



24 May 2017

Mr Bob O'Dea

Via email only: [foi+request-3287-091fbda4@righttoknow.org.au](mailto:foi+request-3287-091fbda4@righttoknow.org.au)

Dear Mr O'Dea

### **Freedom of Information request 17-8**

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**

You requested access to documents relating to AFL drug tests on 24 March 2017. Specifically you sought access to:

- *lists or equivalent documents that detail the number of AFL players tested by ASADA, the number of tests performed, the dates those samples were taken and categorised by club for the AFL seasons between 2004 and 2016.*

Your request was received on 24 March 2017. An acknowledgment of your request was sent to you via email on 10 April 2017. That correspondence informed you that a decision was due to be made by Monday 24 April 2017. Under the terms of sections 27 and 15(6) of the FOI Act this deadline was extended to allow for consultation with a potentially affected third party. The deadline for a decision was therefore extended to **Wednesday 24 May 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 one (1) document as being within the scope of your request. The document is outlined at **Annexure A**. I have refused your request for access to the document under the exemptions outlined below. A copy of the exemption provisions relied on in reaching this decision is at **Annexure B**.

## Reasons for Decision

### Document 1 – Spreadsheet of numbers of athletes and dates sampling undertaken – 2004 - 2016

I have decided that this document is wholly exempt from disclosure. As outlined below I am of the view that it is appropriate to apply the exemptions found at sections 45 and 47G of the FOI Act to this document.

#### **Section 45 – Material obtained in confidence**

Section 45 of the FOI Act provides that a document is an exempt document if its disclosure under the FOI Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for breach of confidence. This exemption is not subject to the public interest test.

The Guidelines issued by the Information Commissioner outline that breach of confidence is a failure of the recipient (in this case ASADA) to keep information, which has been communicated in circumstances giving rise to the obligation of confidence, confidential. To found an action for breach of confidence the following five criteria must be satisfied<sup>1</sup>:

1. It must be specifically identified
  - The information is the number of athletes tested and the dates sampling was undertaken during the AFL Competition between 2004 and 2016 seasons (inclusive).
2. It must have the necessary quality of confidentiality
  - The information is not, in its totality, known beyond ASADA and the AFL and accordingly has the necessary quality of confidentiality.
3. It must have been communicated and received on the basis of a mutual understanding of confidence
  - ASADA conducts drug testing for the AFL on a contractual basis. These contracts are underpinned by a mutual understanding of confidentiality.
4. It must have been disclosed or threatened to be disclosed without authority
  - ASADA has consulted with the AFL and informed it that the information is threatened to be disclosed under the FOI Act.
5. Unauthorised disclosure of the information has or will cause detriment
  - I am satisfied that the release of the information may cause detriment to the AFL and Clubs by way of reputational and commercial harm.

The document meets the five criteria as outlined above and is accordingly exempt under s45 of the FOI Act.

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<sup>1</sup> See: *AF and Department of Immigration and Citizenship* [2013] AICmr 54 and *B and Department of Immigration and Citizenship* [2013] AICmr 9

## **Section 47G – Business Information**

Section 47G(1)(b) of the FOI Act provides that a document is conditionally exempt if its disclosure under the FOI 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 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 purposes of the administration of a law of the Commonwealth or a Territory or the administration of matters administered by the agency.

This exemption is subject to a proper application of the public interest test.

The document outlines the number of athletes tested and the dates they were tested by ASADA over the course of sixteen seasons. This information relates to the business, commercial and financial affairs of the AFL (the relevant organisation or undertaking). I have determined that the release of this information would, or could, reasonably be expected to unreasonably affect the AFL in respect of its lawful business, commercial and financial affairs.

The AFL has an interest in preserving the integrity of its anti-doping program and I am of the view that the release of this information would unreasonably affect that program by allowing trends to be identified which may aid those seeking to subvert any such program in the future.

### **The public interest test**

Conditionally exempt material must be released unless, in the circumstances, access to it at this time would, on balance, be contrary to the public interest (section 11A(5) of the FOI Act). I have carefully considered the public interest arguments for and against disclosure. I have not had regard to factors that are irrelevant in section 11B(4) of the FOI Act. The public interest test is being applied to the exemption claimed under s47G.

In my view, on balance, disclosure of the business information contained in the document would be contrary to the public interest and is therefore exempt from release. My considerations of the relevant public interest factors and reasons for the view I have reached are as follows.

I have considered the following factors in favour of disclosure:

- disclosure would promote the objects of the FOI Act;
- disclosure would inform debate on a matter of public importance; and
- disclosure would promote effective oversight of the use of public resources;

I have considered the following factors against disclosure:

- disclosure could reasonably be expected to impede the flow of information to the police or another law enforcement or regulatory agency (specifically ASADA);
- disclosure could reasonably be expected to prejudice an agency's ability to obtain similar information in the future;

- disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information;
- disclosure could reasonably be expected to harm the business and or commercial interests of a third party; and
- disclosure could reasonably be expected to prejudice the effectiveness of Australia's anti-doping scheme.

In my view, the public interest factors against disclosure should be weighted more heavily in this case. Accordingly the exemption should be maintained.

### **Your review rights**

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

#### *Internal review*

Under section 54 of the FOI Act, you may apply in writing to ASADA for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter. If you wish to make such an application please contact [legal@asada.gov.au](mailto:legal@asada.gov.au).

Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.

#### *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](mailto: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](http://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:

Susan Taylor  
Lawyer  
[legal@asada.gov.au](mailto:legal@asada.gov.au)

Yours sincerely



Judith Lind  
Acting Chief Executive Officer



**Australian Government**

**Australian Sports Anti-Doping Authority**

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**ANNEXURE A**

<u>Date</u>	<u>Doc No.</u>	<u>Pages</u>	<u>Full Name</u>	<u>Release</u>	<u>Exemptions</u>
N/A	1	1	<i>Spreadsheet of drug tests for the AFL- 2004 to 2016</i>	No - exempt in full	45 and 47G



**ANNEXURE B**

FREEDOM OF INFORMATION ACT 1982 - SECT 45

**Documents containing material obtained in confidence**

(1) A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for breach of confidence.

(2) Subsection (1) does not apply to a document to which subsection 47C(1) (deliberative processes) applies (or would apply, but for subsection 47C(2) or (3)), that is prepared by a Minister, a member of the staff of a Minister, or an officer or employee of an agency, in the course of his or her duties, or by a prescribed authority or Norfolk Island authority in the performance of its functions, for purposes relating to the affairs of an agency or a Department of State unless the disclosure of the document would constitute a breach of confidence owed to a person or body other than:

(a) a person in the capacity of Minister, member of the staff of a Minister or officer of an agency; or

(b) an agency, the Commonwealth or Norfolk Island.

FREEDOM OF INFORMATION ACT 1982 - SECT 47G

**Public interest conditional exemptions—business**

(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.

(2) Subsection (1) does not apply to trade secrets or other information to which [section 47](#) applies.

(3) Subsection (1) does not have effect in relation to a request by a person for access to a document:

(a) by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or

(b) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or

(c) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.

(4) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Commonwealth, Norfolk Island or a State or by a local government authority.

(5) For the purposes of subsection (1), information is not taken to concern a person in respect of the person's professional affairs merely because it is information concerning the person's status as a member of a profession.

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