



**ASIC**  
Australian Securities &  
Investments Commission

**Australian Securities  
and Investments Commission**

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09 September 2024

“Me”

By email: [foi+request-11634-bede8cba@righttoknow.org.au](mailto:foi+request-11634-bede8cba@righttoknow.org.au)

Dear “Me”,

**Notice of Internal Review Decision under the Freedom of Information Act 1982**  
**Ref No. 141-2024**

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I refer to your email dated 15 August 2024, in which you request an internal review under the *Freedom of Information Act 1982 (Cth) (FOI Act)*.

I am authorised to conduct the internal review pursuant to s 23(1) of the FOI Act.

**Initial Decision on your FOI Request**

On 17 July 2024 you made a revised request under the FOI Act for the following material:

- *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 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*

On 9 August 2024 the authorised decision maker, Ms Rachel Ranjan, gave notice of her decision on your request (**Original Decision**). Ms Ranjan informed you that she had identified 11 documents falling within the scope of your request. She decided to grant access in part to these documents, relying on the s 47E(d) exemption and redacted irrelevant matter pursuant to s 22 of the FOI Act.

### **Internal Review Request**

On 15 August 2024 you lodged an application for internal review of the original decision (**Internal Review Request**), set out below:

*I am writing to request an internal review of Australian Securities and Investments Commission's handling of my FOI request 'ASIC - SERC enforcement report reactions'.*

*Hi - decision pretty good, and timely, thank you. One point of internal review. Section 22 seems to be overused? I get it for third party information. However, it seems unlikely that entire pages are third party information. And/or, that whole pages of an email that is in scope are themselves outside of scope. They would at least, in part, be context for the email that is in scope? For example, pages 1-3 seem unlikely to be totally irrelevant to the SERC inquiry*

### **Information considered:**

In reaching my decision, I have considered the following:

- the FOI Act, in particular ss 22, 47C and 47F;
- the Australian Information Commissioner's FOI Guidelines issued under s 93A of the FOI Act (**FOI Guidelines**);
- your FOI request, as revised on 17 July 2024;
- the original decision dated 9 August 2024;
- your internal review application received on 15 August 2024; and
- the content of the documents at issue.

In conducting this internal review I can decide all issues raised by your FOI request and exercise all the powers available to the original decision maker.<sup>1</sup>

### **Internal Review Decision**

I have decided to vary the original decision. I consider that certain material in documents 1, 9 and 10 is not irrelevant. I have decided to grant access in part to this material, relying on the exemptions under ss 47C and 47F of the FOI Act.

The material that I have decided to release is **attached**.

A schedule of documents, which details my decision in relation to each document, can be found at the end of this letter.

The reasons for my decision are set out below.

### **Reasons for decision**

#### Section 47C of the FOI Act – deliberative processes

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<sup>1</sup> FOI Guidelines [9.3] and [9.37]

For the reasons below, I have found documents 1 and 10 to be conditionally exempt under s 47C of the FOI Act.

Section 47C of the FOI Act relevantly provides:

- (1) A document is conditionally exempt if its disclosure under this Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency ...
- (2) Deliberative matter does not include either of the following:
  - (a) operational information (see section 8A);
  - (b) purely factual material

The FOI Guidelines provide that “deliberative matter” is a shorthand term for “opinion, advice and recommendation” and “consultation and deliberation” that is recorded or reflected in a document.<sup>2</sup> The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one’s course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.<sup>3</sup>

The meanings of the words ‘opinion’, ‘advice’ and ‘recommendation’ all involve consideration, followed by the formation of a view either about a certain subject or about a course of action and the subsequent transmission of that view.<sup>4</sup> A deliberative process may include the recording or exchange of interim decisions and deliberations.<sup>5</sup>

This material concerns preliminary advice, analysis, opinions, recommendations and thoughts of ASIC staff for the purposes of briefing the Commission and the broader leadership team on the SERC Report. I am satisfied that this is “deliberative matter” within the meaning of s 47C of the FOI Act. The material was prepared for the deliberative process involved in ASIC’s strategic and employee communications functions regarding the SERC Report.

This material is therefore conditionally exempt under s 47C of the FOI Act.

#### Section 47F of the FOI Act – personal privacy

For the reasons below, I consider that the personal opinions expressed in documents 1, 9 and 10 are conditionally exempt under s 47F.

Section 47F relevantly provides:

##### *General rule*

- (1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

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<sup>2</sup> FOI Guidelines [6.59]

<sup>3</sup> FOI Guidelines [6.54] (footnotes omitted)

<sup>4</sup> *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945 [39]

<sup>5</sup> FOI Guidelines [6.57]

- (2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:
- (a) the extent to which the information is well known;
  - (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
  - (c) the availability of the information from publicly accessible sources;
  - (d) any other matters that the agency or Minister considers relevant.

The term, 'personal information', is defined in s 4 of the FOI Act to have the same meaning as in the *Privacy Act 1988* (Cth) (**Privacy Act**). Section 6 of the Privacy Act defines personal information as:

information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not; and
- (b) whether the information or opinion is recorded in a material form or not.

The FOI Guidelines state that key factors for determining whether disclosure of a document would involve an unreasonable disclosure of personal information include:

- the author of the document is identifiable;
- the documents contain third party personal information;
- release of the documents would cause stress on the third party; and
- no public purpose would be achieved through release.<sup>6</sup>

As discussed in *'FG' and National Archives of Australia* [2015] AICmr 26, other relevant factors include:

- the nature, age and current relevance of the information;
- any detriment that disclosure may cause to the person to whom the information relates;
- any opposition to disclosure expressed or likely to be held by that person;
- the circumstances of an agency's collection and use of the information;
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act;
- any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information, and
- whether disclosure of the information might advance the public interest in government transparency and integrity.<sup>7</sup>

I am satisfied that the documents contain the personal information, and personal opinions of, ASIC staff. I am satisfied that they are reasonably identifiable, as their identities are clearly apparent from the documents.

The FOI Guidelines state that documents held by agencies or ministers often include personal information about public servants.<sup>8</sup> In this case, I consider that disclosing this personal information would disclose personal information about the staff, as well as the subjects of their opinions.

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<sup>6</sup> FOI Guidelines [6.137]

<sup>7</sup> FOI Guidelines [6.138]

<sup>8</sup> FOI Guidelines [6.146]

Having regard to the factors in s 47F(2), the Guidelines and *'FG' and National Archives of Australia* [2015] AICmr 26, I am satisfied that it would be unreasonable to disclose this personal information for the following reasons:

- the personal information is not well known or available from publicly accessible sources;
- the personal information was collected for the primary purpose of inviting comment or consideration on issues relevant to the SERC Report;
- disclosure of the information could reasonably be expected to cause detriment to the persons to whom the information relates by disclosing their personal information without consent;
- the parties would be likely to object to disclosure;
- disclosure is unlikely to advance the public interest in government transparency and integrity, given the comments relate to personal opinions about an individual's private disposition; and
- the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.

On balance, I am satisfied that disclosure of this personal information would be an unreasonable disclosure of personal information. This material is therefore conditionally exempt under s 47F of the FOI Act.

### Public Interest Test

Where a document is conditionally exempt, access must be given unless in the circumstances giving access would, on balance, be contrary to the public interest (s 11A(5) of the FOI Act). As I have decided that documents 1, 9 and 10 are conditionally exempt under ss 47C and/or 47F of the FOI Act, I am required to consider whether disclosure would be contrary to the public interest, taking into consideration s 11B of the FOI Act and part 6 of the FOI Guidelines.

One factor in favour of access is that disclosure could promote the objects of the FOI Act.<sup>9</sup> With regard to the public interest factors set out in the FOI Guidelines,<sup>10</sup> I consider the relevant factors against disclosure are that disclosure could reasonably be expected to:

- prejudice the effectiveness of ASIC's decision-making and deliberative processes;<sup>11</sup> in particular, by:
  - discouraging full and complete sharing of opinions and recommendations;
  - and
  - harming the development of sound decision-making.
- prejudice the protection of an individual's right to privacy;<sup>12</sup> and
- harm the interests of an individual or group of individuals.<sup>13</sup>

In balancing the factors for and against disclosure, I have given significant weight to the prejudicial effect on privacy, given the potential effects of disclosure in circumstances where the individuals would not reasonably expect their personal information to be disclosed.

<sup>9</sup> *Freedom of Information Act 1982* (Cth) (FOI Act) s 11B(3)(a)

<sup>10</sup> FOI Guidelines [6.22]

<sup>11</sup> See *Parker and Australian Securities and Investments Commission* [2016] AATA 767 [56] and *Baker and Australian Securities and Investments Commission* [2019] AATA 4898 [30].

<sup>12</sup> FOI Guidelines [6.233(a)]

<sup>13</sup> FOI Guidelines [6.233(k)]

Based on these factors, I have decided that the public interest is weighted more heavily against disclosure and that giving access to the conditionally exempt material would, on balance, be contrary to the public interest. The relevant material is therefore exempt under ss 47C and 47F of the FOI Act.

### **Section 22 – access to edited copies**

Where an agency refuses access to an exempt document or decides that giving access to a document would disclose irrelevant matter, the agency must consider whether it would be reasonably practicable to prepare an edited copy of the document to delete the exempt or irrelevant matter in accordance with s 22 of the FOI Act, having regard to:

- the nature and extent of the modification (s 22(1)(c)(i)); and
- the resources available to modify the document (s 22(1)(c)(ii)).

Relevantly, the FOI Guidelines explain:

... an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.<sup>14</sup>

You have stated, in your internal review application, that “section 22 seems to be overused.” While I have varied the decision in relation to three documents, I consider the remaining material redacted under s 22 is outside the scope of your request.

### **Your review rights**

If you are dissatisfied with my decision, you may apply to the Australian Information Commissioner for review. 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: [foidr@oaic.gov.au](mailto:foidr@oaic.gov.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**

You may lodge a complaint with the Australian Information Commissioner in relation to the conduct of ASIC in the handling of this request. A complaint to the Information Commissioner must be made in writing. Complaints can be lodged in one of the following ways:

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<sup>14</sup> FOI Guidelines [3.98]

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: [foidr@oaic.gov.au](mailto:foidr@oaic.gov.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/>

Yours sincerely

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**SCHEDULE OF DOCUMENTS**

Number	Date	Pages	Description	Decision	Exemption(s)
1	1 July 2024	1	Internal ASIC email from ED attaching transcript	Additional material released on review	Irrelevant matter: s 22 Personal information: s 47F Deliberative matter: s 47C
2	2 July 2024	10	Internal ASIC email from ED	Original decision affirmed	Irrelevant matter: s 22
3	3 July 2024	11	Internal ASIC email from ED	Original decision affirmed	Irrelevant matter: s 22  Contact details, third party material: s 47E(d)
4	3 July 2024	13	Internal ASIC email from ED	Original decision affirmed	Irrelevant matter: s 22
5	3 July 2024	14	Internal ASIC email from ED attaching SERC Report	Original decision affirmed	Irrelevant matter: s 22  Contact details: s 47E(d)
6	3 July 2024	248	Internal ASIC email from ED	Original decision affirmed	Irrelevant matter: s 22  Contact details: s 47E(d)
7	4 July 2024	251	Internal ASIC email from ED	Original decision affirmed	Irrelevant matter: s 22
8	4 July 2024	253	Internal ASIC email from ED	Original decision affirmed	Irrelevant matter: s 22
9	4 July 2024	255	Internal ASIC email from ED	Additional material released on review	Irrelevant matter: s 22 Personal information: s 47F
10	4 July 2024	257	Internal ASIC email from ED	Additional material released on review	Irrelevant matter: s 22  Contact details, third party material: s 47E(d)  Personal information: s 47F  Deliberative matter: s 47C
11	5 July 2024	262	Internal ASIC email from ED	Original decision affirmed	Irrelevant matter: s 22  Contact details, third party material: s 47E(d)