



Dr Allan Hawke AC  
C/- Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600  
Via email: [foireview@ag.gov.au](mailto:foireview@ag.gov.au)

Dear Dr Hawke

The joint submission of 26 March 2013 by the Law Council of Australia and the Tax Institute to your review of the operation of the *Freedom of Information Act 1982* has prompted me to supplement the ATO's original 9 January submission by way of response. I note that the joint submission has been supported by both the Corporate Tax Association and the Institute of Chartered Accountants Australia in their submissions of 27 March and 28 March respectively.

### **Response to the joint submission**

The ATO agrees that the FOI Act serves an important and central role in Australia's system of government and its administrative law. We share with the Law Council and Tax Institute common ground in this, as we do in our commitment to the intent and advancement of open government. We have invested significant resources into ensuring that we comply with our FOI obligations and that we also promote the pro-disclosure philosophy underlying the 2010 FOI reforms. For example:

- whilst we currently have about 25 officers who work exclusively or predominantly on FOI cases, we have also established an Information Law Network comprising about 30 people from across ATO business lines, which is responsible for assisting the FOI decisions makers to obtain the requested documents from the business lines,
- any number of staff from the business lines may be required to search for and deliver documents back to the FOI decision makers (on average, this would likely involve at least another 3 people for each request),
- we have established administrative release schemes providing ready access to information (for example, to enable company liquidators to obtain information about their companies without having to lodge an FOI request), and
- each year we spend several million dollars (about \$3.3 million last financial year) in obtaining legal support to ensure we respond to the hundreds of FOI requests we receive annually in as timely and accurate way as possible

Consistent with the objectives of the FOI reforms, we are committed to providing ready access to information on an informal basis, without requiring taxpayers and others to have to resort to calling on their FOI rights. Promoting information sharing in this way assists in avoiding disputes arising or, if they do arise, resolving them as early as possible in a cost

effective manner. In this respect, we make it as easy as possible for taxpayers to obtain routine information about their own tax affairs outside of the FOI law.

This commitment applies also to taxpayers under audit, as reflected in our response to recommendation 3.4 of the Inspector General of Taxation's *Review into the Australian Taxation Office's use of early and Alternative Dispute Resolution* (July 2012). In the response we reaffirmed our commitment to promoting a policy of open and informal information sharing with taxpayers, enabling them to understand the action being taken against them. Our policy is set out in our *Large business and tax compliance* publication, where we refer to mutual obligations during compliance activities, including having ongoing, open and frank discussions and providing relevant information about processes as well as facts and evidence in a timely manner.

It is against this background that we suggested in our original submission there is merit in the proposition that consideration of an FOI request in the course of on-going compliance action by a regulatory or enforcement agency like the ATO be deferred until completion of the compliance action. In this we agree with the 14 December 2012 submission of the Australian Competition and Consumer Commission (ACCC).

It is significant to note that the vast majority of compliance activities do not result in an FOI request. In 2011-12, there were 599,424 compliance activities resulting in adjustments, and over the same period there were only 973 FOI requests (many of which were unrelated to such activities). Following recommendation 3.3 of the Inspector General of Taxation's review referred to above, the ATO is recording FOI requests made in compliance cases and will publish the result annually. This will give a more precise indication of how few compliance activities result in FOI requests.

The FOI Act contemplates the need for all agencies to guard against FOI processing becoming an undue distraction from their designated functions. In our view, where we have informally provided as much information as we can without seriously prejudicing the ongoing investigation, often no useful purpose can be served by formalising the process under FOI. If certain information has not been disclosed on request to a taxpayer informally, the reasons for that non-disclosure are likely to attract an exemption under the FOI law (for example, because disclosure at that time could reasonably be expected to prejudice the audit, or may disclose third party information subject to confidentiality). If so, then any FOI request will serve no purpose other than to put both the applicant and the ATO to unnecessary expense and inconvenience.

For example, in a recent matter, the ATO resisted production of documents requested under FOI during compliance action on the grounds that disclosure would prejudice on-going investigations, could reveal a confidential source, or could prejudice the ATO's investigative procedures. The decision was reviewed by the Administrative Appeals Tribunal. The Tribunal considered more than 60 different exemptions claimed by the ATO under the FOI Act. Of these, only two were remitted to the ATO to reconsider and three exemption claims were set aside. The three exemption claims that were set aside resulted in the release of just three bullet points and two paragraphs of information. The ATO spent over \$250,000 on the AAT proceedings. Deferring the FOI request until the investigation is complete would enable more information to be released because there would no longer be a reason to withhold information on the grounds that doing so would prejudice the on-going investigation.

In another case, the ATO spent more than two years and hundreds of thousands of dollars processing a number of exceptionally large FOI requests for a taxpayer while compliance activities were on-going. Some of the exemptions claimed related to prejudicing on-going

investigations. Final position papers have now issued in the matter and the ATO is in the process of reviewing the documents once again to determine what additional information can now be disclosed to the applicant. We consider that hundreds of hours of time and significant legal costs for the ATO and the applicant may have been avoided if the ATO was not required to process the application until after conclusion of the investigation.

For completeness, I note that the diversion of resources entailed in unnecessary FOI requests during the course of compliance action is not cured by a user-pays system. The concern lies in the delay and disruption of the compliance activity. If, as recognised in the joint submission, there are some who do use the FOI process for their own 'strategic reasons' (and we note, for example, that the ACCC expressed a concern in their submission about the use of FOI requests as a strategic tool during the course of their investigations), a user-pays approach to FOI would still allow such parties to pay to create delay and disruption of compliance activity.

The ATO is not seeking to deny taxpayers access to information, nor do we wish to avoid accountability for our decision making. Rather, we simply make the point that resorting to formal FOI processes during the course of an investigation may be ineffective for the applicant and unnecessarily burdensome to officers conducting the investigation. In this regard we agree with the ACCC's observation that some requests during an investigation by a regulatory agency may be made to divert resources away from the investigation by tying up investigation staff in identifying and collating documents. The better approach seems to be to focus on administrative release outside of FOI. Indeed that is the approach recommended by the Inspector General of Taxation. Clearly the ATO's submission does not set out to attack the right to make an FOI request, but it reflects the view that an FOI request made during an investigation may not result in any more disclosure than would be achieved through administrative release.

Yours sincerely

A handwritten signature in black ink, appearing to read "Chris Jordan". The signature is written in a cursive style with a horizontal line underneath the name.

Chris Jordan AO  
Commissioner of Taxation  
29 April 2013