



**ASIC**  
Australian Securities &  
Investments Commission

**Australian Securities  
and Investments Commission**

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Me

By email: foι+request-11634-  
xxxxxxxx@xxxxxxxxxxxx.xxx.xx

Our Reference: FOI 141-2024

9 August 2024

Dear Me

**Freedom of Information Request No. FOI 141-2024**

I refer to your request of 6 July 2024 for access to documents in the possession of the Australian Securities and Investments Commission (**ASIC**) pursuant to the *Freedom of Information Act 1982* (**FOI Act**).

Following a request consultation process,<sup>1</sup> you revised your request as follows:

- All emails sent by ASIC between 0000 1 July and 2359 5 July 2024, where:
- The author is an ASIC Executive Director (or equivalent), including acting Executive Director, and
- The email relates in any way to the SERC report on ASIC investigation and enforcement (whether before or after the report's formal tabling), and
- The email was not sent outside the Commonwealth (that is, internal emails, or to other Commonwealth entities, or a minister/their office, are all included; emails to journalists, or companies (that are not CCEs), or private citizens are excluded)

*Personal information of any Senior Executive Leader, Senior Executive Specialist or Executive Director or equivalent, including a/SES and SES at other departments, is included unless (1) it is sensitive personal*

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<sup>1</sup> On 12 July 2024, I advised you that I intended to refuse your request on the basis that a practical refusal reason existed within the meaning of s 24AA(1)(a) of the FOI Act. I invited you to revise the terms of your request before a final decision was made (s 24AB notice). On 17 July 2024, you revised the scope of your request.

*information, or (2) it is a non-work contact detail (such as a mobile phone number where the employer didn't provide the phone)*

*Duplicates are excluded - one email trail is sufficient if it has all the emails in scope*

*Attachments to emails, and other documents referred to in emails, are included*

*Third party personal information, apart from Senior Executive Leader, Senior Executive Specialist or Executive Director and SES as above, is excluded except for first names*

*All emails domains ('@asic.gov.au') are included*

*All email addresses are included subject to the above. So positional emails and Senior Executive Leader, Senior Executive Specialist or Executive Director and SES names included, other names excluded except first name*

The 30-day statutory time period for processing your request commenced on the day after the day on which your request was received.<sup>2</sup> This timeframe was extended until 9 August 2024 to undertake the request consultation process.<sup>3</sup>

I am the authorised decision-maker for the purposes of section 23 of the Act and this letter gives notice of my decision.

#### **Decision and reasons for decision**

I have identified 11 documents within the terms of your request. These documents are described in the schedule attached to this letter.

I advise that I have decided to:

- grant access in full to 6 documents: documents 1, 2, 4, 7, 8 and 9
- grant access in part to 5 documents with the removal of exempt material pursuant to the certain operations of agencies exemption (s 47E(d)): documents 3, 5, 6, 10 and 11, and
- remove some matter as irrelevant to the scope of the request pursuant to s 22 of the FOI Act: documents 1 to 6 and 8 to 11.

I have taken the following material into account in making my decision:

- the terms of your request
- the documents within scope
- searches conducted by ASIC staff
- advice from responsible business areas
- the FOI Act (specifically ss 11A(5), 22 and 47E(d)), and
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the FOI Guidelines).

My reasons are set out below.

#### **Searches undertaken**

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<sup>2</sup> Freedom of Information Act 1982 (Cth), s 15(5).

<sup>3</sup> FOI Act, s 24AB.

Based on the terms of the request, searches were coordinated by liaising with the staff members identified in the terms of the request.

Relevant staff conducted keyword and manual searches on across all relevant locations that the documents could be held within such as ASIC's email system (Outlook). Given the terms of the request, the keywords utilised included: Report, SERC, Senate and Inquiry.

Following these searches, 11 relevant documents were identified.

Having regard to the evidence of searches conducted, I am of the view that searches have been conducted across all relevant locations that the documents could be held within and all relevant documents were identified.

**Certain operations of agencies exemption (s 47E(d))**

For the reasons below I have found that the documents<sup>4</sup> contain material that is conditionally exempt under s 47E(d) of the FOI Act. This material can be described as:

- details that can facilitate direct contact with ASIC staff members and teams such as group email addresses and
- material that relates or refers to information received from third parties.

Section 47E(d) provides:

*A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to...have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

The FOI Guidelines explain:

*The term 'substantial adverse effect' broadly means 'an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person'. The word 'substantial', taken in the context of substantial loss or damage, has been interpreted as 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal'.<sup>5</sup>*

The FOI Guidelines further explain:

*For the grounds in ss 47E(a)-(d) to apply, the predicted effect needs to be reasonably expected to occur... There must be more than merely an assumption or allegation that damage may occur if the document is released.*

...

*An agency cannot merely assert that an effect will occur following disclosure. The particulars of the predicted effect should be identified during the decision-making process, including whether the effect could reasonably be expected to occur. Where the conditional exemption is relied on, the relevant particulars and reasons should form*

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<sup>4</sup> Documents 3, 5, 6, 10 and 11.

<sup>5</sup> FOI Guidelines [6.18].

*part of the decision maker's statement of reasons, if they can be included without disclosing exempt matter...<sup>6</sup>*

*Details that can facilitate direct contact with ASIC staff members and teams*

The documents include the details of staff members and internal group email addresses.<sup>7</sup> There is evidence that some of these staff members are subject to frequent direct contact from members of the public about matters unrelated to their role at ASIC. The public release of this material could lead to increased direct contact from members of the public and impede staff from quickly identifying and progressing priority matters for ASIC. Given the significance of the staff members' role within ASIC, this would impact upon ASIC's ability to efficiently progress significant matters.

I am satisfied that if the staff members are subject to additional significant contact about unrelated matters outside of ASIC's established communication channels for members of the public, this would have an adverse and substantial effect on ASIC's functions as the federal regulator of financial services.

This material is conditionally exempt under s 47E(d) of the FOI Act.

*Third party material*

The documents include material that relates or refers to information received from third parties on a voluntary basis ('third party material').<sup>8</sup> Given ASIC's current regulatory context and based on the nature of the information and communications with the third parties, the release of this material could reasonably be expected to have an adverse impact on the relevant stakeholder relationships. Prejudice to these stakeholder relationships would impede ASIC from receiving and releasing candid and fulsome advice and information relevant to its operations and effectiveness.

I am satisfied that prejudice to the nature and quality of information that ASIC receives from relevant stakeholders and consequently releases to the public would have an adverse and substantial effect on ASIC's functions as the federal regulator of financial services.

This material is conditionally exempt under s 47E(d) of the FOI Act.

**Public Interest Test**

As I have decided that the documents contain material that is conditionally exempt under s 47E(d) of the FOI Act, I am required to consider whether the disclosure of the documents would, on balance, be contrary to the public interest.

The FOI Act provides that access must be given to a conditionally exempt document unless disclosure would be contrary to the public interest.

I have had regard to the public interest factors favouring access to documents outlined in section 11B(3):

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<sup>6</sup> FOI Guidelines [6.90] and [6.92].

<sup>7</sup> Documents 3, 5, 6, 10 and 11.

<sup>8</sup> Documents 3, 10 and 11.

1. Access to the documents would promote the objects of the FOI Act (including all matters set out in sections 3 and 3A).
2. Access to the documents would inform debate on a matter of public importance.
3. Access to the documents would promote effective oversight of public expenditure.
4. Access to the documents would allow a person to access his or her personal information.

Of these factors, factor 1 is relevant. The release of the documents supports the objects of the FOI Act to provide a right of access to information in the possession of Commonwealth government agencies and promote accountability and transparency in government. These considerations weigh in favour of disclosure.

The above factor must be balanced against the factors against disclosure. Although the FOI Act does not specify any factors against disclosure in the public interest, the FOI Guidelines include a non-exhaustive list of factors.<sup>9</sup> In the circumstances of this case relevant factors against disclosure are that disclosure could reasonably be expected to prejudice ASIC's ability to efficiently progress functions and responsibilities imposed upon it by Parliament.

I have not taken into account the irrelevant factors outlined in s11B(4) of the FOI Act in deciding whether access to the documents would be contrary to the public interest.

In balancing the factors for and against disclosure, I give greater weight to the public interest in ensuring that ASIC is not impeded in carrying out the functions and responsibilities imposed upon it by Parliament.<sup>10</sup>

On balance, I find that giving access to the conditionally exempt material would be contrary to the public interest. The relevant material is exempt under s 47E(d) of the FOI Act.

## **Section 22**

Section 22(2) of the FOI Act requires an agency to give an applicant access to an edited copy of a document with the exempt and irrelevant matter deleted if it is reasonably practicable for the agency to prepare an edited copy, having regard to:

- the nature and extent of the modifications (s22(1)(c)(i)); and
- the resources available to modify the document (s22(1)(c)(ii)).

The documents include material that:

- does not "*relat[e] in any way to the SERC report on ASIC investigation and enforcement (whether before or after the report's formal tabling)*"
- is not in an email from an Executive Director or referenced in an email from an Executive Director, and

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<sup>9</sup> FOI Guidelines [6.233].

<sup>10</sup> *Utopia Financial Services and Australian Securities and Investments Commission* [2017] AATA 269 [135].

- is personal information of third party individuals beyond their first names (such as their surnames and contact details).

This material does not fall within the scope of your request and is irrelevant matter.

I find that it is possible to prepare an edited copy of the documents with the removal of the irrelevant matter (s 22(1)(b)). ASIC is required to provide you with access to the edited documents (s 22(2)).

### **Review rights**

If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the decision.

#### ***Internal review***

Under section 54 of the FOI Act, you may apply in writing to ASIC for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter. Where possible please attach your reasons for seeking review of the decision. The internal review will be carried out by another officer within 30 days.

#### ***Information Commissioner review***

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

- online: [https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR\\_10](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10)
- email: [xxxx@xxx.xxx.au](mailto:xxxx@xxx.xxx.au)
- post: GPO Box 5218 Sydney NSW 2001

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

#### ***FOI Complaints***

If you are unhappy with the way we have handled your FOI request, please let us know what we could have done better. We may be able to rectify the problem. If you are not satisfied with our response, you can make a complaint to the Australian Information Commissioner. A complaint to the Information Commissioner must be made in writing. Complaints can be lodged in one of the following ways:

- online: [https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA\\_1](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1)
- email: [xxxx@xxx.xxx.au](mailto:xxxx@xxx.xxx.au)
- post: GPO Box 5218 Sydney 2001

More information about complaints is available on the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>.

If you are not sure whether to lodge an Information Commissioner review or an Information Commissioner complaint, the Office of the Australian Information Commissioner has more information at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>.

**Questions about this decision**

If you have any questions or wish to discuss this decision, please contact me on [xxxxxx.xxxxxx@xxxx.xxx.xx](mailto:xxxxxx.xxxxxx@xxxx.xxx.xx).

Yours sincerely

**Dr Rachel Ranjan**

Senior Lawyer, FOI

Australian Securities and Investments Commission

(Authorised decision-maker pursuant to subsection 23(1) of the FOI Act)

**FOI 141-2024****SCHEDULE OF DOCUMENTS**

Number	Date	Pages	Description	Decision	Exemption(s)
1	1 July 2024	1	Internal ASIC email from ED attaching transcript	Release in full	Irrelevant matter: s 22
2	2 July 2024	10	Internal ASIC email from ED	Release in full	Irrelevant matter: s 22
3	3 July 2024	11	Internal ASIC email from ED	Release in part	Irrelevant matter: s 22 Contact details, third party material: s 47E(d)
4	3 July 2024	13	Internal ASIC email from ED	Release in full	Irrelevant matter: s 22
5	3 July 2024	14	Internal ASIC email from ED attaching SERC Report	Release in part	Irrelevant matter: s 22 Contact details: s 47E(d)
6	3 July 2024	248	Internal ASIC email from ED	Release in part	Irrelevant matter: s 22 Contact details: s 47E(d)
7	4 July 2024	251	Internal ASIC email from ED	Release in full	Irrelevant matter: s 22
8	4 July 2024	253	Internal ASIC email from ED	Release in full	Irrelevant matter: s 22
9	4 July 2024	255	Internal ASIC email from ED	Release in full	Irrelevant matter: s 22
10	4 July 2024	257	Internal ASIC email from ED	Release in part	Irrelevant matter: s 22 Contact details, third party material: s 47E(d)
11	5 July 2024	262	Internal ASIC email from ED	Release in part	Irrelevant matter: s 22 Contact details, third party material: s 47E(d)