

# ***PS LA 2004/9 - Disclosing information about the affairs of a taxpayer to Ministers***

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# Disclosing information about the affairs of a taxpayer to Ministers

This Law Administration Practice Statement outlines the protocol on disclosing protected information about taxpayers to Ministers.

*This practice statement is an internal ATO document, and is an instruction to ATO staff.*

*Taxpayers can rely on this practice statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty. Nor will they have to pay interest on the underpayment provided they reasonably relied on this practice statement in good faith. However, even if they don't have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.*

## 1. What this practice statement is about

Division 355 of Schedule 1 to the *Taxation Administration Act 1953* (TAA)<sup>1</sup> contains the provisions which provide for taxpayer confidentiality, and sets out the rules that we, as taxation officers, need to abide by when dealing with protected information.

This practice statement explains the exceptions to these rules when disclosing protected information to Ministers.

The exceptions are:

- general exceptions (that is, they don't just apply to disclosures to Ministers), and
- specific exceptions (relating only to disclosures to Ministers).

**Note:** this practice statement does not apply to disclosure of protected information to Parliamentary Committees, even if members of that Committee happen to be Ministers. Protected information can be provided to Parliamentary Committees.<sup>2</sup>

## 2. What is 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.

When information doesn't identify an entity, and it isn't possible to identify an entity from the information,<sup>3</sup> it is not protected information, and Division 355 does not apply.

Nor are tax file numbers protected information. TFNs cannot be disclosed under any of the exceptions in this practice statement.

**Note:** the protected information to which Division 355 applies does not equate to information that is classified under our internal security classification of 'protected'.<sup>4</sup>

## 3. General exceptions which allow disclosure of protected information to a Minister

The following are general exceptions to the rules for disclosing protected information, and these apply equally to disclosing such information to a Minister.

### *Where the protected information is already available to the public*

Provided the protected information was not made available through a breach of Division 355, it can be disclosed.<sup>5</sup> However, you need to take care that you don't supplement or qualify that information with information from ATO records.

Information is available to the public if it is in open court records, books, newspapers or other sources that are generally available, even if a member of the public has to pay a fee to access it.

<sup>1</sup> All legislative references in this practice statement are to Schedule 1 to the TAA unless otherwise stated.

<sup>2</sup> Because of the combined effect of section 16 of the *Parliamentary Privileges Act 1987*, and subsection 355-60(2).

<sup>3</sup> Simply removing a taxpayer's name from information does not always mean that the identity of the taxpayer cannot still be identified. You need to consider whether the information as a whole still allows the taxpayer's identity to be ascertained, even by a process of deduction.

<sup>4</sup> See CEI 2014/06/07 *Security* and related guidelines.

<sup>5</sup> Section 355-45.

### **Where the protected information relates to the Minister's own affairs**

Just as for any other taxpayer, protected information about a Minister's own affairs may be disclosed to that Minister.<sup>6</sup>

### **Where the Minister is representing a taxpayer**

Protected information can be disclosed to 'covered entities',<sup>7</sup> which amongst others include a representative the taxpayer has nominated in the approved form to act on their behalf.

A taxpayer may, if they wish, nominate a Minister to act on their behalf.

## **4. Specific exceptions which allow disclosure of protected information to a Minister**

Section 355-55 sets out the specific exceptions relating to disclosure to Ministers. These are as follows.

### **To enable a Minister to exercise taxation law powers or functions<sup>8</sup>**

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.

The Explanatory Memorandum to the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2010 (the Explanatory Memorandum) includes examples of when this exception would apply:

#### **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.

<sup>6</sup> Subparagraph 355-25(1)(a)(ii).

<sup>7</sup> Subsection 355-25(2).

<sup>8</sup> Table item 1 in section 355-55.

### **To enable the Minister to reply to representations<sup>9</sup>**

Protected information can be disclosed to the Minister if:

- the information is about an entity, and
- 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.

Here, 'the Minister' means any of the Ministers appointed to administer the Department of the Treasury, that is the Treasurer and any assistant Minister or parliamentary secretary for the Treasury portfolio.

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.

The Explanatory Memorandum includes an example of when this exception would apply:

#### **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.

Note that Fred's taxpayer information cannot be provided to his local member. A letter may be provided to Fred's local member noting that the Treasurer has responded directly to Fred, provided that letter does not disclose any taxpayer information about Fred.

### **To inform decisions made under the CDAA Scheme<sup>10</sup>**

Protected information may be disclosed to a Treasury portfolio minister, if it is for the purpose of informing decisions made under the Compensation for Detriment Caused by Defective Administration Scheme.

### **To inform decisions about tax debt waivers and act of grace payments<sup>11</sup>**

Protected information can be disclosed to the Finance Minister for the purpose of:

- the making or possible making of a payment referred to in section 65 of the *Public Governance, Performance and Accountability Act 2013* (about act of grace payments) in connection with administering a taxation law, or

<sup>9</sup> Table item 2 in section 355-55.

<sup>10</sup> Table item 3 in section 355-55.

<sup>11</sup> Table item 4 in section 355-55.

- the waiver or possible waiver of a tax debt, under section 63 of the *Public Governance, Performance and Accountability Act 2013*.

However protected information cannot be disclosed to assist the Finance Minister to make decisions about waivers of non-tax debts, or act of grace payments that are unrelated to the administration of a taxation law.

### **To inform decisions about ex-gratia decisions<sup>12</sup>**

Protected information may be disclosed to any Minister for the purpose of determining whether to make an ex-gratia payment or administering (for example, delivering) such a payment, regardless of whether the ex-gratia payment is related or unrelated to taxation laws.

The Explanatory Memorandum includes an example of when this exception would apply:

#### **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.

### **To provide Ministers with information in relation to foreign investment in agricultural land<sup>13</sup>**

Protected information contained in the Register of Foreign Ownership of Agricultural Land may be provided to specified Ministers<sup>14</sup> for the purpose of enabling them to discharge specified responsibilities.

## **5. Approvals required for specific exceptions**

Paragraph 355-55(1)(c) provides that a disclosure of protected information under the specific exceptions relating to Ministers must be approved by either:

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

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).

<sup>12</sup> Table item 5 in section 355-55.

<sup>13</sup> Table item 6 in section 355-55.

<sup>14</sup> Relevant Ministers and responsibilities are listed in table item 6 in section 355-55.

If you are proposing to disclose information to a Minister, you should consult Parliamentary Services in the ATO Corporate business line, and refer also to Chief Executive Instruction CEI 2014/03/02 *Providing Services to Treasury Portfolio Ministers and Parliament*.

Further, if the information to be disclosed 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 the Public Groups and International business line prior to any disclosure being made.

## **6. When protected information can't be disclosed to a Minister**

The general exception to disclosing protected information, which is in the course of performing duties as a taxation officer, cannot be used to allow disclosure to a Minister.

Nor can parliamentary privilege<sup>15</sup> be relied upon to support disclosure.

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.

## **7. More information**

For more information, see:

- [CEI 2014/03/02 \*Providing Services to Treasury Portfolio Ministers and Parliament\*](#) (link available internally only)

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<sup>15</sup> Parliamentary privilege is 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.