

# EXPOSURE DRAFT – FOR COMMENT AND DISCUSSION ONLY

Deadline for comment 16 August 2019. Please quote ED0210



## Standard Practice Statement

ED 0210

### Application of discretion in section 18D(2) of the Tax Administration Act 1994 – an exception to confidentiality

#### Introduction

Standard practice statements describe how the Commissioner of Inland Revenue (the Commissioner) will exercise a statutory discretion or deal with practical issues arising out of the administration of the Inland Revenue Act.

This Statement sets out the Commissioner's practice regarding the new confidentiality rule of the Tax Administration Act 1994 ("the TAA").

#### Application

This statement may be cited as "Standard Practice Statement XX/XX: *Application of discretion in section 18D(2) of the Tax Administration Act 1994 – an exception to confidentiality*" and applies from XX XXXXXX 20XX. It replaces SPS 11/07: *Application of discretion in section 81(1B) of the Tax Administration Act 1994 – The secrecy provisions*, which is withdrawn.

This Standard Practice Statement also appears in *Tax Information Bulletin* Vol XX, No X (..... 201X).

All statutory references are to the Tax Administration Act 1994, unless otherwise specified.

#### Summary

1. The secrecy provisions of the TAA were recently amended by the Taxation (Annual Rates for 2018-19, Modernising Tax Administration, and Remedial Matters) Act 2019. The old s 81 secrecy rule was replaced by the new s 18 confidentiality rule. This new rule protects sensitive revenue information from disclosure by Inland Revenue ("IR") by requiring all revenue officers, being IR staff or people connected with IR work, to keep such information confidential unless disclosure is permitted under ss 18D-18J and schedule 7. Section 18D(2) contains a permitted disclosure that provides IR with a broad discretion to disclose information relating to the Commissioner's various functions after a

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number of factors have been considered. This Statement outlines the factors that revenue officers must consider and the process they must follow to ensure there is a consistent approach when exercising the discretion.

2. Section 6 confirms that all IR employees have an on-going duty to protect the integrity of New Zealand's tax system. An important way in which the tax system's integrity is protected is by IR not disclosing sensitive revenue information it has received about a taxpayer to someone else. Criminal sanctions may be imposed on an IR employee who fails to comply with those secrecy obligations.<sup>1</sup> The TAA goes so far as to protect all revenue related information, including that which does not identify specific taxpayer affairs ("Revenue Information"). Revenue information is not subject to the rule of confidentiality and therefore does not require a "permitted disclosure". However, under s 18(3) revenue information can only be released if it does not adversely affect the integrity of the tax system or prejudice the maintenance of the law.
3. It also recognises that to protect the integrity of the tax system IR will in some circumstances need to disclose taxpayer related information (sensitive revenue information) to the courts, other government agencies and other third parties (sometimes including the public). The TAA has always contained a number of exceptions that specifically allowed IR to disclose certain information. Those exceptions are now called "permitted disclosures", a concept that is defined in s 16C(5). They are contained in ss 18D – 18J and schedule 7 of the TAA.
4. This statement focuses on the permitted disclosure provided for in s 18D(2), which was first enacted in s 81(1B)<sup>2</sup> and was intended to give IR more flexibility to make disclosures when administering the tax system. The new s 18D(2) is a carry-over of the previous s 81(1B) exception with minor amendments.
5. The exercise of the discretion to disclose involves a two-step inquiry:
  - a) Is the disclosure made in carrying out or supporting a function of the Commissioner? and
  - b) Is the disclosure reasonable having regard to five specific factors contained in s 18D(2)(b)?
6. This statement provides guidance and outlines the steps needed before making that disclosure to ensure maximum consistency. Before that it briefly examines how this permitted disclosure interacts with the Commissioner's authority to make other permitted disclosures. The contents are as follows:

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<sup>1</sup> See section 143C of the TAA.

<sup>2</sup> Introduced in the Taxation (Tax Administration Remedial Matters) Act 2011.

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- a) Paragraphs 7 and 8 outline the relevant statutory provisions;
- b) Paragraphs 9 to 15 note the general structure of the confidentiality rules and permitted disclosures that still apply and how they interact with the permitted disclosure in section 18D(2);
- c) Paragraphs 16 to 19 provide guidance on what is a function of the Commissioner;
- d) Paragraphs 20 to 34 discuss the five factors that must be weighed up in determining whether a disclosure is reasonable under section 18D(2);
- e) Paragraphs 35 to 37 summarise how IR will apply section 18D(2); and
- f) An appendix contains examples that may assist in understanding the confidentiality provisions.

### The Legislative Provisions

7. The relevant legislation governing tax confidentiality and permitted disclosures enabling IR to disclose sensitive revenue information (essentially taxpayer specific information) is contained in ss 16C(1)-(5), 18(1), 18C, 18D(1), 18D(2), and schedule 7 which respectively state:

#### **16C Key terms**

##### *Meaning of revenue law*

- (1) For the purposes of this subpart and schedule 7, revenue law means—

- (a) the Inland Revenue Acts;
- (b) the Accident Compensation Act 2001, the Accident Insurance Act 1998, the Accident Rehabilitation and Compensation Insurance Act 1992, or the Accident Compensation Act 1982;
- (c) the New Zealand Superannuation Act 1974;
- (d) any Act that imposes taxes or duties payable to the Crown.

##### *Meaning of revenue information*

- (2) For the purposes of this subpart and schedule 7, revenue information means information that is acquired, obtained, accessed, received by, or disclosed to, or held by the Commissioner—

- (a) under or for the purposes of a revenue law;
- (b) under an information-sharing right.

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### *Meaning of sensitive revenue information*

- (3) For the purposes of this subpart and schedule 7, sensitive revenue information—
- (a) means revenue information that relates to the affairs of a person or entity—
    - (i) that identifies, or is reasonably capable of being used to identify, the person or entity, whether directly or indirectly; or
    - (ii) that might reasonably be regarded as private, commercially sensitive, or otherwise confidential; or
    - (iii) the release of which could result in loss, harm, or prejudice to a person to whom or to which it relates:
  - (b) does not include aggregate or statistical data that may contain information about the person or entity to the extent to which the information does not meet the requirements of paragraph (a).

### *Meaning of revenue officer*

- (4) For the purposes of this subpart and schedule 7, a revenue officer—
- (a) means a person who is employed in, seconded to, or connected with the service of Inland Revenue; and
  - (b) includes—
    - (i) a person employed in the service of the Government of an overseas country or territory who is for the time being seconded to, or connected with the service of Inland Revenue;
    - (ii) a person formerly employed in, seconded to, or connected with the service of Inland Revenue.

### *Meaning of permitted disclosure*

- (5) A permitted disclosure means the disclosure of an item of sensitive revenue information to another person as an exception to the rule of confidentiality set out in s 18. The purposes for which a revenue officer may disclose sensitive revenue information are set out in ss 18D to 18J and schedule 7.

## **18 Confidentiality of sensitive revenue information**

- (1) A revenue officer must keep confidential all sensitive revenue information and must not disclose the information unless the disclosure is a permitted disclosure that meets the requirements of ss 18D to 18J.

## **18C Permitted disclosures**

Sections 18D to 18J provide exceptions to the rule of confidentiality set out in s 18. These exceptions are permitted disclosures.

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## 18D Disclosures made in carrying into effect revenue laws

*Carrying into effect revenue law*

(1) Section 18 does not apply to a disclosure of sensitive revenue information that is made for the purpose of carrying into effect a revenue law as set out in schedule 7, part A.

### Schedule 7 Part A

#### 2 Disclosures for purpose of carrying into effect revenue laws

Section 18 does not prevent the disclosure of sensitive revenue information—

- (a) for the purpose of carrying into effect a revenue law, or performing or supporting a function lawfully conferred on the Commissioner under a revenue law; and (b) to a person or entity specified in clauses 3 to 13 about the matter described in the provision; and
- (c) subject to any conditions set out in the provision.

*Carrying out function conferred on Commissioner*

#### Section 18D(2) Carrying out function conferred on Commissioner.

(2) Section 18 does not apply if—

- (a) a disclosure of sensitive revenue information is made in carrying out or supporting a function lawfully conferred on the Commissioner to—
  - (i) administer the tax system;
  - (ii) implement the tax system;
  - (iii) improve, research, or reform the tax system; and
- (b) the Commissioner considers the disclosure is reasonable for the purposes described in paragraph (a), having regard to—
  - (i) the Commissioner's obligation at all times to use best endeavors to protect the integrity of the tax system; and
  - (ii) the importance of promoting compliance with the law, especially voluntary compliance; and
  - (iii) the impact of the disclosure, personally or commercially or in some other way; and
  - (iv) the resources available to the Commissioner; and
  - (v) the public availability of the information.

8. As noted below, nothing in the operation of s 18D(2) affects other permitted disclosures contained in the TAA. Sometimes a disclosure might be made under either s 18D(2) or another permitted disclosure.

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### The general confidentiality rule and its permitted disclosures

9. Section 18(1) provides the important general rule that revenue officers must maintain the confidentiality of sensitive revenue information. Section 16C defines “sensitive revenue information” as revenue information that is taxpayer-related and meets one of the requirements in s 16C(3)(a)(i)-(iii).

Revenue information is information the Commissioner holds under or for the purposes of a revenue law or under an information-sharing right. Revenue information which is not sensitive revenue information is not subject to the rule of confidentiality. Such information is releasable subject only to two considerations – whether the disclosure would adversely affect the integrity of the tax system or prejudice the maintenance of the law (s 18(3)).

The exceptions to confidentiality are now called “permitted disclosures”. The previous exceptions are retained with some modifications, and new exceptions have been added.

As with its earlier version (s 81(1)), s 18D(1) contains a permitted disclosure of the “carrying into effect” of revenue law. Under s 81(1) this was a general exception. However, this new permitted disclosure contains a list of specific exceptions. Section 18D(1) allows disclosure where it is for the purpose of “carrying into effect” a revenue law as set out in clause 2, schedule 7, part A. Case law on an earlier version of the “carrying into effect” exception is likely to remain relevant.

10. The Supreme Court considered the former version of s 81(1) in *Westpac Banking Corporation Ltd v CIR* (2008) 23 NZTC 21,896. It noted at paragraph [69] that:
- Disclosure is not permitted unless, and to the extent that, it is reasonably necessary for the performance of the Commissioner’s statutory functions.
11. Although the case itself dealt with a relatively unusual situation involving disclosure of third-party confidential information in a complex litigation, the Supreme Court noted that this test was a straightforward legal standard. The test of “reasonable necessity” does however create a measure of uncertainty.
12. The general rule of confidentiality of sensitive revenue information in s 18(1) is subject to the discretion contained in section 18D(2), which takes on an important role. It is intended to enable disclosures which are reasonable (as opposed to reasonably necessary) in terms of the discretion enacted.
13. This raises the issue of the relationship between the permitted disclosure contained in s 18D(2) and the permitted disclosure contained in s 18D(1) – or indeed the permitted disclosures specified in s 18D(4) or schedule 7, part B (which permits disclosures to taxpayers and their representatives). While

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some disclosure may only be made on the authority of s 18D(2), there will be many circumstances where a disclosure would equally be authorised under the other permitted disclosures. In those circumstances, IR might rely on another applicable exception without regard to the balancing act required by s 18D(2).

14. Similarly, the fact that a general subject area might be dealt with in schedule 7, part B will not affect or constrain the use of s 18D(2). If a closely related disclosure was not specifically covered by schedule 7, part B, it might still be reasonably made if it satisfies the requirements of s 18D(2). In this regard, schedule 7, part B cannot be read as an exhaustive code.
15. One purpose behind the introduction of the legislation now contained in s 18D(2) was to expand the circumstances in which IR can disclose information (whether of a taxpayer specific or of a general nature) where disclosure is not necessarily linked to the direct administration of the revenue law. A decision to disclose under s 18D(2) may be made in response to a request from a third party for information, but it also enables IR to proactively disclose information to third parties (including the media) where it considers that the test in s 18 D(2) is met.

### Standard Practice and Analysis

#### The discretion – a function of the Commissioner

16. As noted above, in order to exercise the discretion contained in s 18D(2), the Commissioner must be satisfied that the proposed disclosure will comply with two statutory tests. The first is (subsection (2)(a)) that the communication is made in “carrying out” or “supporting” a function of the Commissioner – whether or not it provides a benefit to the recipient. This means that the communication will be authorised if it assists a revenue officer with the functions described in s18D(2)(a).
17. The “carrying out” of a function extends to a function “lawfully conferred on” the Commissioner to:  
  
“administer”, “implement”, “improve, research or reform” the tax system.  
  
The function (eg, researching or reforming the tax system) must be itself “lawfully conferred”. This would include functions conferred under revenue law and non-revenue law.
18. Section 18D(2) not only applies in relation to the carrying out of such actions but it also extends to anything done to “support” the carrying out of any such actions. This allows disclosure where there is not a direct carrying out of a function as such, but the disclosure is supporting the carrying out of the function. For instance, supporting work being conducted by third parties to research aspects of the tax system might reasonably warrant the disclosure of sensitive revenue information.

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19. There must be a nexus between the disclosure and the Commissioner's functions. So, where the disclosure will only serve the purpose of assisting another party perform its functions and cannot reasonably be linked to carrying out or supporting the carrying out of any of the Commissioner's functions, the test in s 18D(2) will not be met. However, where the disclosure will assist a third party and at the same time carry out or support a relevant function of the Commissioner, the disclosure may be made, if the criteria in s 18D(2) are satisfied.

### The discretion – the factors which must be balanced

20. Once the first test is satisfied, the Commissioner still needs to be objectively satisfied that the proposed disclosure is "reasonable" (in carrying out or supporting the carrying out of a Commissioner's function) having regard to five listed factors. Those factors are:
- the Commissioner's "best endeavours" obligation to protect the integrity of the tax system;
  - the importance of promoting compliance by taxpayers, especially voluntary compliance;
  - any personal or commercial impact of the disclosure;
  - the resources available to the Commissioner; and
  - the public availability of the information.
21. Before considering each factor a number of general preliminary comments can be made:
- a) The test for determining whether the disclosure can be made is one of reasonableness. This is an objective standard. The threshold is less onerous than the "reasonably necessary" test stated in *Westpac* above, meaning that greater disclosure is potentially permissible.
  - b) The test requires that all five of the specified factors are taken into account in any decision to disclose. There may be circumstances where one or two of the factors appear immaterial but they still need to be taken into account and given appropriate weight.
  - c) Often there will be tension between (and within) the various factors with some factors favouring disclosure while others suggesting non-disclosure. IR cannot pre-determine weightings for each of the factors.
  - d) That said, there will be circumstances where a particular factor is so relevant that it effectively determines whether the disclosure should be made or not. An example is where the information is already publicly available. In most of these instances (even if it was confidential when it came into IR's hands) there would be little risk in releasing it (refer to the fifth factor above) to the recipient. However, that factor still needs to be weighed in each decision. For example, IR will not be



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likely to confirm or deny the tax status of a particular person about whom public statements have been made by others. For another example, where there is a public debate about an industry's entitlement to deduct say research and development costs, and IR is asked to assist in the debate by providing to the industry details of a particular taxpayer's research and development approach (which was deductible). Such a step, which might slightly assist the promotion of voluntary compliance by the taxpayer's competitors, could well prejudice the taxpayer's business. The adverse commercial impact of the disclosure far outweighs its benefits, and this factor would preclude disclosure, notwithstanding the other factors.

### *Factor 1 – Protecting the tax system's integrity*

22. The first matter to consider is whether the disclosure is consistent with the Commissioner's obligation to use best endeavours at all times to protect the "integrity of the tax system". That term is defined in s 6(2) to include:
  - (a) taxpayer perceptions of that integrity; and
  - (b) the rights of taxpayers to have their liability determined fairly, impartially, and according to law; and
  - (c) the rights of taxpayers to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other taxpayers; and
  - (d) the responsibilities of taxpayers to comply with the law; and
  - (e) the responsibilities of those administering the law to maintain the confidentiality of the affairs of taxpayers; and
  - (f) the responsibilities of those administering the law to do so fairly, impartially, and according to law.
23. In relation to IR's confidentiality requirements, there are different drivers affecting the integrity of the tax system. The right of the taxpayer and the responsibility of IR to keep information confidential are only two of the factors mentioned in s 6. These may clash with the taxpayer's obligation to comply with the law and IR's obligation to administer the law fairly. Other taxpayers' perceptions of the tax system's integrity are also relevant.
24. For example, a taxpayer makes misleading public statements about trying to settle a tax dispute with the IR for years to no avail, or about the conduct of an investigation. The general body of taxpayers may think negatively of IR and the tax system if they believe the assertions that IR was acting improperly. Therefore, IR may issue a statement that the taxpayer had not provided all relevant facts, and that had contributed materially to IR's not having concluded the dispute, which would allow taxpayers to take a more informed view of the situation.

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### *Factor 2 – Promoting voluntary compliance*

25. The second factor considered is promoting compliance with the law, especially voluntary compliance. This factor is referred to in the Commissioner's care and management responsibilities contained in s 6A (refer to Interpretation Statement IS 10/07). This includes collecting the highest net revenue having regard to:<sup>3</sup>

*The importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts*

26. The promotion of voluntary compliance is a cornerstone of the New Zealand tax system. As such, it is an important factor to consider in any decision as to the reasonableness of disclosure as opposed to non-disclosure. However, as with protecting the tax system's integrity, tensions may arise in considering the voluntary compliance of the individual taxpayer as against taxpayers more generally. Disclosing information about a specific taxpayer may adversely affect that taxpayer's commitment to voluntary compliance, but may enhance the compliance behaviour of others. It is important to note that IR's responsibility is to promote compliance amongst all taxpayers. As such, an adverse effect on an individual taxpayer may still be justifiable in some cases, if the Commissioner considers the disclosure will promote voluntary compliance more generally. For example, IR already makes media statements about taxpayers convicted in the courts for serious tax offending.

### *Factor 3 – The communication's personal or commercial impact*

27. The third factor to be considered in determining whether a disclosure is reasonable is the potential impact that disclosure may have personally or commercially. This requires looking at the disclosure from the perspective of an affected taxpayer or group of taxpayers. This may in some cases justify discussion with the taxpayers potentially affected. For example, a statement by IR that a particular taxpayer is the subject of an IR investigation or dispute may negatively impact on that taxpayer's reputation or business or share price. In such circumstances, the question becomes whether the other factors reasonably favour disclosing the information notwithstanding that consequence.
28. However, it is not necessarily the case that all IR disclosures under s 18D(2) will have an adverse commercial impact on a taxpayer. There may be circumstances where the affected taxpayer would like the confidential information to be disclosed. So where a taxpayer has requested that IR make the disclosure, this factor will carry significant weight in assessing the personal or commercial impact of the disclosure. Consent is therefore a significant factor, but not necessarily an overriding one. IR may, for instance, consider on balance that public comment on a taxpayer's personal

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<sup>3</sup> See section 6A(3)(b).

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affairs could have an adverse effect on voluntary compliance in the circumstances. IR would normally release information directly to the taxpayer concerned rather than to a third party on their behalf.

29. This factor may carry much less weight where the disclosure deals with anonymous, aggregated data, perhaps relating to a large industry or area. In those circumstances, where the potential commercial impact on a particular member of the industry is much less, it is unlikely that this factor would be given much weight. On the other hand, this factor would be more significant if the taxpayer is more readily identifiable and the information relates to a smaller industry or locality.

### *Factor 4 – IR's resources*

30. The use of IR's resources is another factor also referred to in the care and management responsibilities of the Commissioner in s 6A. This factor enables IR to have regard to the effect of a disclosure on its own resources.
31. For example, a disclosure may be an effective way to improve the compliance behaviour of a group of taxpayers. The disclosure may reduce the need for audit, amendment of assessments and possible penalties. Further, IR's investigative resources may be freed up to do other work.
32. The use of resources factor may also be relevant in terms of determining the level of internal (and sometimes external) resource required to obtain the information requested. This can be extremely expensive, and the resources may well be better used elsewhere.

### *Factor 5 – The information is otherwise publicly available*

33. This factor may have significant weight in favour of disclosure if the information is publicly available. However, there may be circumstances where the information is theoretically publicly available but would involve the use of considerable cost or time to obtain. In such cases, the public availability factor may carry less weight in favour of disclosure. Arguably, the publication of industry income benchmarks, or other aggregated statistical data, sourced from public sources, could still be otherwise restricted by the normal confidentiality requirements. However, s 18D(2) allows for such disclosure provided that the disclosure is reasonable having regard to all five factors in s 18D(2)(b).
34. The confidential information may have been made available to the public by someone other than IR in circumstances where the information has been improperly obtained. In those circumstances, IR may decide not to disclose the confidential information even though it is otherwise publicly available, when it considers the other four factors above.

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### How the provisions will work in practice

35. The expanded confidentiality rules allow IR a greater ability to disclose sensitive revenue information, broadly where disclosure will assist the integrity of the tax system. With the greater flexibility of the confidentiality rules, IR recognises that the decision to make disclosures under s 18D(2) needs to be made by senior staff. The process will be as follows:
  - a) The decision maker must be satisfied that the disclosure satisfies the criteria;
  - b) The decision to disclose sensitive revenue information should be the subject of legal advice.
36. Although a proposed communication is related to the function of the Commissioner within the s 18D(2) discretion, IR can still decide not to make the disclosure after balancing the various factors. For example, IR may decline to use its discretion where it was thought that making a public statement about inaccurate information made public by a taxpayer would merely lead to a public debate about that taxpayer's tax affairs, without leading to any material benefit to the tax system. As such, the more sensitive or wide-reaching any potential disclosure from IR is, the more likely more senior management will be involved in the decision to disclose - particularly if the disclosure would tend to identify a taxpayer or small group of taxpayers.
37. A decision maker required to determine whether a disclosure can or should be made must note the following:
  - a) The general rule and starting point is that an officer must maintain confidentiality of all sensitive revenue information unless a permitted disclosure is identified.
  - b) Does the "carrying into effect" permitted disclosure under s 18D(1) apply?
  - c) Does any other specific permitted disclosure under s 18D-18J and schedule 7 apply?
  - d) The final step is to consider if s 18D(2) applies. This requires a conclusion that both statutory tests in subsection (2)(a) and (b) are satisfied in relation to the relevant disclosure. In this regard, the above commentary will be required to be considered in accordance with the policies outlined here before concluding that the disclosure is:
    - i) made in carrying out or supporting a function of the Commissioner;
    - ii) reasonable in relation to that function;
    - iii) reasonable having taken into account each of the five relevant factors.

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This Standard Practice Statement is signed on ????????

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## Appendix - Examples

The Appendix contains examples that are intended to assist revenue officers and taxpayers understand how the Commissioner considers the “carrying out function” permitted disclosure will operate in practice. The circumstances and content of each potential disclosure will dictate whether IR can and will rely on s 18D(2) to disclose. Therefore, revenue officers must still consider the guidance discussed above before deciding whether s 18D(2) applies even where they consider the disclosure is consistent with one of these examples.

### Example 1: Disclosure to the New Zealand Police

IR is approached by New Zealand Police with a request for information on an individual who is suspected of dealing in drugs. At this stage, the Police do not have in mind any specific offence that may have been committed. The information sought is specific to income returned by the individual for tax purposes. The Police intend to use this information to conduct further investigations to determine if the individual has sufficient income to support his standard of living and advise that they will report the results of their investigation to IR to enable it to assess the correct amount of tax.

Does the request come within any of the permitted disclosures to allow the release the information to the Police?

*Section 18D(1): Information may be released for the purpose of carrying into effect a revenue law as set out schedule 7, part A.*

Does the disclosure meet the criterion in relation to s 18D(1)?	No, it is not reasonably necessary for the purpose of carrying into effect a revenue law. And it does not come within the specific exceptions in schedule 7, part A.
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*Sections 18E-18J: Information may be released under other permitted disclosures*

Does the disclosure fall within one of the permitted disclosures in s18E to s 18J?	No - none of the permitted disclosures apply in this case.  However, if the offence that the Police is investigating carries a penalty of more than 4 years imprisonment (“a serious crime”), it may be possible for IR to share that information under the approved information sharing agreement authorised by section 18E(2).
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*Section 18D(2): Information may be released if it relates to a function of the Commissioner having regard to five factors*

*Section 18D(2)(a) – Step One*

Whether the disclosure is made in:

- carrying out a function lawfully conferred on the Commissioner, or
- supporting such a function?

Is it for carrying out a function of the Commissioner?	
-Administer the tax system:	No. The function in question is that of the Police, not IR. While the Police may eventually provide IR with information that impacts on the taxpayer's tax obligations, the primary purpose is to enable the Police to investigate the taxpayer's affairs.
-Implement the tax system:	No – as above
-Improve, research, or reform the tax system:	No
Does it support the carrying out of any of the above?	No. It does not seem to "support" any of those matters – again the nexus between the disclosure and IR's functions is too tenuous to justify the conclusion that it would "support" those functions.

Accordingly, the inquiry would stop here – the information cannot be disclosed.

The same conclusion is likely to be reached where requests for information are received from other government agencies or third parties in circumstances where the information would not be covered by a specific exception and does not also assist IR in administering or implementing the tax system (see example 3 below). Because s 18D(2) will never be satisfied, there is no need to consider Step Two of the s 18D(2) test i.e. the balancing exercise in paragraph (b).

### Example 2: Media statements

A promoter of an innovative financial product has made statements in the product's prospectus and other promotional material that suggests the product is the subject of a binding ruling from IR. However, while the promoter applied for a binding ruling, this was not granted by IR as it did not comply with the relevant tax law. IR is considering issuing a statement to the media that it has not issued a binding ruling on the financial product.

Can that information be released under any of the permitted disclosures?

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*Section 18(1): Information may be released for the purpose of carrying into effect a revenue law as set out schedule 7, part A.*

Does the disclosure meet the criterion in relation to s 18D(1)?	It is arguably not reasonably necessary for the purpose of carrying into effect a revenue law. And it does not come within any other specific permitted disclosures in schedule 7, part A.
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*Sections 18E-18J: Information may be released under other permitted disclosures*

Does the disclosure fall within one of the permitted disclosures in s 18E to s 18J?	No, none of the permitted disclosures apply in this case.
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*Section 18D(2): Information may be released if it relates to a function of the Commissioner having regard to five factors*

*Section 8D(2)(a) – Step One*

Whether the disclosure is made in:

- carrying out a function lawfully conferred on the Commissioner, or
- the supporting of such a function?

Is it for the purpose of carrying out a function of the Commissioner?	
-Administer the tax system:	No. Confirming that a ruling has not been issued is a step removed from the ruling process, which might be considered part of administering the tax system.
-Implement the tax system:	No – for the reason above.
-Improve, research, or reform the tax system.	No.
Does it support the carrying out of the above?	Yes. The administration and implementation of the tax system requires a robust binding ruling system. If IR does not correct the misinformation currently in the public domain, the binding ruling



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	regime's reputation may be diminished.
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### *Section 18D(2)(b) – Step Two*

The Commissioner considers that such disclosure is reasonable with regard to the relevant purpose described in subsection (a) and with regard to the following factors.

Is the request reasonable when considered on balance under the factors under s 18D(2)(b)?	
The integrity of the tax system; and	Yes. The integrity of the tax system requires a robust binding ruling system. This will be undermined if IR does not challenge a statement about obtaining a ruling that is misleading.
The importance of promoting compliance by taxpayers, especially voluntary compliance; and	Yes, for taxpayers more generally. The disclosure will protect the reputation of the ruling system – so encourages more taxpayers to use it.  The disclosure may adversely impact on the promoter's voluntary compliance.
Any personal or commercial impact of the disclosure; and	The product is likely to be adversely affected by the disclosure. Conversely, but each potential investor may be better off by not investing in the product as a result of IR's intervention.
The resources available to the Commissioner; and	Minimal resource will be required to make the disclosure.
The public availability of the information.	The information is not currently publicly available.

The disclosure is reasonable for the purpose of supporting the administration of the tax system: it is merely stating that as a matter of fact there is no binding ruling on the product. The proposed disclosure does not, for example, outline why IR thinks the tax laws relied on by the promoter do not apply to the financial product.

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The disclosure by IR to the media is reasonable having regard to the factors set out in s 18D(2) and the information should be released.

### Example 3: Sharing data with Treasury

Treasury is working jointly with IR on tax policy development in the area of tax incentives for a small specialised industry. The Commissioner considers it worthwhile sharing tax information with Treasury in order to be consistent with international best practices for that particular industry. Specifically, they have asked for information on the start-up expenditure incurred by each of the 3 major players in that industry.

Can that information be released under s.18D(1)?

*Section 18D(1): Information may be released for the purpose of carrying into effect a revenue law as set out schedule 7, part A.*

Does the disclosure meet the criterion in s 18D(1)?	No, it is not reasonably necessary for the purpose of carrying into effect the Income Tax Act or any revenue law. The information relates to the future amendments of the revenue law rather than the present carrying into effect of the revenue law. And it does not come within the specific permitted disclosures in schedule 7, part A.
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*Sections 18E-18J: Information may be released under other permitted disclosures.*

Does the disclosure fall within one of the permitted disclosures in sections 18E to 18J?	No. Section 18H and clause 22 of Schedule 7 only allow the release of information to Treasury for revenue forecasting but not for developing tax policy.
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*Section 18D(2): Information may be released if it relates to a function of the Commissioner having regard to five factors*

*Section 18D(2)(a) – Step One*

Whether the disclosure is made in:

- carrying out a function lawfully conferred on the Commissioner, or
- the supporting of such a function?

Is it for the purpose of carrying out a function of the Commissioner?	
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-Administer the tax system:	No. It might impact on the future administration of the tax system but not the current tax system.
-Implement the tax system:	No – as above.
-Improve, research, or reform the tax system:	Yes. The development of tax policy by IR jointly with Treasury is done to improve research and reform the tax system.
Does it support the carrying out of any of the above?	To the extent there was any doubt, the disclosure to Treasury could also be seen as “supporting” IR’s function to improve, research or reform the tax system.

*Section 18D(2)(b) – Step Two*

The Commissioner considers that such disclosure is reasonable with regard to the relevant purpose described in subsection (a) and with regard to the following factors.

Is the request reasonable when considered on balance under the factors under s 18D(2)(b)?	
The integrity of the tax system; and	Yes. In order to maintain the integrity of the tax system, it is necessary to review current tax policy and research and develop new policy on an on-going basis to keep up with best practices in tax administration.
The importance of promoting compliance by taxpayers, especially voluntary compliance; and	The information will lead to the introduction of tax incentives in keeping with international trends. This may in turn have a positive effect on compliance.
Any personal or commercial impact of the disclosure; and	This is likely to be a neutral factor as Treasury is only at the stage of developing tax policy and the impact may not be adverse.
The resources available to the Commissioner; and	Minimal resource will be required to make the disclosure.
The public availability of the information.	The information is not publicly available.

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The request by Treasury is reasonable having regard to the factors set out in s 18D(2)(b) and the information should be released.

### Example 4: Discussions with tax pooling intermediary

There are a number of criteria that must be satisfied before IR can accept a transfer of funds from a tax pooling intermediary on behalf of a tax agent or its advisor. Where IR considers that one or more of the criteria are not satisfied, can IR disclose the reasons for rejecting the transfer with the tax pooling intermediary? What if during the course of that conversation, the tax pooling intermediary asked for details of the taxpayer's tax payments over the course of a year.

*Section 18D(1): Information may be released for the purpose of carrying into effect a revenue law as set out schedule 7, part A.*

Does the disclosure meet the criterion in relation to section 18D(1)?	No, it is not reasonably necessary for the purpose of carrying into effect the Income Tax Act. The disclosure could be made to either the taxpayer or tax agent directly..
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*Sections 18E-18J: Information may be released under other permitted disclosures*

Does the disclosure fall within one of the permitted disclosures in ss 18E to 18J?	No. Section 18G and clause 16 of schedule 7, Part B allow for disclosure regarding the details of a deposit but does not extend further. In addition, it is generally unlikely, that any other specific exception will apply.
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*Section 18D(2): Information may be released if it relates to a function of the Commissioner having regard to five factors*

*Section 18D(2)(a) – Step One*

Whether the disclosure is made in:

- carrying out a function lawfully conferred on the Commissioner, or
- the supporting of such a function?

Is it for carrying out a function of the Commissioner?	
-Administer the tax system:	Arguably, it has some connection with the Commissioner's function in the collection of taxes. Disclosing the reason for rejecting a transfer may possibly relate to such a function. But not for providing

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	taxpayer tax payment details more generally.
-Implement the tax system:	As above.
-Improve, research, or reform the tax system:	No
Does it support the function of any of the above?	To the extent that there is an argument that the disclosures do not enable IR to carry out its function to collect tax payments via the tax pooling arrangement, the disclosure regarding the reasons for rejection “supports” that function. However, the same conclusion would not be drawn for disclosing any more general details about the taxpayer’s tax payment history. The latter disclosure would not fall within s 18D(2).

*Section 18D(2)(b) – Step Two*

The Commissioner considers that such disclosure is reasonable with regard to the relevant purpose described in subsection (a) and with regard to the following factors.

Is the request reasonable when considered on balance under the factors under s 18D(2)(b)?	
The integrity of the tax system; and	The tax pooling system is an important way in which tax payments are made. Any disclosure that makes that process run efficiently bolsters the tax system’s integrity.
The importance of promoting compliance by taxpayers, especially voluntary compliance; and	Similar to the above – voluntary compliance involves ensuring tax is paid on time. The tax pooling system supports this and the disclosure enables those transfers to occur more efficiently.
Any personal or commercial impact of the disclosure; and	This is to be a neutral factor as both parties are already aware of what the taxpayer wants to achieve (i.e. a transfer). The disclosure is essentially trying to ascertain whether this can occur.

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The resources available to the Commissioner; and	Minimal resource will be required to make the disclosure.
The public availability of the information.	The information will not be publicly available.

The disclosure of the reasons for rejecting the transfer is reasonable having regard to the factors set out in s 18D(2)(b) and can therefore occur. However, as previously noted, the exception would not extend to the disclosure of the taxpayer's history of tax payments.

### Example 5: Disclosing competitor's information

IR is investigating an industry to determine whether participants in the industry are properly returning all their income. A number of taxpayers are arguing that IR has no basis for determining what amount of income their business is generating and what their net profits are. It is proposed to disclose the tax return and accounts of a fully compliant competitor to those taxpayers.

Is IR entitled to disclose that information?

*Section 18D(1): Information may be released for the purpose of carrying into effect a revenue law as set out schedule 7, part A.*

Does the disclosure meet the criteria in relation to s 18D(1)?	No. While there may be circumstances where third-party information will be disclosed it is not reasonably necessary for the purpose of carrying into effect the ITA Act. The non-compliant taxpayer's position can be determined through investigating its affairs and through the use of general industry information in any case.
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*Section 18E-18J: Information may be released under other permitted disclosures*

Does the disclosure fall within one of the permitted disclosures in ss 18E to 18J?	No, none of these permitted disclosures apply in this case.
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*Section 18D(2): Information may be released if it relates to a function of the Commissioner having regard to five factors*

*Section 18D(2)(a) – Step One*

Whether the disclosure is made in:

- Carrying out a function lawfully conferred on the Commissioner, or

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- the supporting of such a function?

Is it for carrying out a function of the Commissioner?	
-Administer the tax system:	Possibly. It has some connection with the collection of the correct amount of taxes. IR is more likely to get a non-compliant taxpayer to agree to return the proper tax if it can show actual evidence of a compliant taxpayer's tax affairs.
-Implement the tax system:	No
-Improve, research, or reform the tax system:	No
Does it support the function of any of the above?	To the extent that there is an argument that the disclosures do not allow IR to perform or execute its duty to collect tax, the disclosure "supports" that function.

*Section 18D(2)(b) – Step Two*

The Commissioner considers that such disclosure is reasonable with regard to the relevant purpose described in subsection (a) and with regard to the following factors.

Is the request reasonable after having considered on balance the factors under s 18D(2)(b)?	
The integrity of the tax system; and	The tax system's integrity is improved by attempting to bring non-compliant taxpayers within the tax system. However, it is harmed by disclosing information about a taxpayer's tax affairs to a direct competitor.
The importance of promoting compliance by taxpayers, especially voluntary compliance; and	As above – compliance might be improved in relation to the non-compliant taxpayers. However, it will not be improved in relation to the taxpayer whose information is disclosed – nor will the general body of taxpayers be encouraged to comply if the information is going to end up in the hands of their competitors.

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Any personal or commercial impact of the disclosure; and	The taxpayer whose information is disclosed is likely to be adversely affected by the disclosure.
The resources available to the Commissioner; and	Minimal resource will be required to make the disclosure.
The public availability of the information.	The information will not be publicly available.

After balancing the above factors, it is concluded that the disclosure is not reasonable having regard to the factors set out in s 18D(2)(b). In particular, a disclosure of such specific information about a taxpayer's tax affairs will have an adverse commercial impact on it. Competitors will discover sensitive information about them and there is no guarantee it will influence those competitors' attitude to compliance or not. In addition, the possible negative impact this will have on how taxpayers generally feel about the confidentiality of the information held by IR bolsters the conclusion that the disclosure should not occur.