



ASIC

Australian Securities & Investments Commission

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Our Ref: 17129/16

21 July 2016

Mr Phillip Sweeney
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Dear Mr Sweeney

Request for Internal Review under section 54B of the Freedom of Information Act 1982

I refer to your email of 23 June 2016 received by this office on 23 June 2016 in which you requested that an internal review be conducted under section 54B of the Freedom of Information Act 1982 (*FOI Act*) in respect of the decision (*initial decision*) of 23 June 2016 refusing you access to a specified document.

I am authorised to conduct the internal review under section 54 of the FOI Act.

Under your initial application dated 7 May 2016 you requested "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". I note that you have indicated that the names of persons alleged to have engaged in misconduct may be redacted if necessary.

The decision maker for the initial decision identified one document that was within the scope of the request. I am satisfied that the same one document comes within the scope of your request for an internal review.

In completing my review of your request and the initial decision, I have had regard to submissions made to ASIC by an affected third party consulted in accordance with section 27 of the FOI Act

The Australian Information Commissioner has issued Guidelines under section 93A of the FOI Act to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. I have also had regard to these Guidelines.

I advise that the document to which you have sought access will not be released on the basis of it being an exempt document on the following grounds:

Paragraph 47G(1)(a) of the FOI Act: adverse effect on a person's lawful business, commercial or financial affairs

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 Guidelines indicate that the operation of this exemption depends on the effect of disclosure rather than the precise nature of the information itself, though the information must have some relevance to the person and their business or professional affairs. It is intended to protect the interests of third parties dealing with the government.

The document covered by your request is a letter to ASIC from a law firm representing Dr Koh. I am satisfied that the document contains information concerning the business affairs of the law firm. Having regard to the affected third party's submissions, I am also satisfied that release of this document could reasonably be expected to 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 future clients of the firm to expect that confidential communications with a regulator in respect to their matter would not be readily available to members of the public. I consider that there is a risk of this adverse effect resulting from disclosure notwithstanding that matters raised in the document falling within this request have been the subject of public comment.

In the context of this anticipated adverse effect on the law firm disclosure would be unreasonable. I consider that the document is conditionally exempt under paragraph 47G(1)(a) of the FOI Act.

Paragraph 47G(1)(b) of the FOI Act: adverse effect on future supply of information

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 alleged misconduct. I am satisfied that there is a risk that release of a document of this nature, which has been provided voluntarily to ASIC, may deter persons from reporting conduct to ASIC. A reduction in the provision of reports raising concerns about misconduct may prejudice the future supply of information to ASIC and the operations of ASIC in administering laws of the Commonwealth.

I consider that the document is conditionally exempt under paragraph 47G(1)(b) of the FOI Act.

Public Interest

Subsection 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.

The Guidelines indicate that the term "public interest" does not mean of interest to the public, but rather in the interests of the public. The Guidelines also note that to conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information.

Subsection 11B(3) of the FOI Act identifies a non-exhaustive list of factors favouring disclosure. Of these factors, I consider that the following may be relevant to this request: promoting the objects of the FOI Act by potentially increasing discussion and comment of the Government's activities, and informing debate on a matter of public importance.

The Guidelines indicate that the harm that may result from disclosure of a document, as noted in the conditional exemptions, is an important consideration that must be weighed in determining the balance of public interest. Taking into account the potential adverse effects of disclosure discussed above, I consider that relevant public interest factors against disclosure are that disclosure of this particular document:

- (a) would not contribute to the administration of justice generally or for a particular person;
- (b) would not contribute to the enforcement of the criminal law;
- (c) could reasonably be expected to, in the future, deter members of the public, or their advisers, from raising concerns about alleged misconduct and breaches of the law;
- (d) could reasonably be expected to impede the flow of information to ASIC in the future, and prejudice ASIC's ability to obtain similar information in the future.

In the circumstances of this matter, I consider that, on balance, the benefit to the public of disclosure of the information would be limited and is outweighed by the benefit to the public of withholding the information, noting in particular the importance to the public of ASIC continuing to receive information of this kind from individuals and their advisers.

I find therefore that the document is exempt under paragraphs 47G(1)(a) and s47G(1)(b) of the FOI Act.

Access to edited copy

I have considered whether, pursuant to section 22 of the FOI Act, access should be granted to part of the document. For the reasons above, explaining the basis of the exemptions applied in respect to the document, I 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 disclosure of information that would negatively impact the affected parties involved and ASIC's ability to obtain similar information in the future.

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

In the event that you are dissatisfied with the decision:

1. You may within 60 days after the day on which you have been notified of this decision, apply in writing to the Australian Information Commissioner for a review of my decision under section 54N of the FOI Act. Correspondence should be addressed to the Office of the Australian Information Commissioner at GPO Box 5218 Sydney NSW 2001.
2. 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 faithfully



Fleur Grey
(Authorised internal-reviewer under subsection 54(1) of the FOI Act)
for the Australian Securities and Investments Commission