



27 March 2017

Mr Bob O'Dea

Via email only: foi+request-2973-78b96561@righttoknow.org.au

Dear Mr O'Dea

Freedom of Information request 17-1

The purpose of this letter is to give you a decision about access to documents that you requested under the *Freedom of Information Act 1982* (FOI Act).

Background to Decision

On 20 January 2017 you requested access to documents relating to correspondence between ASADA and the Minister for Health. Specifically you sought access to:

- *All documents, communications and/or correspondence including emails, text messages, file notes, briefings, reports and phone records exchanged between the Minister for Health, Sussan Ley and a member of ASADA between 23/12/14 and 13/1/17.*

Your request was received on Friday 20 January 2017. An acknowledgment of your request was sent to you via email on 27 January 2017. That correspondence informed you that a decision was due to be made by Monday 20 February 2017. Following an extension of time for consultation with a third party and an extension granted under s15AB of the FOI Act a decision was due to you on **24 March 2017**.

Authority and Materials Considered

I am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.

In reaching my decision I have taken into consideration:

- The relevant provisions of the FOI Act;
- Relevant guidelines issued by the Office of the Australian Information Commissioner; and
- Relevant Tribunal and Federal Court decisions concerning the operation of the FOI Act.

Summary of Decision

I have identified thirty six (36) documents as being within the scope of your request. The documents are outlined at **Annexure A**. I have refused your request for access in part to two (2) of those documents. All other documents have been released to you in full. A copy of the exemption provisions relied on in reaching this decision are at **Annexure B**.

Reasons for Decision

Document 11

Document 11 is a request for personal leave made by myself (the ASADA CEO) dated 22 July 2016. I have applied section 47F of the FOI Act to those parts of the document which relate to medical information.

Section 47F of the FOI Act provides that a document is conditionally exempt if its disclosure under the FOI Act would involve the unreasonable disclosure of personal information about any person (including a deceased person). I have determined that medical information relating to an individual constitutes personal information and that the release of the information would be unreasonable on the grounds that it would be a breach of that person's privacy.

Section 47F is a conditional exemption which means that any application of it is subject to the public interest test. The public interest test is required by section 11A(5) of the FOI Act. Section 11B(3) outlines several factors which should be considered as favouring access to conditionally exempt documents. These include to:

- Promote the objects of the FOI Act;
- Inform debate on matters of public importance;
- Promote effective oversight of public expenditure; and
- Allow a person access to his or her own personal information.

The FOI Act further outlines a number of factors which must not be taken into account in deciding whether on balance release of the documents would be contrary to the public interest. These are:

- Access to the document could result in embarrassment to the Commonwealth Government or cause a loss of confidence in the Commonwealth Government;
- Access to the document could result in any person misinterpreting or misunderstanding the document;
- That the author of the document was (or is) of high seniority in the agency to which the request was made;
- Access to the document could result in confusion or unnecessary debate.

There is no statutory provision outlining those factors which may weigh against release of a conditionally exempt document. Taking into account the nature of the information in question the following factors should be considered as weighing against release of the material identified above:

- That the information is both personal and medical in nature; and
- the public interest in the protection of people's medical information, including those persons employed on both statutory positions and pursuant to Public Service legislation.

Based on the above factors, any material found to be conditionally exempt remains exempt as, on balance, those factors against release should be given greater weight than those favouring access.

Document 27

Document 27 is an Incoming Government Brief (*IGB*) dated 22 July 2016 following the Australian Federal Election of 2 July 2016. I have applied section 47C of the FOI Act to parts of this document. I am satisfied that the material over which this exemption is claimed meets the definition of deliberative matter as outlined below.

Section 47C provides that a document is conditionally exempt if its disclosure under the FOI 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, minister, the Government of the Commonwealth or the Government of Norfolk Island. This exemption is subject to a proper application of the public interest test.

The possible exemption of material in an IGB was considered by the AAT in *Dreyfus and Secretary Attorney-General's Department [2015] AATA 962 (14 December 2015)*. The relevant paragraph for is found at 103 and is replicated below:

In circumstances where an IGB necessarily contains incomplete material and analysis and is prepared for a new Minister in a new Government, it is important that those preparing an IGB do so without concern as to the consequences of doing so. This is not a question of embarrassing a Minister or simply of inhibiting frankness and candour but of limiting the input to an IGB. Further, if the IGB were released and incomplete or incorrect, it would misdirect public understanding of the analysis and advice, to the public's detriment. This is not the same as the irrelevant factor of misinterpreting or misunderstanding the document itself, or of giving rise to confusion or unnecessary debate.

Section 47C is a conditional exemption which means that any application of it is subject to the public interest test. The public interest test it required by section 11A(5) of the FOI Act. Section 11B(3) outlines several factors which should be considered as favouring access to conditionally exempt documents. These include to:

- Promote the objects of the FOI Act;
- Inform debate on matters of public importance;
- Promote effective oversight of public expenditure; and
- Allow a person access to his or her own personal information.

The FOI Act further outlines a number of factors which must not be taken into account in deciding whether on balance release of the documents would be contrary to the public interest. These are:

- Access to the document could result in embarrassment to the Commonwealth Government or cause a loss of confidence in the Commonwealth Government;
- Access to the document could result in any person misinterpreting or misunderstanding the document;
- That the author of the document was (or is) of high seniority in the agency to which the request was made;
- Access to the document could result in confusion or unnecessary debate.

There is no statutory provision outlining those factors which may weigh against release of a conditionally exempt document. Taking into account the nature of the information in question the following factors should be considered as weighing against release of the material identified above:

- That if released the information may inhibit the provision of information to future IGB's; and
- as the information proposed for redaction relates to as yet uncompleted projects and tasks the release of the information would misdirect public understanding to the public's detriment rather than benefit.

Based on the above factors, any material found to be conditionally exempt under s47C remains exempt as, on balance, those factors against release should be given greater weight than those favouring access.

I have also redacted the mobile telephone number listed at the conclusion of the document on the basis that it constitutes personal information pursuant to s47F of the FOI Act.

Section 47F is a conditional exemption which means that any application of it is subject to the public interest test. The public interest test it required by section 11A(5) of the FOI Act. Section 11B(3) outlines several factors which should be considered as favouring access to conditionally exempt documents. These include to:

- Promote the objects of the FOI Act;
- Inform debate on matters of public importance;
- Promote effective oversight of public expenditure; and
- Allow a person access to his or her own personal information.

The FOI Act further outlines a number of factors which must not be taken into account in deciding whether on balance release of the documents would be contrary to the public interest. These are:

- Access to the document could result in embarrassment to the Commonwealth Government or cause a loss of confidence in the Commonwealth Government;
- Access to the document could result in any person misinterpreting or misunderstanding the document;
- That the author of the document was (or is) of high seniority in the agency to which the request was made;
- Access to the document could result in confusion or unnecessary debate.

There is no statutory provision outlining those factors which may weigh against release of a conditionally exempt document. Taking into account the nature of the information in question the following factors should be considered as weighing against release of the material identified above:

- That the information is personal in nature; and
- that I should be able to maintain my personal privacy after the conclusion of my term as the ASADA CEO.

Based on the above factors, any material found to be conditionally exempt remains exempt under s47F as, on balance, those factors against release should be given greater weight than those favouring access.

Your review rights

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

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/aba/oaic/foi-review/>

email: enquiries@oaic.gov.au

post: GPO Box 2999, Canberra ACT 2601

in person: Level 3, 175 Pitt Street, Sydney NSW

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to www.oaic.gov.au/freedom-of-information/foi-reviews.

Questions about this decision

If you wish to discuss this decision, please contact the following officer:

Patrick Dale

Lawyer

legal@asada.gov.au

Yours sincerely



Ben McDevitt AM APM
Chief Executive Officer



Australian Government

Australian Sports Anti-Doping Authority

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ANNEXURE A

FOI 17-1 – O’Dea – Correspondence between the Minister and ASADA

<u>Date</u>	<u>Doc No.</u>	<u>Pages</u>	<u>Full Name</u>	<u>Release</u>	<u>Exemption(s)</u>
29/2/16	1	1	Letter advising of appointment – Acting CEO	In full	N/A
29/2/16	2	1	Letter to CEO re: Instrument of Appointment	In full	N/A
29/2/16	3	1	Instrument of Appointment – Acting CEO	In full	N/A
22/2/16	4	1	Letter from CEO to Minister advising of upcoming travel	In full	N/A
18/10/16	5	1	Email to Department Liaison Officer	In full	N/A
18/10/16	6	1	Letter from CEO to Minister advising of upcoming travel	In full	N/A
22/7/16	7	2	Email from DLO to ASADA CEO	In full	N/A
22/7/16	8	1	Letter advising of appointment – Acting CEO	In full	N/A
22/7/16	9	1	Instrument of Appointment – Acting CEO	In full	N/A
22/7/16	10	1	Email from Office of the CEO to Ministers Office	In full	N/A
22/7/16	11	1	CEO request for personal leave	In part	s47F

4/11/16	12	3	Ministerial Submission	In full	N/A
28/8/15	13	1	Covering letter – 2015:16 Corporate Plan	In full	N/A
28/8/15	14	7	2015:16 Corporate Plan	In full	N/A
Unknown	15	1	Letter advising of appointment – Acting CEO	In full	N/A
9/2/15	16	1	Instrument of Appointment – Acting CEO	In full	N/A
16/3/15	17	1	Letter advising of appointment – Acting CEO	In full	N/A
16/3/15	18	1	Instrument of Appointment – Acting CEO	In full	N/A
29/2/16	19	1	Letter advising of appointment – Acting CEO	In full	N/A
29/2/16	20	1	Instrument of Appointment – Acting CEO	In full	N/A
Unknown	21	1	Letter advising of appointment – Acting CEO	In full	N/A
12/4/16	22	1	Instrument of Appointment – Acting CEO	In full	N/A
Unknown	23	1	Letter advising of appointment – Acting CEO	In full	N/A
20/10/16	24	1	Instrument of Appointment – Acting CEO	In full	N/A
22/8/16	25	1	Letter advising of appointment – Acting CEO	In full	N/A
22/8/16	26	1	Instrument of Appointment – Acting CEO	In full	N/A
22/7/16	27	9	Incoming Government Brief	In part	s47C, S47F

18/1/16	28	1	Email to Ministers Office attaching annual leave request	In full	N/A
18/1/16	29	1	CEO request for annual leave	In full	N/A
30/1/15	30	1	Letter from CEO to Minister advising of upcoming travel	In full	N/A
Unknown	31	1	Letter advising of appointment – Acting CEO	In full	N/A
30/3/16	32	1	Letter from CEO to Minister advising of upcoming travel	In full	N/A
30/3/16	33	1	Email from CEO's Office to Ministers Office	In full	N/A
23/5/16	34	1	Letter from CEO to Minister advising of upcoming travel	In full	N/A
23/11/16	35	1	CEO request for annual leave	In full	N/A
23/11/16	36	1	Email from CEO's Office to Ministers Office	In full	N/A



ANNEXURE B

FREEDOM OF INFORMATION ACT 1982 - SECT 47C

Public interest conditional exemptions--deliberative processes

General rule

(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:

- (a) an agency; or
- (b) a Minister; or
- (c) the Government of the Commonwealth.

Exceptions

(2) Deliberative matter does not include either of the following:

- (a) operational information (see [section 8A](#));
- (b) purely factual material.

Note: An agency must publish its operational information (see [section 8](#)).

(3) This section does not apply to any of the following:

- (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;
- (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;
- (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see [section 11A](#)).

FREEDOM OF INFORMATION ACT 1982 - SECT 47F

Public interest conditional exemptions--personal privacy

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.

(3) Subject to [subsection \(5\)](#), [subsection \(1\)](#) does not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

Access given to qualified person instead

(4) [Subsection \(5\)](#) applies if:

(a) a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains information concerning the applicant, being information that was provided by a qualified person acting in his or her capacity as a qualified person; and

(b) it appears to the principal officer of the agency or to the Minister (as the case may be) that the disclosure of the information to the applicant might be detrimental to the applicant's physical or mental health, or well-being.

(5) The principal officer or Minister may, if access to the document would otherwise be given to the applicant, direct that access to the document, so far as it contains that information, is not to be given to the applicant but is to be given instead to a qualified person who:

(a) carries on the same occupation, of a kind mentioned in the [definition of *qualified person*](#) in [subsection \(7\)](#), as the first-mentioned qualified person; and

(b) is to be nominated by the applicant.

(6) The powers and functions of the principal officer of an agency under this section may be exercised by an officer of the agency acting within his or her scope of authority in accordance with arrangements referred to in [section 23](#).

(7) In this section:

"qualified person " means a person who carries on, and is entitled to carry on, an occupation that involves the provision of care for the physical or mental health of people or for their well-being, and, without limiting the generality of the foregoing, includes any of the following:

- (a) a medical practitioner;
- (b) a psychiatrist;
- (c) a psychologist;
- (d) a counsellor;
- (e) a social worker.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see [section 11A](#)).