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The power of FOI in negotiating repayment of arrears for PAYG, GST, SGC and income tax

Chris Wallis VICTORIAN BAR (GREENS LIST)

The first rule of advising in relation to negotiating repayment of tax arrears (or facing debt recovery actions)

The first rule of advising, in relation to arrears of pay as you go (PAYG) withholding, superannuation guarantee charge (SGC), goods and services tax (GST) or income tax, (facing recovery actions in relation to those arrears) is that in providing instructions a client often omits to mention important and relevant interactions with the Australian Taxation Office (ATO).

A prudent and experienced adviser will want to know the history of the client's dealings with the Commissioner in relation to any arrears before offering any advice because negotiating a favourable outcome in relation to repayment of arrears (or forestalling recovery action) is easier with a full knowledge of the client's previous dealings with the ATO.

Getting the instructions right

A client may admit a breach, or two, of previous repayment arrangements but omit details of bounced cheques or breaches of repayment arrangements.

The omissions may reflect the client's desire to project themselves favourably or often the client "burying their head in the sand".

Most often the omissions reflect the client's lack of attention to detail along the way, particularly if the client was without representation in the earlier stages.

Sometimes the client's omissions are the result of the client having only second hand knowledge of the interactions with the ATO — the client delegated the interaction to an employee who failed to make appropriate notes.

An inexpensive and relatively quick method for an adviser to obtain the back story to the client's instructions is to have the client authorise the adviser to make a request to the Commissioner for access to documents under the Freedom of Information Act 1982 (Cth) (the FOI Act).¹

An adviser would likely charge fees for making a request under the FOI Act and handling the ATO responses to the request.

Scope of this article

This article considers only issues arising in relation to making a request under the FOI Act and does not consider:

- how to obtain copies of publicly available information through the ATO's Information Publication Scheme;
- how to obtain documents, such as recent notices of assessment or recent tax returns, for which a request under the FOI Act is not necessary;²
- follow up steps if the documents obtained show deficiencies in the Commissioner's deliberative processes; and
- follow up steps if the Commissioner denies access.³

The FOI Act

The FOI Act:

- requires the ATO to publish documents that it uses in making decisions; and
- gives a taxpayer rights to access documents that the ATO holds, including documents that contain information about the taxpayer.

Section 15 of the FOI Act enables a person, who wishes to obtain access to a document held by the ATO, to request access to the document.

Making an FOI request

A client's authorised representative, a tax agent or legal representative, can make a request under s 15 of the FOI Act which:

- must be in writing and can take the form of a letter or email;
- should contain the tax file number (TFN) of the person on whose behalf the request is being made;
- can be mailed, faxed or emailed to the ATO; and
- should specify a period during which the documents sought were, or ought to have been, created.

The ATO provides a form, NAT 2877,⁴ for making a request under s 15. NAT 2877 can be filled in electronically or printed out and filled in manually.

The electronic version of NAT 2877 uses an interactive PDF format, a format which is discussed later in this article.

A little known subs (3) obliges ATO to take reasonable steps to assist the person to make the request in a manner that complies with s 15. The ATO's compliance with s 15(3) is addressed further below.

ATO duties after a request is lodged

When a request is lodged under s 15, the ATO:

- must acknowledge the FOI request within 14 days; and
- must give a decision and the reasons for that decision within 30 days.

If the request is for a large number of documents (or on its face appears to be for a large number of documents), the ATO may seek to negotiate an extended time for compliance.

What documents exist?

The ATO should hold at least the following documents in relation to payment arrangements and potential recovery processes:

- the make-up of the client's arrears at a date;
- demands the Commissioner has made;
- responses by the client;
- payment arrangements the client has entered during the relevant period;
- payments the client has made during the relevant period, when and with what accompanying documentation (specifically any directions in relation to allocation of proceeds);
- promises the client has made in relation to repayments;
- budgets the client has provided to the ATO;
- the client's breaches of payment arrangements;
- notifications the ATO gave of breaches;
- phone calls made/received and who from/to on what dates and what was discussed;
- the Commissioner's consideration of each submission the client has made;
- follow up correspondence from the ATO;
- opinions that the Commissioner has formed in relation to the client or the client's financial status or capacity;
- voice files or recordings of phone conversations; and
- documents recording the Commissioner's deliberative processes where the legislation requires the Commissioner to consider and form views in relation to any of the following:

- special circumstances;
- exceptional circumstances;
- all other circumstances;
- all relevant circumstances; and
- such circumstances as the Commissioner considers relevant.

Computer generated documents

The Commissioner maintains extensive, and in 2016, mostly integrated computer systems that provide the Commissioner with capacity to compile documents that do not otherwise exist.

Generally a computer compiled document will be in the form of a spreadsheet and reflect numerous data sources both within and outside the ATO. Computer compiled documents include responses entered directly by an operator at an ATO call centre.

Computer generated compilations can be made the subject of an FOI request.⁵

What ATO documents might reveal

ATO documents relevant to dealings in relation to arrears (or debt recovery actions) have the capacity to reveal:

- a litany of broken promises;
- a history of bounced cheques;
- unmet deadlines;
- details of breaches of payment arrangements;
- sloppy ATO decision making;
- inadequate ATO deliberations;
- incorrect applications of the legislation;
- documents that ought to exist but which do not exist;
- discretions that could have been applied but which were not considered;
- discretions applied incorrectly; and
- failures to adhere to procedures mandated by a relevant practice statement.⁶

What documents should be sought in relation to negotiating repayment of arrears

The adviser drafting a request under s 15:

- must identify what documents would exist in a perfect world;
- must determine what documents are relevant or likely to be useful; and
- must draft a request that secures the relevant and useful documents without making the request so extensive that an FOI officer prefers a practical refusal exemption.⁷

To the extent that the client can't provide copies of the documents that an advisor considers relevant, an FOI request is appropriate.

Documents reflecting information on the client's portal

Some of the information required will exist on the client's portal:

- dates of lodgement of business activity statement (BAS) and other returns; and
- dates on which payments were applied and manner in which the payments were applied.

An FOI request should not be made for documents that simply reflect information that is available on the client's portal and doing so builds in the potential for delays.

The client's tax agent usually has access to the client's portal. The client's solicitor might find it useful to obtain instructions to view the client's portal at the tax agent's office. Under the Tax Agent Services Act 2009 (Cth) the client's tax agent would require a written authorisation from the client to facilitate such a viewing.

Assumptions when drafting an FOI request

Never assume that the client has provided the complete story or the totality of the correspondence. For most clients negotiating payment of arrears (or even fighting debt recovery actions), advisers ought to assume that the most important document has been misplaced or withheld.

Always assume that any document recording the Commissioner's deliberative processes is relevant.

Always assume that process driven ATO officers, often without adequate training or supervision and focused on meeting managerial key performance indicators (KPIs), may have applied the law incorrectly in reaching a decision.

Always assume that documents recording internal ATO consideration of issuing garnishee notices are relevant.

To establish how far the ATO has proceeded, always consider requesting copies of:

- requests made by the ATO of banks in relation to client's assets; and
- replies by the banks;
- requests made by the ATO of property monitoring services such as RP Data; and
- responses provided by property monitoring services.

Assume that the ATO officers have made accurate records of all conversations. Documents provided under FOI have shown a refreshingly accurate reflection of phone conversations to which I have been a party, including within the last 12 months:

- in relation to a request for the release of some portion of the client's funds the Commissioner had garnered contrary to the principles in *Denlay v Commissioner of Taxation*⁸ (and the Commissioner's own Decision Impact Statement⁹), the file note included:
 - the time the ATO officer made the call;
 - the number called;
 - the time at which I returned the call (90 minutes later); and
 - the issues covered in the subsequent conversation;
- on another occasion, an ATO solicitor who had appeared in the Federal Court on a bankruptcy application, and who during a post hearing discussion over coffee to advance the resolution of the dispute, acknowledged that she, along with several other ATO solicitors, had been present at a Tax Bar continuing professional development (CPD) session when an Assistant Commissioner provided an assurance the effect of which was to preclude the Commissioner from attempting to bankrupt a client in the circumstances under consideration, entered details of the discussion as a file note.

Always be surprised if ATO officers didn't make accurate records:

- an officer may not have recorded a phone conversation; or
- an officer's record of a phone conversation may not be accurate.

When shown a record of a conversation, the client's memory will generally have them change anything that is incorrect. Incorrect or misleading records and opinions about a client formed by ATO officers can and should be corrected at the earliest opportunity.

The ATO's FOI officers and their work

The ATO has an extensive network of FOI officers and in my experience those officers are diligent, well informed and professional.

The FOI officers regularly provide documents that do not reflect well on the Commissioner including documents which establish that ATO officers have not dealt with a matter in the manner required by the legislation.

Unfortunately on a few occasions I have concluded that the FOI officer dealing with a request preferred to rely on an exemption rather than search for the documents.

The Commissioner's duty to assist an applicant wishing to make an FOI request

In the course of writing this article I decided to road test the ATO's compliance with s 15(3)(a) of the FOI Act

in relation to a request for a document that could be produced but which did not necessarily exist in discrete form.¹⁰

The request I “wished to make” would be for a document evidencing all accesses within the ATO to my personal file over the last 12 months.¹¹

It is extremely unlikely that a document existed that contained that information, however, the ATO security systems would surely log such access attempts and the document I required would be a compilation from the ATO computer held logs.¹²

I wasn’t concerned to know who had been accessing my files¹³ — just on what dates.

The immediate issue was whether a request for “documents evidencing all accesses within the ATO to my personal file over the last 12 months” be sufficient to deliver a document compiled from the computer logs or would the request need to be more specific — a request for records of actual access and attempted access?

How does the ATO satisfy its duty under s 15(3)

Aware of the duty that s 15(3) imposes on the ATO, my first step to search for assistance in addressing the immediate issue was to use the search function provided on www.ato.gov.au for “making an FOI request to the ATO”.

My search yielded 296 results:

- the first result provided access to the FOI Form (NAT 2877);
- the second result provided access to the ATO disclosure log kept in accordance with s 11A of the FOI Act;
- the third response provided irrelevant information on “Request remission of interest or penalties | Australian...”;
- the fourth and subsequent responses were similarly irrelevant.

A further search on “getting help to make an FOI request” drew similar responses.

The next search “ATO duty to provide assistance for FOI” returned more depressing results:

- the first response being “An application for remission of customs duty”; and
- the second response being “Licence to store goods with permission to sell duty free”.

A new approach — using Google

A search of google “making an FOI request to the ATO” provided access to several pages including:

- the FOI form at www.ato.gov.au/Forms/FOI-request-individuals-businesses/;

- making an FOI request;
- the disclosure log that the Commissioner maintains under s 11C of the FOI Act; and
- an A-Z index.

A third approach — the ATO website links

Clearly it was time to try another approach to establish how the ATO satisfied its duty under s 15(3)(a) of the FOI Act.

The web page housing the FOI form provides links to various ATO phone numbers and an access table at the foot of the page to “freedom of information” which in turn leads to the freedom of information disclosure log maintained in accordance with s 11C of the FOI Act accompanied by an explanation of “how to obtain a document mentioned in the disclosure log”. It also provided links to an order page, none of which provided any assistance of the type contemplated by s 15(3)(a).

Time to reach for the phone

The depressing results left no choice but to call one of the ATO phone numbers and so 13 28 61. After listening to voice recognition information, TFN requests and other “stuff” for in excess of 3 minutes and then spending another 2 minutes 45 seconds on hold, a most helpful operator came on line.

The operator, Marina, listened to what I wanted and said she would locate the relevant person and have them talk to me. Several minutes later Marina was back to apologise for the delay and confirmed that she was still searching for an appropriate person.

More minutes went by and Marina reported that the relevant person had told her that 15.3 (sic) did not put any duty on the Commissioner and that the Commissioner only needed to provide a form which he did on the ATO website.

The reference to 15.3 and several other things that Marina read out, including the pronouns “we” and “us” made it clear that the anonymous ATO officer had given Marina irrelevant nonsense based on internal ATO summary documents.

After I read s 15(1) and 15(3) to Marina she went back to the anonymous ATO officer whose advice on this occasion was that the Commissioner does not have a duty to provide any assistance and that the Australian Information Commissioner must provide the assistance was also wrong.

On a final referral back, after 45 minutes, the anonymous ATO officer told Marina to tell me that if I needed help I should send an email to the FOI section.

What does s 15(3) require

Section 15(3) is unambiguous:

Agency required to assist

(3) *Where a person:*

- (a) *wishes to make a request to an agency;* or
- (b) *has made to an agency a request that does not comply with this section;*

it is the duty of the agency to take reasonable steps to assist the person to make the request in a manner that complies with this section. [Emphasis added.]

The ATO is an agency, the Australian Information Commissioner is an entirely separate agency. Where a person wishes to make a request for documents held by the ATO, s 15(3) imposes the duty to assist on the ATO.

Although there has been no judicial consideration of the duty imposed by s 15(3)(a) in the recent Jockel's case,¹⁴ one of the issues was whether the Department of Immigration and Border Protection took all reasonable steps to assist the applicant in relation to a request made for "the Department's Australian State and Global structure charts; and contact lists that identify the position names, title, telephone number and email addresses of relevant staff members".¹⁵

The Australian Information Commissioner considered the operation of s 15(3) and said:

Requests for access s 15, requests involving the use of computers s 17

...

17 An agency may refuse a request that does not meet the formal requirements. However, an agency also has a duty to take reasonable steps to assist a person to make a request that complies with the formal requirements (s 15(3)). This duty applies both when a person wishes to make a request and when they have made a request that does not meet the formal requirements.

Earlier in *Apache Energy Pty Ltd and Chief Executive Officer of the National Offshore Petroleum Safety and Environmental Management Authority and Lander & Rogers Lawyers*¹⁶ Senior Member Fice, addressing an actual request, rather than a request that a person wished to make, said:

25 ... Taking account of s 15(3), which provides that where a request does not comply with s 15, the agency must take reasonable steps to assist the person to make a request in a manner that complies with the section, the necessary inference to be drawn from that section is that upon a request being made to an agency, it must first determine whether the request has been properly made, in the sense that it requires the agency to respond to the request. If the agency determines that the request is not properly made, it must assist the person to make a compliant request. ...

178 ... It is also the duty of the original decision-maker to take reasonable steps to assist the person making the application to make it in a manner which complies with s 15.

The Explanatory Memorandum for the Freedom of Information Bill 1981 at para 45 states:

Sub-clauses 15(3) and 15(4) direct that an agency take reasonable steps to assist a person who wishes to make a request to it. For example, the agency is under a duty to provide reasonable assistance to a person to enable him to provide sufficient information to identify the document to which he seeks access. ...

The only question that remains is the point at which the Commissioner's duty to take reasonable steps is triggered:

- Is the Commissioner's duty under s 15(3)(a) only triggered once the Commissioner becomes aware that a person wishes to make a request?
- Does the Commissioner's duty under s 15(3)(a) exist whether or not the Commissioner is aware that a person may wish to make a request?
- Can the Commissioner's duty under s 15(3)(a) be satisfied, at the threshold level, by providing relevant contact information on the website, perhaps immediately adjacent to the FOI form?

What authorisation is required to make a request on behalf of a client?

If a solicitor or tax agent makes an FOI request on behalf of a client they will need to provide to the ATO a specific, written authority:

- to obtain copies of documents on behalf of the client; or
- to inspect copies of documents containing information about the client.

The ATO form NAT 11525-08.2014, once completed and lodged, provides the appropriate authorisation.

Failing to include the authorisation with the FOI request will delay the Commissioner's response.

Is using the ATO form NAT 2877 mandatory?

While the ATO preference is for applicants to use their form NAT 2877, my preference is to avoid using the form for making a request. Although NAT 2877 identifies the information that must be provided, NAT 2877:

- makes no provision for a professional adviser to insert an internal or firm reference;
- while allowing a past function, does not scroll or wrap text composed in Word;
- is not an expandable form and assumes that all requests can be articulated within the given six lines;
- provides limited editing functionality particularly if the edit extends the text beyond a line and

regularly inserts edits somewhere on the form irrespective of where the cursor might have been located;

- denies any opportunity for formatting the request through the use of bulleted or numbered subparagraphs.

Conclusions

Documents readily obtained using FOI can provide an adviser:

- with a fuller picture of what has been occurring;
- inform any decisions made in relation to future actions; and
- provide useful negotiating leverage.

Many relevant and useful documents can only be obtained from the Commissioner because the Commissioner created them in the usual course of his activity and was never required to provide them to the client.

Care is required in drafting an FOI application and, in the context of the urgency of negotiating repayment of arrears, prompt well drafted applications provide the best chance of obtaining documents that will be useful in a timely fashion.

The Commissioner has not taken reasonable attempts to satisfy the duty imposed by s 15(3)(a).

At the threshold level the Commissioner could satisfy his duty under s 15(3)(a) by providing relevant contact information (preferably a phone number leading to a sufficiently knowledgeable ATO officer) on the website immediately adjacent to the FOI form.

Advisers will find it easier to make applications:

- by avoiding the use of the electronic version of NAT 2877;
- by preparing applications in Word and incorporating the scanned word application with a scanned version of the handwritten NAT 2877; or
- by ensuring the Word document includes all the information identified in NAT 2877.



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Footnotes

1. There is no application fee for making a request for documents under the FOI Act and no processing charge for documents containing only personal information about the person on whose behalf the request is made. Details of the charges that apply in relation to documents containing information other than personal information are set out on NAT2877.
2. See Taxpayers' charter — what you need to know (Version: Last modified 5 January 2016).
3. A subsequent article will address follow up steps.
4. Australian Taxation Office, *Freedom of information (FOI) request—individuals and businesses*, 20 March 2014, www.ato.gov.au.
5. *Jockel v Department of Immigration and Border Protection* [2015] AICmr 70 (5 November 2015) at [23].
6. ATO Practice Statement Law Administration PS LA 1998/1 Law Administration Practice Statements (19 February 2015).
7. FOI Act, s 24AA.
8. *Denlay v Commissioner of Taxation* (2013) 211 FCR 344; 135 ALD 100; [2013] FCA 307; BC201301588.
9. Decision impact statement *Denlay v Commissioner of Taxation* 2013 ATC 20–382 (5 June 2013).
10. Section 17 of the FOI Act makes specific provision for requests of this type.
11. The request was prompted by several curious coincidences as I fought for a client and vigorously pursued several matters of concern with ATO complaints and subsequently referred their handling of the issues to the Inspector General of Taxation. The coincidences themselves had been revealed by documents obtained under earlier FOI requests lodged for the client.
12. Section 17 of the FOI Act makes specific provision for requests of this type.
13. The computer identifications for ATO officers are regularly (but not always) redacted usually in reliance on s 47F of the FOI Act.
14. Above n 5.
15. Above n 5, at [5].
16. *Apache Energy Pty Ltd and Chief Executive Officer of the National Offshore Petroleum Safety and Environmental Management Authority and Lander & Rogers Lawyers* [2012] AATA 296 (15 May 2012).