



ASIC

Australian Securities & Investments Commission

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Our Ref: 17129/16

23 June 2016

Mr Phillip Sweeney  
[foi+request-1925-15425050@righttoknow.org.au](mailto:foi+request-1925-15425050@righttoknow.org.au)

Dear Mr Sweeney

### **Request under the *Freedom of Information Act 1982* for access to documents**

I refer to your request under the *Freedom of Information Act 1982* (FOI Act) received by the Australian Securities and Investments Commission (ASIC) by email on 7 May 2016 in which you sought access to:

*A copy of the document recently lodged with ASIC by the legal firm representing Dr Benjamin Koh seeking ASIC to enforce Section 156C of the Life Insurance Act 1995 which alleges victimisation by one or more senior managers of Comminsure.*

*The names of those alleged to have contravened Section 156C can be redacted if necessary.*

On 23 May 2016, I informed you by letter that I had consulted with an affected party in relation to the document that fell within the scope of your request and that I would notify you of my decision by 6 July 2016. I have now received a submission from the affected party and I have had regard to this submission when making my decision in relation to your request.

I have identified the document which comes within the terms of your request. The document is a letter to ASIC dated 3 May 2016 from a law firm representing Dr Benjamin Koh.

### **Relevant Legislation**

#### ***Section 47G(1) – Public interest conditional exemption – business***

Section 47G(1) provides that:

- (1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs

of an organisation or undertaking, in a case in which the disclosure of the information:

- (a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
- (b) could reasonably be expected to prejudice the future supply of information to the Commonwealth, Norfolk Island or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

## ***Section 22***

Section 22 of the FOI Act provides that where an agency or Minister decides not to grant access to a document on the grounds that it is an exempt document or that to grant access to a document would disclose information that would reasonably be regarded as irrelevant to the request: and, "it is possible for the agency....to make a copy of the document with such deletions that the copy ....would not be an exempt document: and ..would not disclose such information....and it is reasonably practical for the agency or Minister, having regard to the nature and extent of the work involved in deciding on and making those deletions and resources available for the work, to make such a copy...the agency or Minister shall, unless it is apparent from the request or as a result of consultation by the agency or Minister with the applicant, that the applicant would not wish to have access to such a copy, make and grant access to such a copy".

## **Decision**

I have decided not to release the document under your request, on the grounds that the document is exempt from release for the following reasons.

***Section 47G(1)(a)*** of the FOI Act provides that a document is a conditionally exempt document if its disclosure under the FOI Act would, or could reasonably be expected to, unreasonably affect an organisation adversely in respect of its lawful business, commercial or financial affairs.

The document falling within your request is a letter to ASIC from a law firm representing Dr Koh seeking that ASIC take action in respect of certain matters. I am satisfied that the document contains information concerning the business affairs of the law firm.

I have consulted with the affected third party under s27 of the FOI Act about the disclosure of the requested information. After considering the third party's submission, I am satisfied that the document contains information that if disclosed, would adversely impact the law firm's ability to act in similar matters in the future if potential clients are concerned that correspondence with a regulator is not treated with the strictest of confidence. It would be reasonable for a client of this affected party to

expect that confidential communications with a regulator in respect to their matter would not be readily available to members of the public.

I have therefore determined that disclosure of the relevant information in the document where the affected party has not expressly consented to the disclosure would be unreasonable.

**Section 47G(1)(b)** of the FOI Act provides that a document is a conditionally exempt document if its disclosure under the FOI Act could reasonably be expected to prejudice the future supply of information to the Commonwealth, Norfolk Island or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

The document is a letter that has been sent to ASIC containing information about a matter involving particular conduct. There is a risk that release of information provided voluntarily to ASIC of this nature may prejudice the future supply of similar information to ASIC and act as a deterrence for persons wishing to report similar conduct to ASIC.

#### ***Public Interest***

Section 11A(5) of the FOI Act provides that an agency must give a person access to a document if it is conditionally exempt at a particular time unless, in the circumstances, access to the document at that time would, on balance, be contrary to the public interest.

In relation to the document that is conditionally exempt under s47G(1) of the FOI Act, I find that giving access to this document in the circumstances would be, on balance, contrary to the public interest and therefore, that the document is an exempt document. In making this finding, I took into account that the release of the document:

- (a) could, although only to a limited extent, promote the objects of the FOI Act, by potentially increasing discussion and comment of the Government's activities;
- (b) would not contribute to the administration of justice generally or for a particular person;
- (c) would not contribute to the enforcement of the criminal law;
- (d) could reasonably be expected to harm the interests of an individual or group of individuals;
- (e) could reasonably be expected to deter future parties from raising concerns about alleged misconduct and breaches of the law;
- (f) could reasonably be expected to impede the flow of information to ASIC in the future;
- (g) in particular, could reasonably be expected to prejudice ASIC's ability to obtain similar information in the future; and

- (h) could reasonably be expected to prejudice and negatively impact ASIC's ability to obtain confidential nature in the future.

### ***Access to edited copy***

I have considered whether, pursuant to s22 of the FOI Act, access should be granted to part of the previously mentioned exempt document. For the reasons above, explaining the basis of the exemptions applied in respect to the document, I find that the document is an "exempt document" under s47G of FOI Act. I further find that it would not be possible to make a copy of the document with such deletions that the document would not be an exempt document. Releasing any part of the exempt document would still in my view, constitute an unauthorised disclosure of information that would negatively impact the affected parties involved and ASIC's ability to obtain similar information in the future.

### **Assessment of Charges**

The FOI Act provides that charges may be assessed for time spent processing a request. I have decided that there are no charges applicable to the processing of your request in this instance.

### **Review Rights**

I provide you with the following information as required by s26 of the FOI Act.

In the event that you are dissatisfied with the decision:

1. You may, within 30 days after the day on which you have been notified of this decision, apply in writing to ASIC for a review of my decision by another ASIC officer under s54B of the FOI Act. This request should be addressed to me or to the Senior Manager, Administrative Law GPO Box 9827 SYDNEY or by email to foirequest@asic.gov.au.
2. You may apply in writing to the Australian Information Commissioner for a review of my decision under s54N of the FOI Act. Correspondence should be addressed to the Office of the Australian Information Commissioner at GPO Box 5218 Sydney NSW 2001.
3. You may lodge a complaint to the Commonwealth Ombudsman in respect to the conduct of ASIC in the handling of this request. To do so, you can contact the Ombudsman's office either: by e-mail to ombudsman@ombudsman.gov.au, by letter to GPO Box 442 Canberra ACT 2601, or by fax to (02) 6276 0123.

Yours sincerely



Evelyn Ong

(Authorised decision-maker under subsection 23(1) of the FOI Act)  
for the Australian Securities and Investments Commission