

35. In this situation the FOI decision-maker must follow the process in section 27A of the FOI Act to give the relevant officer an opportunity for making submissions. Any submission made must be taken into account by the decision-maker. This is commonly known as **'reverse FOI'** and is dealt with in a separate practice statement about disclosure of third party information.
36. Particular care should be taken in this area where the officer affected works in, or is connected with, an area performing sensitive, high risk compliance work. It should be remembered that there may be some special circumstance beyond any apparent immediate business relationship between an officer and an FOI applicant which may make release of the officer's name a sensitive issue. For example the officer may know that their child attends the school at which a taxpayer who is a high compliance risk teaches, and the officer may believe the child could be at risk if the officer's identity was made known to the taxpayer. As a general rule, if in doubt, consult.
37. It is ordinarily not appropriate for privacy reasons to disclose the identity of the FOI applicant to a consulted person (in this case an officer). However, it may be necessary to do so to ascertain any context in which the FOI applicant knows the person or if the reason for consultation is to ascertain from the officer whether there is any reason why the release of information could endanger their (or another person's) physical safety.
38. When consulting, the FOI decision-maker should inform the officer that their consent (or objection) may, but need not, be treated in the same way in future if application is made for the same information by another person.
39. In the majority of cases decisions on documents bearing officers' names will be able to be made without consultation of the types described above. The volume and complexity of many FOI requests, coupled with the requirement to meet strict statutory timeframes, means that not all officers can be made aware that a document bearing their name is likely to be, or has been, provided to an FOI applicant.
40. FOI officers will, however, endeavour to ensure named current Tax officers are informed of a release as a matter of courtesy if the circumstances of the release have the potential to be controversial or embarrassing. Where practicable, this notification will be provided prior to release, but in any event all officers should note that such notification is likely to contain little, if any, detail about the FOI applicant concerned.

### **Examples**

41. *An email relevant to a request contains a signature block showing a staff members name, work location and work phone number.*
42. As a general rule this information will not be considered to be an unreasonable disclosure of personal information so will not be exempt.
43. Further consideration should be given if any of the above exemptions apply
44. *An email contains information about when a staff member is planning on taking leave.*
45. Consideration should be given to whether the information is relevant to the request. If it is relevant, consideration should be given to whether the information is exempt under section 41 as being an unreasonable disclosure of personal information.
46. *A request is made for an officer's performance data*



47. Consultation should be undertake with the officer involved as it is likely to be considered to be an unreasonable disclosure of personal information.

<i>subject references</i>	FOI Officers' names
<i>legislative references</i>	<i>Freedom of Information Act 1982</i> sections 22, s.27A, 37, 40 and 41.
<i>Related practice statements</i>	PS CM 2005/05 (RM) Processing FOI requests in the ATO PS CM 2005/02 Employee identification PS LA 2005/3 Authorisation to request information under the <i>Freedom of Information Act 1982</i> PS LA 2005/4 Fees and charges under the <i>Freedom of Information Act 1982</i> PS LA 2005/5 Provision of Third Party information under the <i>Freedom of Information 1982</i>
<i>case references</i>	<i>Colakovski v. Aust Telecommunications Corp</i> (1991) 100 ALR 111 <i>Commissioner of Police v District Court of NSW and Perrin</i> (1993) 31 NSWLR 606 <i>Dykstra and Centrelink</i> [2002] AATA 659 <i>Dykstra and Centrelink</i> (No.2) [2003] AATA 202 <i>Gould and Comcare</i> 23 AAR 19 <i>Harris v. Australian Broadcasting Commission and Others</i> (1983) 50 ALR 551 <i>Hudson and Child Support Registrar</i> (1998) 55 ALD 225 <i>Lalogianni and ANU</i> (2001) AATA 347 <i>Mann and Australian Taxation Office</i> (1985) 7 ALD 687 <i>Collie and Deputy Commissioner of Taxation</i> (1997) 35 ATR 1204 <i>Murtagh v. CoT</i> (1984) 6 ALD 112 <i>News Corporation Ltd and Others v National Companies and Securities Commission</i> (1984) 52 ALR 277 <i>Re Boehm and Department of Industry, Technology and Commerce</i> (1985) 7 ALN N186 <i>Re Chandra and Minister for Immigration and Ethnic Affairs</i> (1984) (1984) 6 ALN N257 <i>Re Matthews and Department of Social Security</i> (unreported AAT decision, N90/364, 21 December 1990) <i>Re State of Queensland v. Albietz</i> (1996) 1 QdR 215 <i>Re Thiess and Department of Aviation</i> (1986) 9 ALD 454 <i>Re Subramanian and Refugee Review Tribunal</i> (1997) 44 ALD 435 <i>Schlegal and DTRS</i> (2002) AATA 1184. <i>Searle Australia Pty Ltd and Public Interest Advocacy Centre and Another</i> (1992) 108 ALR 163 <i>Tillman's Butcheries Pty Ltd v Australasian Meat Industry Employees Union</i> 27 ALR 367

<i>Other references</i>	<i>Freedom Of Information Memoranda Nos 94 and 98</i> issued by the Attorney-General's Department Joint Report of the Administrative Review Council Report No 44 and the Australian Law Reform Commission, Report No 77 (1995) <i>Open</i> <i>Government, A review of the federal Freedom of</i> <i>Information Act 1982</i>
<i>file references</i>	TRIM 05-977

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