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

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Australian Government
Australian Taxation Office

Practice Statement
Law Administration

PS LA 2004/9

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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:	Disclosure to Ministers of information about the affairs of taxpayers
PURPOSE:	To explain Australian Taxation Office (ATO) policy concerning disclosure of taxpayer information to Ministers

STATEMENT

1.   Taxation officers are bound by the secrecy provisions in Division 355 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).[1]

2.   The secrecy provisions apply to protected information as defined in section 355-30 of Schedule 1 to the TAA, which is information that was disclosed or obtained under or for the purposes of a taxation law (other than the *Tax Agent Services Act 2009*), and which identifies, or is reasonably capable of being used to identify, any entity.

3.   Note that protected information to which Division 355 applies is not equivalent to the PROTECTED security classification of information as defined under the Information classification and handling CMPI 2006/07/10. Protected information for the purposes of Division 355 would generally be classified as Sensitive for security classification purposes, although information about some taxpayers (such as taxpayers at risk of personal harm) might have a PROTECTED security classification. All subsequent references to protected information in this Practice Statement refer to this term as defined in Division 355.

4.   Protected information may only be disclosed to a Minister if the disclosure is within the strict limits set out in Division 355.

5.   Information that in no way identifies an entity is not protected information and it may be disclosed to a Minister without further reference to Division 355.

6.   Protected information that is already available to the public (so long as it was not made public as a result of a breach of Division 355) may also be disclosed to a Minister without further reference to Division 355.

7.   Protected information about a Minister's own taxation affairs may be disclosed to that Minister.

8.   Protected information about a taxpayer may also be disclosed to a Minister if that taxpayer has appointed the Minister as their representative in the approved form.

9.   Otherwise, protected information can be provided to a Minister only in the limited circumstances set out in section 355-55. These disclosures are:

   •   to enable any Minister to exercise a power or perform a function under a taxation law

   •   to enable the Minister (see paragraph 25 of this practice statement) to reply directly to taxpayer representations

   •   to the Minister (see paragraph 30 of this practice statement) to inform decisions under the Compensation for Detriment Caused by Defective Administration (CDDA) Scheme

   •   to the Finance Minister, for making decisions about an act of grace payment connected to the administration of a taxation law, or waiver of a tax debt, or

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

- to any Minister for the purpose of making a decision about or administering an ex-gratia payment, whether or not the payment is tax-related.

10. If a taxation officer who proposes to disclose protected information to a Minister under section 355-55 is not an SES officer, acting SES Officer or the Commissioner or a Second Commissioner, the disclosing officer:

- must obtain agreement that their disclosure is covered by the relevant table item in section 355-55

- from the Commissioner, a Second Commissioner, or an SES or acting SES officer of the ATO who is not a direct supervisor of the disclosing officer.

11. A taxation officer cannot disclose protected information to a Minister under the general disclosure provision in section 355-50, that is, in performing their duties as a taxation officer.

12. Under section 355-60, parliamentary privilege does not over-ride the specific rules about disclosures to Ministers in Division 355. Protected information (apart from publicly available information, to which section 355-45 applies) cannot be disclosed to Ministers on the basis that parliamentary privilege would apply to the disclosure, in documents such as responses to questions on notice and question time briefs.

13. However, protected information **can** be provided to a parliamentary committee even if one or more members of that committee happen to be Ministers. This is because of the combined effect of section 16 of the *Parliamentary Privileges Act 1987*, and subsection 355-60(2). This is further explained in the note to subsection 355-60(2) and the Explanatory Memorandum to the Tax Law Amendment (Confidentiality of Taxpayer Information) Bill 2010 (Explanatory Memorandum) at paragraph 4.30.

14. 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 the EOI Unit in Large Business and International prior to any disclosure being made.

15. Tax officers who are proposing to make a disclosure of information to a Minister should consult Parliamentary Services.

16. For further information on the provision of ministerial and parliamentary services to Treasury portfolio ministers please consult the following Corporate Management Practice Statement PS CM 2003/13 *Provision of Services to Treasury Portfolio Ministers and Parliament*.

EXPLANATION

Division 355 and protected information

17. The secrecy provisions in Division 355 apply to protected information. Protected information is defined in subsection 355-30(1) as information that:

- was disclosed or obtained under or for the purposes of a taxation law (other than the *Tax Agent Services Act 2009*),

- relates to the affairs of an entity, and

- identifies, or is reasonably capable of being used to identify, the entity.

18. Therefore, if information does not identify an entity, and it is not possible to identify an entity from the information, even by a process of deduction, that

information is not protected information, and it may be disclosed to a Minister without further reference to Division 355.

19. It should be noted that simply removing a taxpayer's name from information will often not be enough to prevent the information from being protected information. The Explanatory Memorandum explains in Example 2.11 at paragraph 2.20, that even aggregate data may be protected information for the purposes of Division 355. The example is based on the hypothetical 'haysnorkel' industry:

> **Example 2.11**
>
> The ATO collects information on the volume of production of haysnorkels in Australia. Because haysnorkel production is a very specialised industry, only three firms manufacture haysnorkels in Australia. One major producer, meeting the needs of most of the Australian market, and two very much smaller boutique producers manufacture only a small number of haysnorkels each year. If the ATO were to disclose information on the aggregate production of haysnorkels in Australia, then it would be possible for anyone with a general knowledge of the haysnorkel market to deduce (with a fair degree of accuracy) how many haysnorkels were being manufactured by each producer. In this case, the disclosure of aggregate production information would, though not explicitly identifying a particular taxpayer, allow a particular haysnorkel producer to be identified. Such aggregate information would therefore be protected information.

20. Protected information (whether or not it includes names and other obvious identifiers) can only be recorded and disclosed in circumstances permitted by Division 355. It is an offence for a taxation officer to record or disclose protected information in other circumstances (subsection 355-25(1) sets out the offence provision that applies to taxation officers).

Disclosing protected information to Ministers

21. Division 355 permits a taxation officer to disclose protected information to Ministers in the limited circumstances set out in the table in section 355-55. These disclosures are:

- to enable any Minister to exercise a power or perform a function under a taxation law (table item 1)

- to enable the Minister (see paragraph 25 of this practice statement) to respond directly to the entity the information is about in relation to a representation made by that entity either to the Minister or another member of Parliament (table item 2)

- to the Minister (see paragraph 30 of this practice statement) to inform decisions made under the Compensation for Detriment Caused by Defective Administration Scheme (table item 3)

- to the Finance Minister, for the purpose of the making or possible making of an act of grace payment connected to the administration of a taxation law, or the waiver or possible waiver of a tax debt (table item 4), or

- to any Minister for the purpose of making a decision about, or administering an ex-gratia payment, whether or not the payment is tax-related (table item 5).

Item 1 in the table in section 355-55: disclosing protected information to Ministers exercising taxation law powers or functions

22.   Table item 1 in section 355-55 permits a taxation officer to disclose protected information to any Minister for the purpose of enabling that Minister to exercise a power or perform a function under a taxation law. The Explanatory Memorandum explains that a Minister for this purpose will usually be the Treasurer. However, there may be other Ministers either within or outside the Treasury portfolio with a function under a taxation law.

23.   The Explanatory Memorandum includes Examples 5.13 and 5.14 at paragraph 5.33 to which this table item applies:

> **Example 5.13**
>
> Subdivision CB, Part III of Division 3 of the ITAA 1936 provides that the Treasurer may determine that a company is a regional headquarters company and is eligible to claim a tax deduction for certain expenditures incurred. It is not an offence for a taxation officer to provide information about a company to the Treasurer to enable him to determine whether or not that company is a regional headquarters company.
>
> **Example 5.14**
>
> Under subsection 14(2) of the ITAA 1936, the Minister has the function of tabling a copy of the Commissioner's annual report outlining the operation of that Act. This report may include taxpayer information relating to any breaches of the Act over the course of the year (see subsection 14(1)). It is not an offence for the Commissioner to disclose taxpayer information in the annual report to the Minister as the Minister has the function under a taxation law of tabling that report in each House of the Parliament.

Item 2 in the table in section 355-55: disclosing protected information for Ministerial replies to representations

24.   Table item 2 in section 355-55 permits a taxation officer to disclose protected information to 'the Minister' if:

(a)   the information is about an entity, and

(b)   the disclosure is for the purpose of enabling the Minister to respond directly to the entity in relation to a representation made by the entity to the Minister or to another member of Parliament.

25.   'The Minister' for this purpose means any of the Ministers appointed to administer the department (in this case, the Department of the Treasury) that administers the relevant law (see section 19A of the *Acts Interpretation Act 1901*). These Ministers are the Treasurer and any assistant Minister or parliamentary secretary for the Treasury portfolio.

26.   Care must be taken to ensure that only information about the entity making the representation is disclosed to the Minister. Protected information about any other entity must not be disclosed to the Minister.

27.   The Explanatory Memorandum includes Example 5.15 at paragraph 5.34 to illustrate the operation of this table item:

> **Example 5.15**
>
> Fred writes to his local member (who is also the Minister for Defence) saying that the ATO has charged him a penalty for late payment, when his payment was only slightly overdue and for a very good reason. His local member forwards the letter to the Treasurer. It is not an offence for a taxation officer to provide information about Fred's tax affairs to the Treasurer to enable the Treasurer to respond to Fred's concerns.

28. This example highlights the fact that protected information cannot be disclosed under this table item to any Minister or Member of Parliament apart from Treasury portfolio Ministers.

29. However, in the context of representations, a taxpayer may appoint an MP or Minister as their representative, in the approved form. If this occurs, protected information may be disclosed to the MP or Minister without applying the exception in this table item: see subsection 355-25(2).

Item 3 in the table in section 355-55: disclosing protected information for CDDA decisions

30. Table item 3 in section 355-55 permits a taxation officer to disclose protected information to the Minister for the purpose of informing decisions made under the CDDA Scheme. 'The Minister' for this purpose is a Treasury portfolio minister.

Item 4 in the table in section 355-55: disclosing protected information for act of grace payment and tax debt waiver decisions

31. Table item 4 in section 355-55 permits a taxation officer to disclose protected information to the **Finance Minister** for the purpose of:

    (a) the making or possible making of a payment referred to in section 33 of the *Financial Management and Accountability Act 1997* (an act of grace payment) in connection with administering a taxation law, or

    (b) the waiver or possible waiver of a tax debt, under section 34 of the *Financial Management and Accountability Act 1997*.

32. This provision does not permit protected information to be disclosed to assist the Finance Minister to make decisions about waivers of non-tax debts, nor to assist with act of grace payments that are unrelated to the administration of a taxation law.

Item 5 in the table in section 355-55: disclosing protected information for ex-gratia payment decisions

33. Table item 5 in section 355-55 permits a taxation officer to disclose protected information to any Minister for the purpose of determining whether to make an ex-gratia payment or administering (for example, delivering) such a payment.

34. It does not matter for this purpose whether the ex-gratia payment is related or unrelated to taxation laws.

35. The Explanatory Memorandum includes Example 5.17 at paragraph 5.40 to illustrate the operation of this table item:

    Example 5.17

    The Prime Minister and Cabinet determine that an ex-gratia payment should be granted to certain family members of former Australian servicemen. The Department of Defence does not have up to date contact information for these individuals and is unable to get in touch with them. The ATO, which does have current contact details for the relevant individuals, is able to provide this information to the Defence Minister to allow these payments to be made.

Senior officer agreement required for disclosures under section 355-55

36.   Under paragraph 355-55(1)(c), if an officer who proposes to disclose protected information to a Minister under one of the table items in section 355-55 is *not* the Commissioner, a Second Commissioner or an SES employee or acting SES employee of the ATO, the officer must obtain agreement that the disclosure is covered by the relevant table item, from:

   (i)   the Commissioner,

   (ii)   a Second Commissioner, or

   (iii)   an SES employee or acting SES employee of the ATO who is not a direct supervisor of the disclosing officer.

37.   A direct supervisor is the officer with immediate managerial responsibilities for the disclosing officer (their manager to whom they report on SAP in the ATO). An SES officer who is the manager of the disclosing officer's manager would not be a direct supervisor of the disclosing officer because the relationship between the disclosing officer and the SES officer lacks immediacy and directness. So, for example, if an EL1 officer has an EL2 manager who in turn has an SES manager, then the SES officer is not a 'direct supervisor' of the EL1 officer and could provide the necessary agreement to a disclosure of protected information the EL1 officer proposes to make under section 355-55.

Other exceptions are not available for disclosing protected information to Ministers

38.   Section 355-60 stipulates that sections 355-45 (publicly available information) and 355-55 (the exhaustive list of table items set out above) are the only exceptions on which a taxation officer may rely in order to make a disclosure of protected information to a Minister.

39.   A taxation officer cannot disclose protected information to a Minister under the general disclosure provisions in section 355-50, that is, in performing their duties as a taxation officer.

40.   Parliamentary privilege also cannot be relied on to support a disclosure of protected information to a Minister.

41.   Parliamentary privilege refers to the special legal rights and immunities applying to 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 incidentally to, the business of a House of Parliament.

42.   Under section 355-60, parliamentary privilege does not over-ride the specific rules about disclosures to Ministers in Division 355. Protected information (apart from publicly available information, to which section 355-45 applies) cannot be disclosed to Ministers on the basis that parliamentary privilege would apply to the disclosure, in documents such as responses to questions on notice and question time briefs.

43.   However, protected information **can** be provided to a parliamentary committee even if one or more members of that committee happen to be Ministers. The Explanatory Memorandum explains that this is because the information would be disclosed to the Minister as a committee member, not as a Minister as such.

Ministers as taxpayers

44.   It is not an offence for a taxation officer to disclose protected information about an entity to the entity the information is about (see subparagraph 355-25(1)(a)(ii))..

45.   This means that, just as for any other taxpayer, protected information about a Minister's own affairs may be disclosed to that Minister.

Ministers as representatives of taxpayers

46.   It is not an offence for a taxation officer to disclose protected information about an entity to another entity that subsection 355-25(2) refers to as a 'covered entity'.

47.   Subsection 355-25(2) contains an exhaustive list of covered entities. These are: the taxpayer's registered tax agent or BAS agent, their legal practitioner, an insolvency practitioner appointed to manage the taxpayer's affairs, the taxpayer's legal personal representative (for example, the executor of a deceased estate), the guardian of a taxpayer who is a minor or has a mental incapacity, a fellow-member of a consolidated or MEC group, or **a representative the taxpayer has nominated in the approved form to act on their behalf with respect to protected information**. The last type of representative is specified in paragraph 355-25(2)(g).

48.   While many representatives appointed in the approved form by taxpayers for the purpose of 355-25(2)(g) will be 'lay' representatives such as a family member, a taxpayer could if they wish appoint a Minister under the same provision.

49.   If a taxpayer nominates a Minister in accordance with paragraph 355-25(2)(g), in the approved form, as their representative to act on their behalf with respect to protected information, a taxation officer will be able to disclose protected information about that taxpayer to that Minister, without reference to section 355-55.

50.   This is so despite the operation of section 355-60 (which excludes applying any exceptions apart from sections 355-45 and 355-55 to disclose protected information to a Minister), because subsection 355-25(2) is not an exception to the disclosure offence in subsection 355-25(1). Rather, it provides for circumstances in which an offence cannot be committed and so no exception to the offence need be relied on.

Disclosing publicly available information

51.   Section 355-45 states that it is not an offence for a taxation officer to disclose protected information if it is already available to the public (other than as a result of breach of one of the offence provisions in Division 355).

52.   Information is available to the public if it is in open court records, books, newspapers and other sources that are generally available to the public (note that speculation or unconfirmed reports do not constitute information for these purposes). The Explanatory Memorandum explains at paragraph 4.35 that 'information does not cease to be 'publicly available' if a member of the public has to pay a fee to access that information'.

53.   A taxation officer may disclose information of this kind to any entity, including to a Minister, without further reference to Division 355.

54.   It is important to note, as the Explanatory Memorandum explains at paragraph 4.37, that publicly available information being disclosed in

accordance with section 355-45 must not be supplemented or qualified by non-public protected information from ATO records.

Tax file numbers (TFNs)

55.   Tax file numbers are not protected information for the purposes of Division 355. TFNs cannot be disclosed under any of the exceptions in Division 355, including the exceptions discussed in this Practice Statement under which protected information may be disclosed to Ministers.

56.   TFNs can only be disclosed by a taxation officer in accordance with the specific TFN rules in section 8WB of the TAA.

Operation of the Privacy Act 1988 (Privacy Act)

57.   Australian Privacy Principle (APP) 6 in Schedule 1 of the Privacy Act regulates the disclosure of personal information (that identifies a living individual) by an agency such as the ATO. APP 6.2(b) permits the disclosure of personal information where the disclosure 'is required or authorised by or under Australian law.' Where a disclosure of protected information which is also personal information is permitted under Division 355 of Schedule 1 of the TAA, the disclosure will be authorised by law for the purposes of APP 6.2(b). Therefore the disclosure will be lawful under the Privacy Act.

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

°   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 Public Groups and International prior to any disclosure being made.

Amendment history

Date of amendment	Part	Comment
7 April 2014	Paragraphs 57 & 58	Updated to reflect changes to the *Privacy Act 1988*
	Contact details	Updated.
3 May 2013	Paragraph 3	Unnecessary punctuation removed; 'Protected' capitalised; 'S' capitalised in 'sensitive'; ATO Guidelines to Information Security changed to Information classification and handling CMPI 2006/07/10; 'legislative' changed to 'subsequent'.
	Paragraph 13	'It is' changed to 'This'.
	Paragraph 16	PS CM 2003/13 Provision of Services to Treasurer and Minister for Revenue and Assistant Treasurer changed to PS CM 2003/13 Provision of Services to Treasury Portfolio Ministers and Parliament.
	Paragraph 46	Subsection 355-55(2) changed to subsection 355-25(2).
	Related practice statements	PS CM 2003/13 Provision of Services to Treasurer and Minister for Revenue and Assistant Treasurer changed to PS CM 2003/13 Provision of Services to Treasury Portfolio Ministers and Parliament.
	Contact details	Updated.
4 February 2011	Throughout	Updated as a result of Division 355 of Schedule 1 of the *Taxation Administration Act 1953*
15 March 2007	Throughout	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
1 July 2006	Throughout	Update reference to section 68 of the TAA to section 355-5 of Schedule 1 to the TAA
18 August 2005	Throughout	As a result of advice received from the Solicitor-General on 5 May 2005

Subject references	protected information
	privacy
	disclosure of protected information
	parliamentary privilege
	performing duties as a taxation officer
	secrecy
Legislative references	TAA 1953 8WB
	TAA 1953 Sch 1
	TAA 1953 Sch 1 Div 355
	TAA 1953 Sch 1 355-25(1)
	TAA 1953 Sch 1 355-25(1)(a)(ii)
	TAA 1953 Sch 1 355-25(2)
	TAA 1953 Sch 1 355-25(2)(g)
	TAA 1953 Sch 1 355-30(1)
	TAA 1953 Sch 1 355-45
	TAA 1953 Sch 1 355-50
	TAA 1953 Sch 1 355-55
	TAA 1953 Sch 1 355-55(1)(c)
	TAA 1953 Sch 1 355-55(2)
	TAA 1953 Sch 1 355-60
	TAA 1953 Sch 1 355-60(2)
	AIA 1901 19A
	FMAA 1997 33
	FMAA 1997 34
	Parliamentary Privileges Act 1987 16
	Privacy Act 1988 Sch 1
	Tax Agent Services Act 2009
Related practice statements	Corporate Management Practice Statement, PS CM 2003/13 – Provision of Services to Treasury Portfolio Ministers and Parliament.
Other references	A Guide to Ministerials
	Department of Finance and Administration (DoFA) Finance Circular 2001/01
	ATO Receivables Policy
	Explanatory Memorandum to the Tax Law Amendment (Confidentiality of Taxpayer Information) Bill 2010
File references	2003/06260
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Other Business Lines consulted	Excise; GST; LB&I; OCTC; OPS; PMD; PTax; SB; Superannuation