

# Operational Statement

OS 18/02

## Non-disclosure right for tax advice documents

### Introduction

Operational statements set out the Commissioner's view of the law in respect of the matter discussed and deal with practical issues arising out of the administration of the Inland Revenue Acts.

This operational statement (the "Statement") sets out the process that the Commissioner will follow when issuing a notice to a taxpayer, tax advisor and/or a third party requiring the disclosure of documents, which may contain tax advice and may be subject to the right to claim non-disclosure under sections 20B to 20G of the Tax Administration Act 1994 (the Act).

Unless specified otherwise, all legislative references in this Statement refer to the Act.

### Application

This Statement updates and replaces Standard Practice Statement 05/07 *Non-disclosure right for tax advice documents*.

The Statement incorporates amendments to the legislation (in particular the extension of the non-disclosure right in 2009 to apply to discovery and similar processes that occur during litigation), and incorporates principles established in cases since SPS 05/07 was published in 2005.

The requirement to disclose the information to the Commissioner will be made pursuant to a notice requiring either access to or disclosure of information under sections 16 to 19 (collectively referred to in this Statement as an "information demand").

This Statement applies to tax advisors who may or may not be a chartered accountant, but are members of an approved advisory group.

This Statement supplements the protocol on *Access to Audit Working Papers* (the "protocol") that was signed between the New Zealand Institute of Chartered Accountants (now Chartered Accountants Australia New Zealand) and Inland Revenue on 29 April 2008.<sup>1</sup> Documents that are prepared solely for audit purposes in relation to a client's accounting or tax positions and exposures constitute "audit working papers". They are the property of the auditor and not of the client and generally do not include tax advice documents. However if an inconsistency arises between this Statement and the protocol this Statement shall apply where appropriate.

Documents or other communications which are legally privileged under section 20 are not subject to these requirements. The Search and Surveillance Act 2012 also has no impact on the taxpayer's right or their authorised tax advisor's right to claim non-disclosure under the Act.

This Statement should be read in conjunction with the Operational Statement *OS 13/02 Section 17 Notices* or any statement issued in replacement.

This Statement applies to information demands or discovery obligations issued on or after 1 July 2018.

## **Background**

### **Information demands and discovery obligations**

1. The Act contains specific legislative provisions which deal with requesting and obtaining information related to a taxpayer's affairs. Together with sections 6 and 6A, these provisions play an important role in enabling the Commissioner to administer the Inland Revenue Acts.
2. The Commissioner may choose to limit inquiries in respect of independent advice on the interpretation of tax laws sought by taxpayers from tax advisors. However, in circumstances where the information provided previously by the taxpayer, their tax advisor or a third party does not lead to a complete factual description of the transactions under review, or where the taxpayer, their tax advisor or a third party refuses to answer questions in relation to the transactions under review, the Commissioner may request tax advice documents.

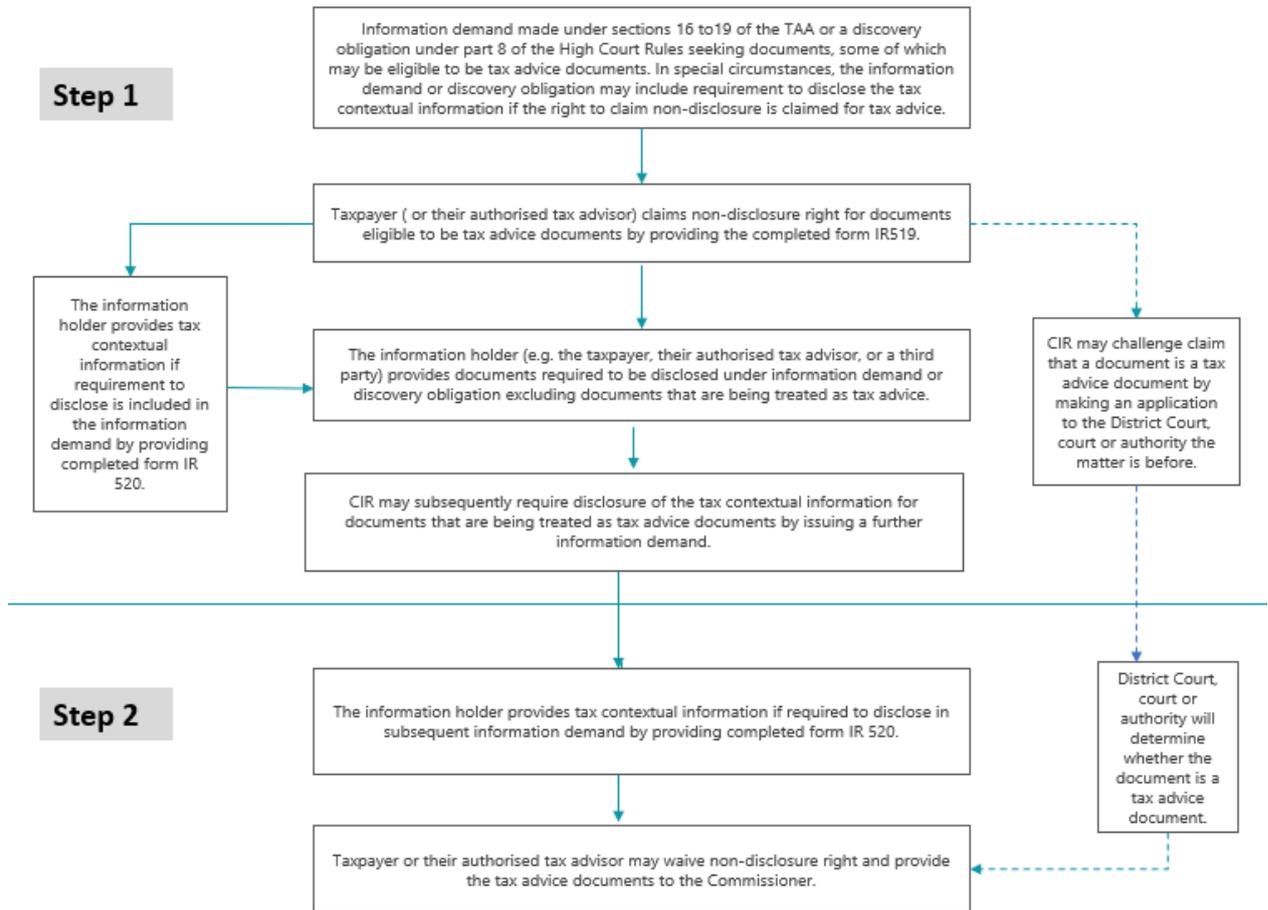
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<sup>1</sup> Available at <http://www.ird.govt.nz/technical-tax/general-articles/ga-access-to-audit-working-papers.html>

3. Subject to the right of non-disclosure, an information demand may require that tax advice documents be disclosed to resolve issues in more complex situations and where there are apparent material gaps in the information available to the Commissioner. Tax advice documents often contain factual information. This factual information may include information relevant to establishing the purpose or effect of the transaction or intent of the taxpayer involved if that is relevant to the statutory provisions under consideration (such as recording what has been stated to be the reason for acquiring an item of property). Inland Revenue officers are generally not concerned with the substance of the tax advice contained in the tax advice documents, but rather with the relevant facts which relate to the taxpayer's tax positions.
  
4. The High Court in *Blakeley v C of IR* (2008) 23 NZTC 21,865 considered the scope of protection against disclosure of a tax advice document provided by sections 20B to 20G. The case concerned a section 17 notice issued to the appellant requiring him to provide a list of names and IRD numbers of clients to whom he had provided tax advice in respect of certain transactions. The appellant declined to provide the information on the basis that it would involve the disclosure of a tax advice document which was protected by section 20B. The High Court dismissed the appeal and confirmed the finding of the District Court that the right to non-disclosure of a tax advice document in respect of the information required is not available to the appellant. The following observations made by the Court indicate the scope of non-disclosure right:
  - the protection afforded by section 20B is more confined than legal professional privilege. It is not a new substantive right of equivalent utility to legal professional privilege. It was a creature of statute and protected defined parts of a limited category of written communications.
  - the plain words of the legislation gave no protection to the information from disclosure sought by the Commissioner.
  - tax contextual information contained in the opinions would not be protected from disclosure even if the tax advice itself was.
  - waiver did not arise under sections 20B to 20G. The protection against disclosure provided by the legislation was not susceptible to waiver. The right to non-disclosure must be claimed by following the detailed procedure set out in section 20D. If the procedure set out in the legislation was not followed, there would be no right to non-disclosure.

5. Where tax advice documents are referred to in an information demand, a two-step process will generally be followed (outlined in [45 to 63] and [73 to 83]):
  - (1) the taxpayer (or their authorised tax advisor) claims the right of non-disclosure for documents that are eligible to be tax advice documents; and
  - (2) if required by the Commissioner, the taxpayer (or their authorised tax advisor) discloses the factual content (i.e. the tax contextual information) of the tax advice documents.
6. Where an information demand is issued directly to a taxpayer's tax advisor the Commissioner will be as specific as practicable about the transactions to which the information demand relates, based on information the Commissioner already holds. The information demand will be made in a manner consistent with the Commissioner's information gathering powers and standard practices.
7. While not limited to cases of potential evasion or avoidance, requests to a taxpayer's tax advisor will generally involve more complex matters and will usually only be made when direct inquiry from the taxpayer has not yielded the level of information which in the Commissioner's view is reasonably required to complete her inquiry.
8. The issuing of an information demand is limited to an appropriately delegated Inland Revenue officer on behalf of the Commissioner. They will take careful consideration of the statutory requirements of the provisions which provide for the information gathering powers of the Commissioner and the Commissioner's standard practice and other relevant statements (if any).
9. The Commissioner and the taxpayer may also be subject to a discovery obligation under part 8 of the High Court Rules, which requires the parties to a proceeding to discover the existence of documents to every other party of the proceeding. In these cases the same two-step process set out in [5] applies.

# The right to claim non-disclosure



## Key Terms

### Tax advisor

10. A "tax advisor" is defined in section 20B(4) to mean a natural person who is subject to the code of conduct and disciplinary process of an "approved advisor group".
11. Generally, due to the professional standards imposed through the approved advisor group's code of conduct in giving tax advice, a tax advisor will be someone who is technically qualified and is experienced and competent to give advice on the operation and effect of tax laws.
12. The definition covers tax advisors in public practice such as tax advisors within professional firms and also professionals holding in-house positions involved in tax advisory work for their employer.
13. When complying with an information demand, in-house tax advisors will need to ensure that they distinguish documents which are commercial or transactional in nature such as a sale and purchase agreement, as opposed to those documents being created for the main purpose of giving tax advice such as a tax opinion.
14. Where tax advice has been provided to a taxpayer by an offshore tax advisor, that advice can only be withheld from disclosure where the tax advisor is a member of an approved tax advisory group and the tax advisor has sufficient knowledge of New Zealand tax laws.

### Approved advisory group

15. An "approved advisor group" is defined in section 20B(5) as a group that includes natural persons who meet all of the following requirements:
  - have a significant function of giving advice on the operation and effect of tax laws; and
  - are subject to a professional code of conduct in giving that advice; and
  - are subject to a disciplinary process that enforces compliance with the code of conduct; and
  - is approved by the Commissioner.

16. The ability for a taxpayer to exercise their right to claim non-disclosure depends on the tax advisor who gave the advice being subject to an approved advisor's group code of conduct and disciplinary procedures at the time the tax advice document was created.
17. Typically, a tax advisor will be subject to an approved advisor group's code of conduct and disciplinary procedures because they are a member of the approved advisor group. Some organisations may allow non-members to be subject to an approved advisor group's code of conduct and disciplinary procedures under certain circumstances such as where a non-member is practising in partnership with a member of an approved advisor group.
18. The group must also be approved by the Commissioner. The Commissioner will exercise this power of approval at a high level of delegated authority having regard to the statutory requirements and other relevant considerations as may be applicable.
19. The list of approved tax advisory groups is available to view at:  
<http://www.ird.govt.nz/taxagents/maintain/maintain-tax-agent-status.html>

### **Tax advice document**

20. Whether or not a "document" is a "tax advice document" depends on whether it meets the criteria set out in section 20B(3):
  - (3) A document is a tax advice document for a person if-
    - (a) the document is eligible under subsection (2) to be a tax advice document for the person; and
    - (b) the person makes a claim, under section 20D, that the document is a tax advice document; and
    - (c) the person satisfies the requirements of sections 20E and 20F for the document.

If it is not a tax advice document, it must be disclosed if required under an information demand.

A "document" is defined in section 3:

document means-

- (a) a thing that is used to hold, in or on the thing and in any form, items of information:
- (b) an item of information held in or on a thing referred to in paragraph (a):
- (c) a device associated with a thing referred to in paragraph (a) and required for the expression, in any form, of an item of information held in or on the thing

21. The definition is wide and applies to both paper and electronic communications such as books, accounts, records, letters, faxes, reports, memos, file-notes, photographs, images, e-mails and other data however stored.

22. The right of non-disclosure only applies to documents that are "tax advice documents". It is not intended to limit the Commissioner's ability to ask general questions about a taxpayer's affairs either to a taxpayer or their tax advisor.

### **Requirements of a tax advice document**

23. Under section 20B(3), in order for a document to be a tax advice document, three requirements must be met:

- 1. the document must be **eligible** to be a tax advice document (section 20B(2)); and
- 2. the taxpayer or their authorised tax advisor must **make a claim** that the document is a tax advice document (see [58 to 59] which set out the claim requirements); and
- 3. the taxpayer or their authorised tax advisor must satisfy the **disclosure requirements** for tax contextual information (if such a disclosure is required) and disclose documents (or parts of documents) that do not meet the tax advice document requirements (see [35 to 42]).

24. In order to be **eligible** to be a tax advice document the document must have been intended to be confidential. That is the document was intended to be treated as a private document for non-public purposes, in the same way that a communication between a legal practitioner and their clients is required to be a confidential communication before legal professional privilege attaches to it. Additionally, the document must have been:

- created by a person ("the taxpayer") for the main purpose of instructing a tax advisor to act for the taxpayer by giving the taxpayer advice about the operation and effect of tax laws; or

- have been created by a tax advisor (or where the tax advisor is in public practice, an employee of the tax advisor's firm whether this is a company, partnership or other business entity) for the main purpose of giving the taxpayer confidential advice about the operation and effect of tax laws; or
- the document must record tax advice previously provided to the taxpayer by their tax advisor; or
- the document must record research or analysis of tax laws by a tax advisor (or where the tax advisor is in public practice, an employee of the tax advisor's firm) and the document was created for the main purpose of the tax advisor providing tax advice to the taxpayer; and
- the document must not have been created for the purpose of committing, or promoting or assisting the committing of, an illegal or wrongful act. Tax evasion would be an example of an illegal or wrongful act, but it would also extend to tax advice given in the course of committing some other illegal or quasi-illegal act, such as a wider act of fraud or some other crime.

25. Therefore the types of confidential documents to which the right to claim non-disclosure may apply will be those which are created in order to seek or obtain tax advice, and would not have been created except for such purpose, even though they may serve ancillary functions such as conveying factual information.

26. Documents which simply record decisions or transactions, set out calculations or summarise facts, whether or not they are part of the process of generating tax advice, will generally not be eligible to be tax advice documents. Document or forms completed for the main purpose of meeting tax compliance obligations will also not be eligible to be tax advice documents.

27. Other examples of documents which will generally not be tax advice documents are:

- tax calculations and worksheets;
- transfer pricing documentation ;
- reports on factual matters in support of tax returns;
- financial statements (including the tax notes, tax worksheets and tax provisioning calculations);
- board minutes;
- valuation reports;
- invoices, agreements and other transaction documents;
- structure diagrams;
- memoranda of understanding;
- tax indemnity agreements;

- term sheets;
- guarantees;
- compliance forms and certificates;
- communications with third parties;
- employment contracts;
- confidentiality agreements;
- bank statements and other similar documents.

28. All these types of documents will need to be disclosed in full (any advice referred to or contained in them may not be deleted or blanked out) if subject to an information demand. The above list is not intended to be an exhaustive list.
29. It is fundamental that the document must have been intended to be and remain confidential between the tax advisor and the taxpayer, and not intended to be read by third parties or members of the public. The expression "third parties" in this context however does not include the taxpayer's other advisors such as their legal advisors, financial advisors, employees of the taxpayer or the taxpayer's shareholders or owners or where the third party is subject to a confidentiality agreement. The way in which the document is treated by the taxpayer and/or the tax advisor is relevant in determining whether confidentiality has been maintained. A confidentiality obligation should exist on the part of the third party, such as is commonly the case in due diligence exercises, joint venture arrangements, insurance proposals etc.
30. If the document is eligible to be a tax advice document, the taxpayer or their authorised tax advisor must make a claim that the document is a tax advice document. Refer to [54 to 63] which outline the procedure for making a claim. If the claim is not made in the required time period the right to claim non-disclosure will not apply to the document after the expiry of that period even if a further information demand is issued in relation to the same document or a claim for the right of nondisclosure is later made.
31. If the taxpayer or their authorised tax advisor has made a claim that a document is a tax advice document, the taxpayer or their authorised tax advisor must also satisfy the tax contextual information disclosure requirements if required to do so by the Commissioner. The tax contextual information disclosure requirements are outlined in [35 to 42].

## **Tax laws**

32. "Tax law" is a defined term in section 3 and means:

- (a) A provision of the Inland Revenue Acts or an Act that an Inland Revenue Act replaces:
  - (b) An Order in Council or a regulation made under another tax law:
  - (c) A non-disputable decision:
  - (d) In relation to an obligation to provide a tax return or a tax form, also includes a provision of the Accident Rehabilitation and Compensation Insurance Act 1992 or a regulation made under that Act or the Accident Insurance Act 1998 or a regulation made under that Act of the Injury Prevention Rehabilitation and Compensation Act 2001 or a regulation made under that Act.
33. The tax advice must only be about New Zealand tax rules as they affect the taxpayer in question. Advice about the effect and application of tax laws in another jurisdiction (such as a country in which a controlled foreign company is resident) will not be subject to the right to claim non-disclosure.
34. Advice provided to taxpayers about non-tax issues such as accounting treatment (including materiality, provisioning, and related party disclosures), insolvency law, company and trust law will constitute tax contextual information, as discussed below. If the main purpose of the document is to give such advice, it will not be subject to the right to claim non-disclosure.

## **Tax contextual information**

35. Tax contextual information may be required to be disclosed as a result of one of the following:
- in special cases, where the Commissioner issues a subsequent information demand requiring disclosure of the tax contextual information after the taxpayer or their authorised tax advisor has made a claim for the nondisclosure right; or
  - in rare cases, where the Commissioner requires the tax contextual information as part of the original information demand.
36. The circumstances in which Inland Revenue may require disclosure of the tax contextual information under either of the above situations is discussed at [76 to 77].
37. Tax contextual information means information **relating to** a tax advice document that falls into any of the following categories, as defined in section 20F(3):
- facts or assumptions relating to the transaction identified in the information demand and to which the advice relates, whether the transaction has occurred,

or is expected to occur or is assumed to have occurred by the creator of the tax advice document (i.e. either the tax advisor or the taxpayer);

- a description of steps involved or expected to be involved in the performance of the transaction;
- advice related to the operation and effect of laws, other than tax laws, on the taxpayer and any related facts or assumptions that this advice is based on;
- advice related to the operation and effect on the taxpayer of tax laws which relate to the collection of debts payable to the Commissioner (i.e. debt recovery issues) and any related facts or assumptions that this advice is based on;
- facts or assumptions from, or relating to the preparation of, the taxpayer's financial statements, supporting worksheets or other source documents or documents containing information that the taxpayer is required to provide the Commissioner under an Inland Revenue Act. This is including tax advisor's accounting and tax workpapers which support the financial statements and/or tax return.

38. Generally, the Commissioner will seek tax contextual information in order to establish the facts relating to a transaction or series of transactions. The information sought will include relevant information such as whether the transaction took place, the names of the parties involved, the purpose of the transaction, relevant dates, amounts, conditions, formulae, etc.
39. "Assumptions" are statements or propositions that have been accepted or assumed as true for the purpose of the tax advice whether the basis for the statement or proposition is factual or not.
40. Tax contextual information may be required to be provided in relation to one or more tax advice documents requested in the same information demand.
41. If an authorised tax advisor is providing the tax contextual information, that information should reflect the advisor's understanding of the transaction. Verbatim extracts from transaction documents may be included if the tax advisor considers that the extracts are the best representation of the information in order to meet the disclosure requirements of the tax contextual information. This is optional and is a matter for the judgment of the tax advisor.
42. Tax contextual information from a tax advice document is to be disclosed to the Commissioner in a statutory declaration in the prescribed form (IR 520 form *Tax contextual information disclosure*). A copy of this form can be found on Inland Revenue's website: <http://www.ird.govt.nz/forms-guides/number/forms-500-599/ir520-form-taxcontext.html>

## Information holder

43. An information holder is a person who has been issued with an information demand pursuant to sections 16 to 19 requiring that information holder to disclose information in relation to a taxpayer. The information holder may be a taxpayer, a taxpayer's tax advisor or an unrelated third party such as a bank.
44. Irrespective of the relationship between the information holder and the taxpayer, the non-disclosure right must be claimed by the taxpayer to whom the information demand relates (or their authorised tax advisor). Where a taxpayer and their authorised tax advisor disagree or dispute the right to claim non-disclosure or any of the disclosure requirements related to the right to claim non-disclosure, the taxpayer's position will take precedence.

## Process for claiming the right of non-disclosure

### **STEP 1: The Commissioner must issue an information demand or the taxpayer and the Commissioner must be subject to a discovery obligation requiring the disclosure of a document which may be eligible to be a tax advice document**

45. A claim that a document is a tax advice document can only be made where the Commissioner and the taxpayer are subject to a discovery obligation or where the Commissioner has issued the information holder with an information demand under any of the following sections:
- section 16 access to premises, section 16B removal and copying of documents and section 16C removal and inspection of documents;
  - section 17 notice requiring production of information;
  - section 17A Court order for production of information or return;
  - section 18 inquiry before a District Court Judge; or
  - section 19 inquiry by the Commissioner.
46. If the information demand is a section 17 notice then the Commissioner must follow the practice set out in Operational Statement *OS 13/02 Section 17 Notices* or its replacement.
47. An information demand may be issued directly to a tax advisor but this action must be approved in accordance with the exercise of delegated powers conferred to Inland Revenue officers by the Commissioner.
48. Generally, Inland Revenue will only issue an information demand directly to a tax advisor where the information has not been provided voluntarily or in a timely manner by the information holder and cannot reasonably (in the opinion of the

Commissioner) be obtained or verified elsewhere. For example records may have been lost, the taxpayer may no longer be available or may have left the country, or the taxpayer or information holder is being uncooperative in regard to reasonable inquiries made by the Commissioner.

49. Other examples of when an information demand may be issued to a tax advisor include cases involving suspected tax evasion or fraud, suspected tax avoidance, and cases involving complex international transactions or transfer pricing.
50. In some cases the information demand may be issued to a third party who is not the taxpayer's tax advisor. The legislation does not require the Commissioner to advise the taxpayer or their tax advisor of the information demand. However, where this does occur, and the Commissioner considers that the information demand may include documents that may be eligible to be a tax advice document, the Commissioner's practice is that the taxpayer or their tax advisor will be notified (by the Commissioner) of the notice, so as to provide the opportunity for a claim of non-disclosure to be made.
51. The Commissioner, however, reserves the right **not** to advise the taxpayer of an information demand to a third party where the Commissioner considers that to do so will endanger the safety of the third party or for reasons relating to her duty to protect the integrity of the tax system. A decision not to advise the taxpayer of an information demand made to a third party will be made by a senior officer of the department.
52. The notice to the third party will refer to the non-disclosure right and the third party may choose to advise the taxpayer of the notice and so allow the taxpayer the opportunity to make a claim of non-disclosure. However in some cases the Commissioner may specifically ask the third party not to advise the taxpayer of the information demand.
53. Where the information demand requires disclosure of the tax contextual information from the outset, this will be clearly stated in the information demand.

### **Notification to Commissioner that taxpayer or their authorised tax advisor is claiming the non-disclosure right.**

54. A claim that a document is a tax advice document for a taxpayer must be made by either the taxpayer or their authorised tax advisor. This is also the case where the information holder is a third party, since a third party cannot make such a claim.

55. Where the non-disclosure right is made by a tax advisor on behalf of their client, section 20D(5) requires that the tax advisor must also include a statement that they are authorised to act on behalf of the taxpayer for the purposes of the non-disclosure right.
56. The Commissioner expects and prefers that the authorised tax advisor is the tax advisor who created the tax advice document. However if that tax advisor is unavailable, for example because the tax advisor is not in New Zealand, or has left the organisation originally instructed to provide the advice, or that organisation has ceased to operate, then an appropriate alternative tax advisor may be the authorised tax advisor.
57. Although the legislation does not provide for the claim to be made on a prescribed form, the Commissioner prefers that the claim that a document is a tax advice document be made on the IR 519 form *Tax advice document claim* which has been designed for this purpose. This form is available at:  
<http://www.ird.govt.nz/formsguides/number/forms-500-599/ir519-form-nondisclosure.html>
58. The claim that a document is a tax advice document must contain certain information. Where the document was created by the taxpayer (i.e. a document instructing a tax advisor to provide advice on the operation and effect of tax laws), the claim must contain the following:
- a brief description of the form (such as a letter, email, report) and content (such as request for tax advice concerning fringe benefit tax) of the document;
  - the name of the tax advisor for whom the document was intended; and
  - the date on which the document was created (that is, finalised or sent to the taxpayer's tax advisor).
59. Where the document was created by a tax advisor the claim must contain the following:
- a brief description of the form (such as a letter, research paper, summary of phone conference, email) and content (such as tax advice concerning fringe benefit tax, depreciation, treatment of bloodstock) of the document; and
  - the statute, enactment or regulation and the type of revenue such as income tax, fringe benefit tax, GST, PAYE or withholding tax which was the subject of the tax advice; and
  - the name and if possible the contact details of the tax advisor who gave the tax advice in relation to the document; and

- the name of the approved advisor group that the tax advisor belonged to when the document was created; and
- the date on which the document was created (that is, finalised or sent to the taxpayer).

60. Different versions of the "same" tax advice document, where the content of the various versions are significantly different, may need to be separately identified in the IR519 form.

61. The following table sets out the time periods within which a claim that a document is a tax advice document must be made (section 20D(4)):

<b>Type of information demand/obligation</b>	<b>Due date for non-disclosure claim</b>
Access to premises for information (section 16 notice, sections 16B and 16C)	The date the right of inspection or removal is exercised, or later date agreed with Inland Revenue
Information demand (section 17 notice)	The later of the date given by the Commissioner or 28 days after the date of the section 17 notice
Court order for information (issued under section 17A or section 18)	The date the court requires the information
Inquiry by Commissioner (section 19)	The date the Commissioner requires the information
Discovery obligation	The date required by the discovery obligation

62. Where the taxpayer or their authorised tax advisor has not notified the Commissioner of their claim of non-disclosure within the above stated time periods the claim will be invalid. A further claim may not be made at a later date even if the document happens to be the subject of a later information demand. Accordingly it is recommended that the taxpayer or their authorised tax advisor should notify the Commissioner of a claim that a document is a tax advice document as soon as practicable after receiving an information demand.

63. The Commissioner may extend the above time periods for making a claim of nondisclosure in exceptional circumstances if requested to do so by the taxpayer (or their authorised tax advisor). Any request for such an extension must be made before the end of the time frame advised in the information demand and any extension will be granted at the discretion of the Commissioner. Any change to the

time period will be notified to the taxpayer in writing. The Commissioner will (as necessary) take the following matters into account when extending the time period for making a claim of non-disclosure:

- the complexity of the situation;
- the compliance history of the taxpayer;
- issues related to the timing of the notice;
- the difficulty which the taxpayer may have in making the claim; and
- other factors generally relevant to the exercise of the relevant statutory power.

## **Limitations on the right to claim non-disclosure**

64. If a document required to be disclosed under an information demand does not meet the requirements of being a tax advice document, that document is ineligible to be a tax advice document. In such circumstances, the information holder is required to disclose that document pursuant to the requirements of the information demand. This includes attachments (such as appendices, schedules and notes) to tax advice documents where the attachment is not eligible to be a tax advice document.

65. Examples of documents (including those that are attached to another document which is a tax advice document) that are generally not eligible to be tax advice documents include, but are not limited to:

- business and management records;
- financial statements, work papers, and notes to the financial accounts;
- letters of engagement;
- numerical calculations compiled for the purpose of calculating a taxpayer's tax liability;
- transfer pricing documentation;
- legal transaction documents such as contracts, licence agreements, loan documentation, guarantees, deeds, title documents, tax indemnity agreements and letters between the transaction parties;
- databases and spreadsheets;
- diagrams demonstrating transactions;
- documents created by the tax advisor for main purposes other than giving a taxpayer advice on the operation and effect of tax laws, such as advising on employment law, company law, securities law, other regulatory requirements, or the accounting or financial treatment of transactions, etc.

66. If the taxpayer or their tax advisor does not disclose the documents or part of documents which are not tax advice documents by the required date set out in the information demand, the taxpayer or their tax advisor may be liable for penalties as set out in Part 9. It is therefore important that care is taken to identify those documents which may be tax advice documents from those other documents or parts of documents which are not eligible to be tax advice documents.

## **Treatment of potential tax advice documents**

67. Section 20C contains specific provisions dealing with the treatment of a potentially eligible tax advice document while the non-disclosure claim is being established.

68. The document will be regarded as being a tax advice document from the date of the information demand or discovery obligation until the earlier of:

- the date by which the taxpayer or their authorised tax advisor is required to claim the document is a tax advice document; or
- the date on which the taxpayer or their authorised tax advisor informs the Commissioner that the person is waiving the right to claim non-disclosure over the document (including where the document is provided as it is not included in a claim for non-disclosure).

69. As advised above, if a non-disclosure claim is not made within the statutory time frame the document loses its tax advice document status.

70. If the taxpayer or their authorised tax advisor claims a document is a tax advice document within the statutory time frame the document must be treated as a tax advice document from the date the Commissioner is advised of the claim until one of the following events occurs:

- the District Court, or a court or Taxation Review Authority (that the discovery obligation is in proceedings before) rules that the document is not a tax advice document;
- the taxpayer or their authorised tax advisor agrees in writing that the document is not a tax advice document;
- the taxpayer or their authorised tax advisor withdraws in writing the claim that the document is a tax advice document;
- an approved advisor group informs the Commissioner that the authorised tax advisor is or was not a member of the approved advisor group at the time that the authorised tax advisor claimed and was required to be a member of the approved advisor group.

71. While the non-disclosure claim is being considered a copy of the document is to be held in a secure place.
72. A "secure place" includes a lockable cupboard, locker or safe at the tax advisor's business premises and secure electronic storage. It can also include the non-public parts of a tax advisor's offices where access to that area is limited, and protected or controlled by the tax advisor.

## **STEP 2: Provision of tax contextual information in statutory declaration**

73. An information holder who is required to disclose information under an information demand or discovery obligation must also disclose tax contextual information relating to any document that the taxpayer or their authorised tax advisor claims to be a tax advice document, if required to do so by the Commissioner. The Commissioner may require disclosure of the tax contextual information either as part of the original information demand, discovery obligation or may require disclosure through a subsequent information demand at a later date.
74. The discretion to require disclosure of the tax contextual information will be exercised sparingly in order to minimise compliance costs, and so that the spirit of the nondisclosure right rules are not undermined. Accordingly, exercising this discretion will be limited to officers at an appropriately high level of delegated authority.
75. The Commissioner will notify the taxpayer or their authorised tax advisor if disclosure of the tax contextual information is required either as part of the original information demand or in a separate information demand. A decision to require disclosure of the tax contextual information will be made after the Commissioner has assessed the information already provided under the information demand and after considering the nature of the documents for which the non-disclosure claim has been claimed. Generally the Commissioner will require the disclosure of tax contextual information after the information demand has been issued where:
- there appears to be material gaps in the information available;
  - there is an issue of credibility in respect of the information already held by Inland Revenue;
  - inconsistent information already provided needs to be verified; or
  - there is considerable factual complexity requiring clarification and there are no other reasonable sources for that information.
76. Where the Commissioner considers it necessary to protect the integrity of the tax system, an original information demand may require the tax contextual information

to be disclosed at the same time the information demand is given. This is likely to occur:

- in circumstances involving suspected evasion or other suspected criminal action;
- where sections 16 or 16B are being applied;
- where the transactions in question are particularly complex and the evidence is inconsistent, and there may be insufficient time for the Inland Revenue to properly complete the investigation within the timebar period; and/or
- where there is a history of non-compliance by the taxpayer or associated persons.

77. The disclosure of the tax contextual information must be in a statutory declaration in the prescribed IR 520 form *Tax contextual information disclosure*.

78. The statutory declaration contained in the IR 520 form must be made by an authorised tax advisor who has not been barred from making a statutory declaration. A tax advisor may be barred from making a statutory declaration if a Court has so ordered where the tax advisor has previously been convicted of an offence under one or more of the following provisions:

- section 111 of the Crimes Act 1961 - false statements or declarations;
- section 143(1)(b) - not supplying information when required to by tax law;
- section 143A(1)(b) or (c) - knowingly does not provide information when required to by law or knowingly provides altered, false, incomplete or misleading information;
- section 143B(1)(b) or (c) - knowingly not supplying information when required to by tax law, or providing altered, false, incomplete or misleading information;
- or
- section 143H - obstruction.

79. Generally, the Commissioner prefers that the authorised tax advisor making the statutory declaration will be the same tax advisor or a member of the same firm which created the tax advice document for which the non-disclosure right is claimed (and where possible be the same authorised tax advisor who claimed the non-disclosure right on behalf of the taxpayer).

80. The statutory declaration must be sworn before:

- a Solicitor of the High Court of New Zealand; or
- a Justice of the Peace; or
- any other person authorised by law under the Oaths and Declarations Act 1957 to take a statutory declaration but not including officers of Inland Revenue.

81. Where the information demand requires disclosure of the tax contextual information, that information, including the IR 520 form, may be delivered within the time periods outlined below, together with any documents which are not tax advice documents and that are required to be disclosed under the information demand to the officer of the Department authorised by the Commissioner to receive the documents. This generally will be the officer listed in the information demand.

<b>Type of information demand/ obligation</b>	<b>Due date for tax contextual information</b>
Access to premises for information (section 16 notice, sections 16B and 16C)	The date determined by the Commissioner when requiring the statutory declaration.
Information demand (section 17 notice)	The later of the date given by the Commissioner on the notice or 28 days after the date of the notice requiring the disclosure of the tax contextual information.
Court order for information (issued under section 17A or section 18)	The date the court requires the production of the information.
Inquiry by Commissioner (section 19)	The date the Commissioner requires the production of the information.
Discovery obligation	The date required by the discovery obligation.

82. The Commissioner may extend the above time periods in exceptional circumstances if requested to do so by the taxpayer (or their authorised tax advisor). An extension may be granted at the discretion of the Commissioner and any change to the time period will be notified to the taxpayer.

83. The Commissioner may take the following matters into account when extending the time period for providing tax contextual information:

- the complexity of the situation;
- the compliance history of the taxpayer;
- issues related to the timing of the notice;
- the difficulty which the taxpayer or their authorised tax advisor may have in providing the information; and
- other factors generally relevant to the exercise of the relevant statutory power.

## **Section 16 information demands and tax contextual information**

84. Where the Commissioner exercises her powers under sections 16, 16B or 16C, disclosure of the tax contextual information in the information demand related to the exercise of the section 16, 16B or 16C powers will be required.

85. A taxpayer or their authorised tax advisor will need to ensure that they have met the following requirements by the relevant statutory time period(s) set out in the information demand in relation to sections 16, 16B and 16C:

- all documents required to be disclosed under the information demand which are not eligible to be tax advice documents have been provided;
- if the non-disclosure right is being claimed the Commissioner has been notified of that and the required information in the IR 519 form has been provided; and
- the tax contextual information for all documents which are subject to the nondisclosure right has been provided.

### **Voluntarily providing eligible documents**

86. Nothing in this Statement precludes a taxpayer or their authorised tax advisor from voluntarily providing documents which may be eligible to be tax advice documents. However taxpayers and their authorised tax advisors should be aware that any documents which may be eligible to be tax advice documents but which are provided voluntarily will constitute a waiver of the right to claim non-disclosure over those particular documents.

87. Nothing in this Statement precludes a taxpayer from meeting their obligations under Part 9. For example, it will commonly be the case that tax advice documents need to be disclosed to demonstrate that the taxpayer took reasonable care in taking a particular tax position.

### **Challenge by the Commissioner**

88. The legislation provides that the Commissioner may apply to the District Court (this may be included in the course of a section 18 inquiry), or the court or authority the particular matter is before, for an order determining one or more of the following:

- whether a document is a tax advice document for the taxpayer;
- whether information provided by a taxpayer or their authorised tax advisor is tax contextual information for a tax advice document; or
- whether the taxpayer or their authorised tax advisor is required to provide a more detailed or better description of tax contextual information in relation to a document.

89. As part of an application by the Commissioner, the District Court Judge, court or authority may require disclosure to the court of the document which is the subject of the order.

## **Disclosure of information to approved advisor group**

90. Section 81 allows the Commissioner to supply information to an approved advisor group about an action or omission by a person who is or purports to be a member of the approved advisor group where the Commissioner considers that act or omission to be a breach of the tax advisor's responsibilities in relation to the non-disclosure right.

91. The Commissioner would only consider this type of disclosure in specific circumstances such as:

- the provision of false or incomplete information in the statutory declaration required for the disclosure of tax contextual information;
- where a tax advisor has knowingly failed to disclose facts or assumptions relating to a transaction which is the subject of the tax advice document;
- where the tax advisor has failed to provide tax contextual information when required to do so by the Commissioner under or pursuant to an information demand.

This Operational Statement is signed on 16 August 2018.

**Rob Wells**

**Manager, Technical Standards**