



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

Office address (inc courier deliveries):
Level 20, 240 Queen Street,
Brisbane QLD 4000

Mail address for Brisbane office:
GPO Box 9827,
Melbourne VIC 3001

Tel: +61 1300 935 075

www.asic.gov.au

4 December 2024

Ms Harriet Spring
By email: foi+request-12385-a8fed84c@righttoknow.org.au

Dear Ms Spring,

**Freedom of Information Request FOI 280-2024
Notice of practical refusal ground under section 24AB of the FOI Act**

I refer to your request dated 26 November 2024, under the *Freedom of Information Act 1982 (Cth)* (FOI Act) in which you seek access to documents in the possession of the Australian Securities and Investments Commission (ASIC).

Your request states the following:

I request any advice or information either sought by or provided to the Government relating to the legality or fairness of the ePayments code regarding mistaken payments. I seek any information the Government has:

- establishing the Government investigated/evaluated the legality of the reduction in consumer rights created by the ePayments code regarding mistaken payments (which clearly sacrificed some of the consumer protections otherwise inherent in the common law approach);*
- any legal advice sought or received in preparing the "ASIC Regulation Impact Statement - ePayments Code, September 2011";*
- any risk assessments or cost benefit analysis undertaken for assessing Option 1 versus Option 2 relating to mistaken payments in the "ASIC Regulation Impact Statement - ePayments Code, September 2011";*
- any subsequent reviews into the efficacy of the ePayment Code of 2011 - which ASIC was required to review every 5 years (therefore due 2016 and 2021) as per clause 244 of the "ASIC Regulation Impact Statement - ePayments Code, September 2011". Particularly with the growing emergence of Scam Fraud over this period.*

The timeframes I seek are:

- the lead up to and during the update and rebranding of the EFT Code to the ePayments Code by ASIC in 2011; and*

- *the lead up to and during the reviews of the ePayments code which should have been undertaken in 2016 and 2021.*

I would like the information requested to include the following:

- *Any legal advice, background documents, risk assessments, business cases, cost/benefit analysis, reports, or briefings requested, for or by the Public Service or Government;*
- *Any briefs to the Government and/or Government Solicitors relating to this (including any Ministerial signed documents).*

Exclusions:

1. Please do not provide documents that are duplicates wholly or in substance (eg emails to multiple stakeholders with the same content, reply emails).

2. Also, please redact any content that would require consultation with third parties.

I note that on 26 November 2024, you also made a request for information under the FOI Act in the same terms as those set out above to the Solicitor-General. That request was being considered by the Attorney-General's Department and has since been transferred to ASIC. This has occurred because the subject-matter of your request is more closely connected with the functions of ASIC. As the terms of the two requests are identical, I will now consider them as the one request to be referred to as FOI 280-2024. As such this notice equally applies to both applications.

Practical refusal grounds(s)

Section 24AA of the FOI Act provides that a practical refusal ground exists in relation to a request for documents if either (or both) of the following apply:

- the work involved in processing the request, in the case of an agency, would substantially and unreasonably divert the resources of the agency from its other operations (section 24AA(1)(a));
- the request does not satisfy the requirement in paragraph 15(2)(b) of FOI Act (section 24AA(1)(b)).

In relation to your request, I find that section 24AA(1)(b) applies.

Identification of documents: section 24AA(1)(b) of the FOI Act

Section 15(2)(b) of the FOI Act states that a request for access to a document must 'provide such information concerning the document as is reasonably necessary to enable a responsible officer of an agency... to identify it'.

Your request, in its current form, does not sufficiently allow ASIC to identify the relevant documents that fall within the scope of your request. On that basis I

intend to refuse your request given that a practical refusal reason exists within the meaning of section 24AA(1)(b) of the FOI Act.

While your request relates to the ePayments Code and mistaken payments, it is not clear what documents you are specifically seeking.

The first dot point in your request expresses a view about the effect of the ePayments Code which does not aid in identifying the information that you are seeking. It is also unclear what information you are seeking in relation to the third dot point in your request outside of that already provided in the publicly available Regulatory Impact Statement – ePayments Code – September 2011. In relation to the fourth dot point in your request, I note that the details of ASIC's subsequent review of the ePayments Code are contained in publicly available documents – in particular, in the documents linked on page 4 of this notice. It is unclear what information you are seeking in addition to that material.

Further to the above, I note that you are seeking information the Government has. We are, however, limited to providing documents held by ASIC. It is unclear whether you intend your references to Government, when making reference to "information the Government has", to be taken to mean ASIC.

It is further unclear:

- what kind of documents you are seeking, as your request states that you seek "any information" in relation to four categories of information but then goes on to state that you would "like the information to include the following:". It is unclear whether you intend to limit the kinds of information to the dot points you have provided. I note that a very broad request creates difficulty in identifying what information is being sought.
- who you intend your reference to "the Public Service" or "Government" (particular when you refer to "any briefs to the Government, or briefing requests made by the Government) to include – this could include every staff member at ASIC or across the public service and every federal and state government department, minister and their offices.
- what the timeframe is that you intend the "lead up to and during the update and rebranding of the EFT Code to the ePayments Code by ASIC in 2011" to be.
- what the timeframe is that you intend the "lead up to and during the reviews of the ePayments Code" to be.

Consequently, your request, in its current form, is very broad and lacks sufficient clarity to allow me to identify the documents you are seeking. Given the broadness of your request, even if I could identify the classes of documents you are seeking, the work involved in processing the request

would likely substantially and unreasonably divert the resources of the agency from its other operations.

Intention to refuse request and invitation to revise scope

Accordingly, I intend to refuse your request given that a practical refusal reason exists within the meaning of section 24AA(1)(b) of the FOI Act. The purpose of this letter is to provide you with an opportunity to revise your request so that the practical refusal reason no longer exists before a final decision is made. This is called a 'request consultation process' as set out under section 24AB of the FOI Act.

Revising your request can mean explaining in more detail and with greater clarity the documents you wish to access – for example, by providing more specific information about exactly what documents you are interest in.

Specifically, I invite you to clarify the subject or issues to which the documents you seek relate, the specific kinds of documents you are seeking, the specific people or organisations you are seeking to capture in your request and the timeframe that you seek to apply to searches for any such documents.

I note that the following documents are available publicly on the ASIC website and may satisfy some or all of your request:

- Media Release 11-205MR – ASIC releases new ePayments Code – provides explanation of the process undertaken in the lead up to the ePayments Code being released together with links to relevant material. 11-205 MR can be found at [11-205MR ASIC releases new ePayments Code | ASIC](#).
- The Regulatory Impact Statement – ePayments Code – September 2011 can be found at [ePayments Code](#).
- Media Release 22-125MR – ASIC releases updated ePayments Code – provides an explanation of the process undertaken in the lead up to the most recent update to the ePayments Code on 2 June 2022. 22-125MR can be found at [22-125MR ASIC releases updated ePayments Code | ASIC](#).
- Consultation Paper 310 *Review of the ePayments Code: Scope of the review* together with submissions received can be found at [CP 310 Review of the ePayments Code: Scope of the review | ASIC](#).
- Consultation Paper 341 *Review of the ePayments Code: Further consultation* together with submissions received can be found at [CP 341 Review of the ePayments Code: Further consultation | ASIC](#).
- Report 718 *Response to submissions on CP 341 Review of the ePayments Code: Further consultation* can be found at [REP 718 Response to submissions on CP 341 Review of the ePayments Code: Further consultation | ASIC](#).

Further information about the ePayments Code can also be found on ASIC's website at [ePayments Code | ASIC](#).

Timeframe

The statutory timeframe for notifying an applicant of a decision on a request for access under the FOI Act is 30 days from the day the agency receives the request. Please note that in accordance with section 24AB(8) of the FOI Act, the time for processing your request is suspended from the day that you receive this letter and resumes on the day after you provide ASIC with one of the following:

- written notification that you wish to withdraw the request;
- a revised written request addressing the matters raised above; or
- written notification that you do not wish to revise your request.

If you choose to do one of the three things listed above, you must do so **within 14 days of the date of this letter** (the consultation period). If you do not do one of the three things listed above during the consultation period, your request will be taken to be withdrawn in accordance with section 24AB(7) of the FOI Act.

During the consultation period you may wish to seek assistance in reframing your request. If you have any questions or wish to discuss, please contact me by email at foirequest@asic.gov.au.

Yours sincerely

D Mitchell

Deborah Mitchell

Senior Lawyer – Freedom of Information
Australian Securities and Investment Commission
Email: deborah.mitchell@asic.gov.au

(Authorised decision-maker for the purposes of section 23 of the FOI Act)