



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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17 July 2024

Me

By email: foi+request-11636-966353a8@righttoknow.org.au

Dear Me,

Notice of Freedom of Information Decision – Ref 142-2024

I refer to your email received on 5 July 2024, in which you seek access to the following under the *Freedom of Information Act 1982* (Cth) (**FOI Act**):

I request a fully unredacted copy of the advice 'in February 2019, ASIC advised that it had not been authorised to consider and determine such claims since 2015' referred to at [5.130] of the recent SERC report.

On 11 July 2024 I issued a request consultation notice under s 24AB of the FOI Act advising that I intended to refuse your request on the basis that I was satisfied that a practical refusal reason existed. On 12 July 2024 you revised the scope of your request to be for 'the eight examples of ASIC stating that it was no longer authorised to determine such claims' mentioned in the s 24AB notice.

The 30-day statutory time period for processing your request commenced on the day after the day on which your request was received (s 15(5) of the FOI Act). The due date to issue a decision on your request is therefore 5 August 2024.

Authority to make decision

I am an officer authorised under s 23(1) of the FOI Act to make decisions in relation to FOI requests. This letter gives notice of my decision.

Decision

I have conducted searches of ASIC's records. I have identified 7 documents falling within the scope of your revised request. I have decided to grant access to 1 document in full and 6 documents in part, relying on the exemptions under ss 37(1)(b), 47F and 47E(d).

I have also decided to redact irrelevant material in the documents under s 22 of the FOI Act, on the basis that this material would reasonably be regarded as irrelevant to your request for access, as that material does not comprise any of the eight examples referred to above.

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.

Information considered:

In reaching my decision, I have considered the following:

- the FOI Act, in particular ss 22, 37(1)(b), 47F and 47E(d);
- the Australian Information Commissioner's FOI Guidelines issued under s 93A of the FOI Act (**FOI Guidelines**);
- the terms of your revised request;
- details of the searches conducted; and
- the 7 documents falling within the scope of your request.

Reasons for decision

Section 37(1)(b) of the FOI Act – disclosure of a confidential source exemption

Section 37(1)(b) of the FOI Act relevantly provides:

(1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

(b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law

This exemption is intended to protect the identity of a confidential source of information connected with the administration or the enforcement of the law. This 'extends to the work of agencies in administering legislation schemes and requirements, monitoring compliance, and investigating breaches.'¹

It is the source, rather than the information, which is confidential.² The exemption applies where the person who supplies that information wishes his or her identity to be known only to those who need to know it for the purpose of enforcing or administering the law and the information was supplied on the understanding, express or implied, that the source's identity would remain confidential.³

I have found material in 2 documents exempt under s 37(1)(b) of the FOI Act. This material discloses confidential sources of information connected with ASIC's investigation, and therefore with ASIC's administration and enforcement of the law. I consider that the information was supplied on the understanding that the source's identity would remain confidential.

The FOI Guidelines explain that it is not essential that the confidential source provide the information under an express agreement. Often an implied undertaking of confidentiality can be made out from the circumstances of a particular case.⁴ In this case, I am satisfied that the information was supplied on an express or implied understanding that the source's identity would remain confidential.

¹ FOI Guidelines [5.98]. See also 'OG' and Australian Securities and Investments Commission [2018] AICmr 31 [32]

² FOI Guidelines [5.107]

³ FOI Guidelines [5.108]

⁴ FOI Guidelines [5.115]

Intelligence gathering through conduct complaints from members of the public is an important part of ASIC's operations. It is important that evidence that ASIC collects through complaints from informants be as frank as possible. ASIC's public position in relation to managing complaints about ASIC is outlined in Information Sheet 107, which states '*Investigations will usually be confidential. Any disclosure of information required for the investigation to proceed will be on a confidential basis.*'⁵ I am satisfied that the sources would have wished their existence or identity to be known only to those who need to know it for the purpose of administering the law.

For the purposes of s 37(1)(b), it is sufficient that a document would be exempt if it would reveal either the existence or non-existence (rather than the identity) of a confidential source of information.⁶ It is also sufficient that a document would be exempt if it would reveal even an absence of a confidential source of information.⁷

I am therefore satisfied that disclosure of the material would enable a person to ascertain the existence or identity of a confidential source in relation to the enforcement or administration of the law. Accordingly, I consider this material exempt under s 37(1)(b) of the FOI Act.

Section 47E(d) of the FOI Act – certain operations of agencies

For the reasons below, I consider that 2 documents are conditionally exempt under s 47E(d) of the FOI Act.

Section 47E(d) of the FOI Act relevantly provides:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

...

- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

The FOI Guidelines relevantly explain:

There must, based on reasonable grounds, be at least a real, significant or material possibility of prejudice.⁸ 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.'⁹

This material comprises an operational email address used by the Professional Standards Unit. This email address is not otherwise publicly available, and disclosure of this information could reasonably be expected to result in potential vexatious communication and public inquiries. ASIC has established channels of communication for members of the public to make lodge reports of misconduct, through its online portal.¹⁰

The release of this information would undermine the purpose of ASIC's report management protocols and the ability of ASIC to manage future reports of misconduct. There are usually a

⁵ [Guidelines for managing complaints about ASIC officers | ASIC](#)

⁶ FOI Guidelines [5.110]

⁷ *The Sun-Herald Newspaper and the Australian Federal Police* [2014] AICmr 52 [24]

⁸ FOI Guidelines [6.16]

⁹ FOI Guidelines [6.18]

¹⁰ [Make a report of misconduct to ASIC | ASIC](#)

very limited number of staff trained in the functions to monitor this mailbox; release would be unreasonable, as there are streamlined communication pathways for the public to lodge reports of misconduct.

If members of the public were to use this mailbox it would only be for enquiries completely unrelated to the business area. If disclosed, it is likely that the email address would be shut down, further affecting ASIC's operations given a new email address would have to be set up.

I am therefore satisfied that this material is conditionally exempt under s 47E(d) of the FOI Act.

Section 47F of the FOI Act – personal privacy

For the reasons below, I consider that material in 6 documents is conditionally exempt under s 47F.

The documents comprise the personal information of both ASIC staff and third parties.

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).
- (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.¹¹

¹¹ FOI Guidelines [6.137]

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.¹²

I am satisfied that the documents contain personal information.

I consider that the disclosure of personal information of ASIC staff would reveal their involvement in a sensitive and contentious matter. I accept that the officers named in the documents could be exposed to unwanted contact as a result of their involvement in the matter. I also accept that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act, and this can be a relevant consideration in deciding whether the officer's details are conditionally exempt under s 47F. I consider that disclosure of this personal information could reasonably be expected to create a harassment risk to these staff.

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 the personal information of both ASIC staff and third parties 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 managing an enquiry from a third party;
- disclosure of the information could reasonably be expected to cause detriment to the persons to whom the information relates by disclosing the individuals' personal information without their consent;
- the individuals would be likely to object to disclosure;
- disclosure is unlikely to advance the public interest in government transparency and integrity; 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

¹² FOI Guidelines [6.138]

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 material is conditionally exempt under ss 47E(d) and 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.¹³ With regard to the public interest factors set out in the FOI Guidelines,¹⁴ I consider the relevant factors against disclosure are that disclosure could reasonably be expected to:

- prejudice the protection of an individual's right to privacy (s 47F);¹⁵
- harm the interests of an individual or group of individuals (s 47F);¹⁶ and
- prejudice ASIC's operational functions,¹⁷ in relation to its management of reports of misconduct (s 47E(d)).

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 47E(d) 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.¹⁸

I consider that it is reasonably practicable to prepare an edited copy of the documents I have found exempt in part, with the exempt and irrelevant matter redacted.

Your review rights

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

¹³ *Freedom of Information Act 1982* (Cth) (FOI Act) s 11B(3)(a)

¹⁴ FOI Guidelines [6.233]

¹⁵ FOI Guidelines [6.233(a)]

¹⁶ FOI Guidelines [6.233(k)]

¹⁷ *Paul Farrell and Department of Home Affairs (No 5)* [2019] AICmr 65 [47]-[50]

¹⁸ FOI Guidelines [3.98]

Internal review

Under section 54 of the FOI Act, you may apply in writing to ASIC for an internal review of my decision by another ASIC officer. The internal review application must be made within 30 days of the date of this letter. This request should be addressed to the Senior Manager, Freedom of Information, by email to foirequest@asic.gov.au

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

email: 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/your-freedom-of-information-rights/freedom-of-information-reviews/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:

online:

https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1

email: foidr@oaic.gov.au

post: GPO Box 5218 Sydney NSW 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 wish to discuss this decision, I can be contacted by phone or email as below.

Yours sincerely

Haydar Tuncer
 Senior Lawyer - Freedom of Information
 Australian Securities and Investments Commission
 Phone: 03 9280 4416
 Email: haydar.tuncer@asic.gov.au

SCHEDULE OF DOCUMENTS

No	Date	Pages	Description	Decision on access	Exemptions
1	7/3/19	1	Email to third party	Exempt in part, irrelevant in part	22, 37(1)(b), 47F, 47E(d)
2	8/3/19	1	Email to third party	Exempt in part, irrelevant in part	22, 37(1)(b), 47F, 47E(d)
3	12/3/19	1	Internal email chain	Exempt in part, irrelevant in part	22, 47F
4	9/7/19	3	Email chain with third party	Exempt in part, irrelevant in part	22, 47F
5	13/3/20	4	Letter from Commission Counsel to third party	Exempt in part, irrelevant in part	22, 47F
6	27/8/21	1	ASIC response to question on notice	Release in full	
7	19/10/21	5	FOI Decision Letter 212-2021	Exempt in part, irrelevant in part	22, 47F