



19 February 2018
FOI ref: 2228

Jak Dac
By email: foi+request-4177-f592b6c7@righttoknow.org.au

Freedom of Information Request - Decision

Dear Mr Dac,

I refer to your request to the Treasury dated 24 November 2017, for access under the *Freedom of Information Act 1982* (the FOI Act) to the following:

Documents in relation to double taxation US/AU regarding Australians Superannuation and sale of primary residence since Compulsory Superannuation has been implemented.

I am an authorised decision maker under section 23 of the FOI Act.

On 9 February 2018 I advised you of my intention to refuse your request under section 24(1) of the FOI Act on the ground that the work involved in processing it would substantially and unreasonably divert the resources of the Treasury from its other operations.

On the same day you provided the following response, which I have taken as a revision to the scope of your request:

When last updating the Australia – US Tax Treaty in 2001, what was Treasury thinking in terms of US tax treatment of individual taxpayers? Most importantly, did the negotiators consider possible US double taxation of Superannuation, given compulsory superannuation (ie. the modern Superannuation Guarantee) was introduced in 1992, nearly a full decade before the Treaty update renegotiations took place?

Has Australia ever sought to clarify the US taxation status of Superannuation; particularly using the treaty processes such as Article 24, Mutual Agreement Process?

Did the coincident “Australia – US Agreement on Social Security”, the so-called Totalisation Agreements, consider superannuation?

In 2012, during the review and consultation period prior to entering into the FATCA IGA, the Privacy Commissioner recommended that Treasury conduct a Privacy Impact Assessment (PIA). Was this ever done (we think not)? If not, was there an internal response or close-out?

Now that the mandated reporting of account information of Australian taxpayers to the US IRS under the FATCA IGA has been in place for several years, is there statistical information available in regards to the depth and breadth of this reporting?

Documents detailing the Australian negotiation objectives, progress, decision making and outcomes of the 2001 amendment (protocol) of the Australian – USA Tax Treaty (effective 1 July 2003). Our interest is only on subject matter pertaining to US tax treatment of individual taxpayers, not businesses. Within this scope, documents of interest include: 1) Negotiation framing, strategy and preparation documents, 2) Proposal evaluations and recommendations, 3) Meeting minutes, 4) Any

documents evaluating the impact of the Savings Clause on Australian residents (Article 1, Paragraph 3&4); and 5) Any documents pertaining to discussion of the US tax treatment of Superannuation in regards to the 2001 Tax Treaty amendment process.

Any documents relating to any upcoming procedures in relation to the US/AU Tax Treaty

Any documents relating to the clarification of the US tax treatment of Australian Superannuation undertaken pursuant to Article 24, Mutual Agreement Procedure of the Australia – USA Tax Treaty.

Any documents pertaining to the US income tax treatment of Superannuation in regards to the 2001 Australia – US Agreement on Social Security (Totalisation Agreement).

Any documents pertaining to a Privacy Impact Assessment (PIA) of the US Foreign Account Tax Compliance Act (FATCA), particularly in regards to actions, response or close-out taken on the specific recommendations, Items 26-29, made to Treasury by the Office of the Australian Information Commissioner (OAIC) submission on FATCA, September 2012. (Reference: <https://www.oaic.gov.au/engage-with-us/submissions/intergovernmental-agreement-to-implement-fatca>).

Any available documents summarising the extent of, or providing statistics or estimates on, the annual ATO report / disclosure of Australian taxpayer information provided to the United States Internal Revenue Service (IRS) as part of the Foreign Account Tax Compliance Act (FATCA) requirements. This includes non-identifying information, by year, such as number of taxpayers reported on, number of accounts, aggregate amounts, average / range of values, country of residence, etc. Ideally, this would be broken down by individual versus entity account.

Decision

In the notice sent to you on 9 February 2018, I advised that search terms for your original request had identified more than 14,000 emails that were likely to be relevant to your request.

I do not consider that restricting your request to the points you have raised in your response would reduce the number of documents that would be within scope of your request – if anything it expands the scope of the original request. As such, Treasury staff would need to review at least 14,000 emails to identify whether they are relevant to any of the points that you have raised. I consider that this would impose a significant and unreasonable burden on the relatively small number of Treasury staff.

Accordingly, I have decided to refuse your request under section 24(1) of the FOI Act because a ‘practical refusal reason’ exists under section 24AA of the FOI Act. I am satisfied that the work involved in processing your request would substantially and unreasonably divert the resources of the Treasury from its other operations.

A statement setting out your rights of review in this matter is attached.

Yours sincerely,



Tony McDonald
A/g Division Head
Corporate and Individual Tax Division

INFORMATION ON RIGHTS OF REVIEW

1. APPLICATION FOR INTERNAL REVIEW OF DECISION

Section 54 of the Freedom of Information Act gives you the right to apply for an internal review of the decision refusing to grant access to documents in accordance with your request.

Application for a review of the decision must be made in writing within 30 days of receipt of this letter.

No particular form is required but it would assist the decision-maker if you could set out in the application the grounds on which you consider that the decision should be reviewed.

Application for a review of the decision should be sent to FOI@treasury.gov.au.

OR

2. APPLICATION TO AUSTRALIAN INFORMATION COMMISSIONER (INFORMATION COMMISSIONER) FOR REVIEW OF DECISION

Section 54L of the FOI Act gives you the right to seek a review of the decision from the Information Commissioner. An application for review must be made within 60 days of receiving the decision.

Applications for review must be in writing and must:

- give details of how notices must be sent to you; and
- include a copy of the notice of decision.

Further information on seeking a review is available here:

<https://www.oaic.gov.au/freedom-of-information/foi-review-process>

AND/OR

3. COMPLAINTS TO THE INFORMATION COMMISSIONER

Section 70 of the FOI Act provides that a person may complain to the Information Commissioner about action taken by an agency in the exercise of powers or the performance of functions under the FOI Act.

A complaint to the Information Commissioner must be in writing and identify the agency the complaint is about. The Information Commissioner may decline to investigate the complaint in a number of circumstances, including that you did not exercise your right to ask the agency, the Information Commissioner, a court or tribunal to review the decision.

Further information on making a complaint is available here:

<https://www.oaic.gov.au/freedom-of-information/foi-complaints>