

PS LA 2004/9 - Disclosure to Ministers of information about the affairs of taxpayers

⚠ This cover sheet is provided for information only. It does not form part of *PS LA 2004/9 - Disclosure to Ministers of information about the affairs of taxpayers*

⚠ This Practice Statement is being updated to reflect changes to the taxation law secrecy provisions. A new version will appear shortly.

Before disclosing any taxpayer information to a minister please contact Parliamentary Services.

⚠ This document has changed over time. This version was published on *30 July 2004*



PS LA 2004/9

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

SUBJECT: Disclosure to Ministers of information about the affairs of taxpayers

PURPOSE: To explain Tax Office policy concerning disclosure of taxpayer information to Ministers.

STATEMENT

1. The Commissioner is bound by secrecy provisions in the Acts he administers. His ability to provide taxpayer information to a Minister without breaching the various secrecy provisions depends on the purpose for disclosing the information and the particular taxation legislation involved.
2. Disclosure of taxpayer information which relates to parliamentary proceedings such as questions on notice, question time briefs and information requested by parliamentary committees is covered by parliamentary privilege. The Tax Office will generally not disclose taxpayer information in these circumstances, unless the disclosure is seen to be necessary. Tax Office staff must contact [Parliamentary Services](#) for advice about whether the inclusion of identifying taxpayer information is necessary.
3. Information provided to Ministers in other circumstances is not covered by parliamentary privilege. This includes:
 - Ministerial correspondence
 - Referrals and reports relating to claims by taxpayers under the 'compensation for detriment caused by defective administration' scheme (the CDDA scheme)
 - General briefs and minutes to Ministers, and
 - Enquiries from Ministers' offices.
4. The Tax Office considers that officers can provide information about a taxpayer to a Minister in some circumstances and in respect of some laws. These are:

- Where the disclosure is expressly authorised by legislation,
 - Where the officer makes the disclosure in the performance of their duties, and
 - Where the information has been obtained under the Income Tax and Fringe Benefits Tax legislation and certain other Acts listed at Table 1 and Table 2 in [Attachment A](#) of this practice statement.
5. Taxpayer information obtained by the Tax Office under Excise and indirect tax legislation and those laws listed in Table 3 in [Attachment A](#) cannot be provided to a Minister, unless the information is covered by parliamentary privilege.
 6. Where the Tax Office cannot make information available to a Minister, the taxpayer might provide the information directly to the Minister.
 7. For further information on the provision of Ministerial and parliamentary services to the Treasurer and the Minister for Revenue and Assistant Treasurer please consult the following Corporate Management Practice Statement, [PS CM 2003/13](#), Provision of Services to the Treasurer and Minister for Revenue and Assistant Treasurer. See also [A Guide to Ministerials](#) in relation to Ministerial correspondence concerning legislation in Table 3.
 8. Australia's tax treaty network provides for exchanges of information with other countries' tax administrations. If a disclosure involves taxpayer information that has been obtained via an exchange of information (EOI) process with another country's tax administration, specific advice should be sought from [Parliamentary Services](#) and the EOI Unit of International Relations prior to any disclosure being made.
 9. Please note that this Practice Statement only applies to disclosures of taxpayer information to Ministers. Disclosures to other Commonwealth departments or agencies, even if they are exercising powers of a Minister under a delegation or other authorisation, may be subject to different considerations. If you are contemplating a disclosure to another Commonwealth department or agency you should check whether there is another Practice Statement which applies, or contact [Government Law and Practice, Legal Services Branch](#).

EXPLANATION

Disclosure for the purposes of Parliamentary Proceedings

10. Parliamentary privilege encompasses the special rights and immunities enjoyed by the Houses of Parliament and their members to enable them to carry out their functions effectively without external interference. The privilege is not restricted to members of parliament but includes the actions of any person, done for the purposes of, or incidental to, the transacting of the business of a House of Parliament. Parliamentary privilege is not overridden by any of the taxation secrecy provisions.
11. This means that Tax Office staff may provide taxpayer information to a Minister without breaching any taxation secrecy provisions if the communications are part of the proceedings of parliament.

12. In practice, question time briefs, questions on notice and information legitimately requested by a parliamentary committee are all communications that form part of the proceedings of parliament.
13. The Commissioner will usually not disclose taxpayer information for these purposes. However, if taxpayer information is provided for any of the above purposes, Tax Office staff must act with caution to ensure that the information provided is relevant and necessary for the purpose for which it is sought. In most circumstances, it will be sufficient to provide general responses which do not contain information about an identified taxpayer.
14. Staff who are concerned about a proposed disclosure should consult with their manager. In addition, they should contact [Parliamentary Services](#) for advice about the inclusion of identifying taxpayer information prior to providing that information.

Disclosure for other purposes

15. Subsection 16(2) of the *Income Tax Assessment Act 1936* (the ITAA 1936) broadly provides that an officer is not to communicate 'to any person' information regarding the affairs of another person obtained under that Act. Subsection 16(4) provides a number of specific exceptions to this, including the communication of 'information to the Treasurer, for the purpose of exercising his or her powers under section 128AE of the ITAA 1936, as set out in paragraph 16(4)(l).
16. However, subsection 16(5A) provides that, in the absence of an express exception to the prohibition in subsection 16(2), communication of information regarding the affairs of another person 'to any [Commonwealth or State] Minister' is a contravention of subsection 16(2). Previously the interpretation of subsection 16(5A) of the ITAA 1936 (and other Acts with similar provisions) provided by the Australian Government Solicitor (AGS) was that, in the absence of an express authorisation, Tax Office staff were absolutely prohibited from disclosing any taxpayer information to a Minister, even where the taxpayer had consented or authorised the disclosure of the information.
17. However, on later advice provided by the Solicitor-General, there has been a change to Tax Office's approach regarding the provision of taxpayer information to Ministers, consistent with the Solicitor-General's advice. Subsection 16(2A) of the ITAA 1936 provides that communications 'in the performance of [an officer's] duties' are allowed. It is now considered that subsection 16(5A) does not limit subsection 16(2A) – that is, information that is protected by section 16 of the ITAA 1936 or some other taxation secrecy provisions, may be disclosed to a Minister if that disclosure is made in the performance of the officer's duties.
18. This change necessitated by the Solicitor-General's advice and implemented since late 2002 only relates to some taxation secrecy provisions, such as those which relate to Income Tax and Fringe Benefits Tax legislation, and certain other Acts listed in Table 1 and Table 2 in Attachment A to this Practice Statement. The Acts contained in Table 2 do not expressly refer to disclosure of taxpayer information to a Minister. Accordingly, the disclosure of taxpayer information obtained under this legislation is also considered to be permitted where the disclosure is in the performance of an officer's duties.
19. As advised by the Solicitor-General, other taxation secrecy provisions, including those which relate to Excise and GST, do not allow for this

interpretation (see Table 3). For example, section 355-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) and section 159 of the *Excise Act 1901* specifically provide that the exceptions relating 'in the course of the performance of duties' '[do] not authorise the disclosure of information to a Minister'. Therefore, taxpayer information obtained under those Acts may not be disclosed to a Minister.

20. If a Minister wishes to attend a meeting between a taxpayer and Tax Office staff, officers must contact [Parliamentary Services](#) for advice about how to proceed.

What is meant by 'performance of duties'?

21. The meaning of the 'performance of duties' has received considerable judicial consideration. The courts have determined that actions performed in the course of an officer's duties include all that is incidental to the carrying out of the duties of an officer's employment. This definition includes acts which an officer is not legally obliged to perform in any particular way, or at all. However, there must generally be a tangible link between the administration of the relevant taxation legislation and the performance of an officer's duties. Therefore, the duties of Tax Office staff extend to actions taken in relation to legislation which the Commissioner has responsibility for administering. In some limited circumstances the 'duties of an officer's employment' may extend to duties or functions conferred by other legislation.
22. As a general rule, disclosure of taxpayer information to Ministers outside the Treasury portfolio is unlikely to be within the 'performance of duties'. However, some examples of an officer's duties which are conferred by legislation include those discussed below at paragraphs 27 and 28 in relation to processing claims for act of grace payments and claims for waiver of a Commonwealth debt. Tax Office staff should contact [Parliamentary Services](#) for advice if a request is received from another Minister.
23. Some general guidance on what is meant by the performance of duties may also be obtained by considering the following examples. Remember that in each of these examples the disclosure to a Minister in the performance of duties will not extend to the Excise Act, GST Act or other Acts in Table 3.

EXAMPLES

Ministerial correspondence

24. Draft correspondence provided to Ministers to enable them to respond to inquiries or representations received by them from taxpayers, or members of parliament acting on behalf of taxpayers might be more effective and meaningful if information about the taxpayer's affairs was disclosed. In such circumstances, the disclosure would be within the performance of an officer's duties. For example, where a taxpayer writes to the Minister for Revenue and Assistant Treasurer complaining about how he or she has been disadvantaged by the administration of the income tax law, it would be incidental to the administration of the income tax law to provide the Minister with information that responds to the complaint.
25. However, if a taxpayer writes to the Minister for Revenue and Assistant Treasurer asking for information about another person (for example, a question about how much tax a celebrity pays), it would not be within the performance of an officer's duties to provide the Minister with information

about the other person. Care should be taken to ensure that only information about the taxpayer making the inquiry or representation is disclosed to the Minister.

Compensation for detriment caused by defective administration (the CDDA Scheme)

26. Tax Office staff may disclose information about an individual to the Minister for Revenue and Assistant Treasurer where that information will permit the Minister to consider applications by taxpayers under the CDDA scheme.

Act of grace payments or waiver of Commonwealth debts

27. Tax Office staff may disclose information about the affairs of a taxpayer to the Minister for Finance (or his delegate) where the information relates to an application for an act of grace payment in connection with a Commonwealth tax debt, or waiver of a Commonwealth tax debt. If the disclosure would assist the Minister's consideration of the application in whole or in part, the disclosure will be incidental to the duties of the Commissioner. This is because the Minister's decision may have a direct effect on the amount of tax recoverable, or able to be retained, by the Tax Office.
28. Although the wording of the secrecy provisions listed in [Table 3 in Attachment A](#) create an absolute prohibition on disclosure to Ministers (including for the purposes described in the paragraph above), the prohibitions will be overridden to the extent that legislation specifically requires a Minister to have regard to taxpayer information. For example, as section 59 of the *Financial Management and Accountability Act 1997* (FMA Act 1997) requires the Minister for Finance to decide applications for waiver or act of grace payments on the basis of an Advisory Committee's Report where the application is for amounts exceeding \$100,000, the general prohibition on disclosure to Ministers is overridden for the purposes of giving advice to the Committee to report on to the Minister, even where the relevant secrecy provision is one of those listed in [Table 3 in Attachment A](#).
29. For further information in relation to disclosing information in these circumstances please refer to [Chapter 25 of the ATO Receivables Policy](#).

Information obtained from Exchange of Information processes or via Australia's tax treaty network

30. In situations where taxpayer information has been obtained through an exchange of information with a tax administration in another country via Australia's tax treaty network, specific advice should be sought from [Parliamentary Services](#) and the EOI Unit of International Relations prior to any disclosure being made.

What to do where a disclosure cannot be made

31. Where an officer is not permitted to disclose taxpayer information to a Minister (for example, in connection with the Acts listed in Table 3) it may be possible to structure alternative administrative arrangements.

Ministerial correspondence

32. Officers can provide two responses to any one inquiry or representation. If an answer to an inquiry or representation requires the disclosure of taxpayer-specific information, then the following correspondence should be prepared:
- first, a comprehensive reply should be sent to the taxpayer or member of parliament (MP) (as long as they are not a Minister) who made the inquiry or representation. Provided the appropriate business line (BSL) proof of identity procedures are observed, such replies can contain detailed information concerning the taxpayer's affairs; and
 - second, a draft reply to the taxpayer or the MP should also be prepared for the Treasurer or the Minister for Revenue and Assistant Treasurer, as the case may be. Such replies should not include specific information concerning the taxpayer's affairs, but should note that the Commissioner will respond directly to the taxpayer or the MP; depending on the context. General observations about relevant taxation laws or policy considerations may be appropriate.
33. Further detail can be obtained from the Parliamentary Services document, [A Guide to Ministerials](#), or from contacting [Parliamentary Services](#).

Compensation, etc

34. In order for an appropriate Minister to have sufficient information for the purposes of making a decision (for example, under the CDDA scheme in relation to defective administration of Acts listed in Table 3, or on an application for waiver of a Commonwealth debt based on hardship), it may be possible to arrange for the relevant information to be provided to the taxpayer, who can then provide that information directly to the Minister.
35. Note that this is not the same as the taxpayer consenting to the Tax Office providing information to a Minister. Consent from the taxpayer, in itself, does not generally authorise the Commissioner to disclose information that is covered by the taxation secrecy provisions.

Difficulties with new disclosure requirements

36. If an officer is concerned about providing certain information to Ministers, they are advised to consult their Manager or Parliamentary Services. Further advice may be obtained from [Government Law and Practice, Legal Services Branch](#).

subject references

taxpayer information
privacy
disclosure of taxpayer information
Ministerial correspondence
parliamentary privilege
performance of duties
secrecy

legislative references

Income Tax Assessment Act 1936 section 16
Income Tax Assessment Act 1936 subsection 16(2)
Income Tax Assessment Act 1936 subsection 16(2A)
Income Tax Assessment Act 1936 subsection 16(4)
Income Tax Assessment Act 1936 paragraph 16(4)(l)
Income Tax Assessment Act 1936 subsection 16(5A)

Taxation Administration Act 1953 section 3C
Taxation Administration Act 1953 sections 8XA, 8XB
Taxation Administration Act 1953 Schedule 1 section 355-5

A New Tax System (Australian Business Number) Act 1999 section 30
A New Tax System (Bonuses for Older Australians) Act 1999 section 3A
A New Tax System (Family Assistance) (Administration) Act 1999, Part 6 Div2
Crimes (Taxation Offences) Act 1980 section 4
Debits Taxation Administration Act 1982 section 7
Diesel and Alternative Fuel Grant Scheme Act 1999 section 46
Excise Act 1901 section 159
Fringe Benefit Tax Assessment Act 1986 section 5
Higher Education Funding Act 1988 sections 78, 98K, 98ZA, 106F, 106ZA & 106ZD
Higher Education Support Act 2003 sections 179-10, 179-20 and 179-25
Loan (Income Equalisation Deposits) Act 1976 section 27C
Petroleum Resource Rent Tax Assessment Act 1987 section 17
Products Grants and Benefits Administration Act 2000 section 47
Sales Tax Assessment Act 1992 section 110
Sales Tax Procedures Act 1934 section 4A
Student Assistance Act 1973 section 12ZU
Superannuation Contributions Tax (Assessment and Collection) Act 1997 section 32
Superannuation Contributions (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997 section 28
Superannuation (Government Co-contribution for Low Income Earners) Act 2003 section 53
Superannuation Guarantee (Administration) Act 1992 section 45

Superannuation (Self Managed Super Funds)
Taxation Act 1987 section 18
Superannuation Industry (Supervision) Act 1993
 section 252C
Swimming Pools Tax Refund Act 1992 section 13
Taxation (Interest on Overpayments and Early
Payments) Act section 8
Tobacco Charges Assessment Act 1955 section 10
Termination Payments Tax (Assessment and
Collection) Act 1997 section 23
Wool Tax (Administration) Act 1964 section 8

related public rulings

related practice statements Corporate Management Practice Statement,
 PS CM 2003/13 - Provision of Services to the
 Treasurer and Minister for Revenue and Assistant
 Treasurer.

other references *A Guide to Ministerials*
 Department of Finance and Administration (DoFA)
Finance Circular 2001/01
ATO Receivables Policy

file references 2003/06260

Date issued: **18 August 2005**
 Date of effect: **30 July 2004**
 Other Business Lines consulted **Excise; GST; LB&I; OCTC; OPS; PMD; PTax; SB; Superannuation**

Amendment history: **18 August 2005:**
 As a result of advice received from the Solicitor-General on 5 May 2005
1 July 2006:
 Update reference to section 68 of the TAA to section 355-5 of Schedule 1 to the TAA
15 March 2007:
 Move reference to the *Superannuation (Government Co-Contribution For Low Income Earners) Act 2003* from Table 3 in Attachment A into Table 1 of Attachment A

ATTACHMENT A

Can information be disclosed to a Minister in the performance of an officer's duty?

Table 1 Information can be disclosed to Minister in performance of duties

Act	Relevant tax	Secrecy provisions	Can information be disclosed to the Minister in the 'performance of an officer's duties'?
<i>Debits Taxation Administration Act 1982</i>	Debits	Section 7	Yes
<i>Fringe Benefit Tax Assessment Act 1986</i>	Fringe benefits	Section 5	Yes
<i>Higher Education Funding Act 1988</i>	HECS	Sections 78, 98K, 98ZA, 106F & 106ZA & 106ZD	Yes
<i>Income Tax Assessment Act 1936</i>	Income	Section 16	Yes
<i>Petroleum Resource Rent Tax Assessment Act 1987</i>	Petroleum resource rent	Section 17	Yes
<i>Sales Tax Procedures Act 1934</i>	Sales	Section 4A	Yes
<i>Student Assistance Act 1973</i>	Student financial supplement loan scheme	Section 12ZU	Yes
<i>Superannuation Contributions Tax (Assessment and Collection) Act 1997</i>	Superannuation contributions	Section 32	Yes
<i>Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997</i>	Superannuation contributions surcharge for high income members of constitutionally protected superannuation funds	Section 28	Yes
<i>Superannuation (Government Co-contribution for Low Income Earners) Act 2003</i>	Government co-contributions for superannuation	Section 53	Yes
<i>Superannuation Guarantee (Administration) Act 1992</i>	Super Guarantee	Section 45	Yes

<i>Superannuation (Self Managed Super Funds) Taxation Act 1987</i>	Superannuation	Section 18	Yes
<i>Swimming Pools Tax Refund Act 1992</i>	Swimming pool tax	Section 13	Yes
<i>Taxation Administration Act 1953</i>	Administration	Section 3C	Yes
<i>Taxation (Interest on Overpayments and Early Payments) Act 1983</i>	Interest on overpayments and early payments	Section 8	Yes
<i>Termination Payments Tax (Assessment and Collection) Act 1997</i>	Termination payments	Section 23	Yes

Table 2 – Legislation does not expressly refer to disclosure to Minister

Act	Relevant tax	Secrecy provisions	Can information be disclosed to the Minister in the 'performance of an officer's duties'?
<i>A New Tax System (Bonuses for Older Australians) Act 1999</i>	Bonuses	Section 3A	Does not expressly refer to disclosure to a Minister – refers to Information Privacy Principles
<i>A New Tax System (Family Assistance) (Administration) Act 1999</i>	Family assistance	Part 6 Division 2	Does not expressly refer to disclosure to a Minister – gives Secretary power to use information
<i>Crimes (Taxation Offences) Act 1980</i>	Criminal offences	Section 4	Does not expressly refer to disclosure to a Minister
<i>Higher Education Support Act 2003</i>	FEE-HELP and other higher education support schemes	Sections 179-10, 179-20 and 179-25	Does not expressly refer to disclosure to a Minister
<i>Loan (Income Equalisation Deposits) Act 1976</i>	Income	Section 27C	Does not expressly refer to disclosure to a Minister
<i>Superannuation Industry (Supervision) Act 1993</i>	Superannuation	Section 252C	Does not expressly refer to disclosure to a Minister
<i>Tobacco Charges Assessment Act 1955</i>	Tobacco charges	Section 10	Does not expressly refer to disclosure to a Minister
<i>Taxation Administration Act 1953</i>	Administration	Sections 8XA, 8XB	Does not expressly refer to disclosure to a Minister
<i>Wool Tax (Administration) Act 1964</i>	Wool tax	Section 8	Does not expressly refer to disclosure to a Minister

Table 3 - Information cannot be provided to Minister except where Parliamentary Privilege applies

Act	Relevant tax	Secrecy provisions	Can information be disclosed to the Minister in the 'performance of an officer's duties'?
<i>A New Tax System (Australian Business Number) Act 1999</i>	ABNs	Section 30	No
<i>Diesel and Alternative Fuel Grant Scheme Act 1999</i>	Diesel and alternative fuels grants scheme	Section 46	No
<i>Excise Act 1901</i>	Excise	Section 159	No
<i>Products Grants and Benefits Administration Act 2000</i>	Products, grants and benefits	Section 47	No
<i>Sales Tax Assessment Act 1992</i>	Sales	Section 110	No
<i>Taxation Administration Act 1953</i>	Indirect taxes (including GST, Luxury Car Tax, Wine Equalisation Tax, etc)	Section 355-5	No