



5 June 2017

Mr Phillip Nelson

Via email only: foi+request-3470-459d9ab1@righttoknow.org.au

Dear Mr Nelson

Freedom of Information request 17-21

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 a document on 6 May 2017 being:

- *"Performance Enhancing Drugs in the Australian Football League and the National Rugby League – Report to the Chief Executive Officer of ASADA on investigations into doping in the Australian Football League and the National Rugby League"*, 28 April 2014;
The Hon Garry Downes AM QC (**the Downes Report**)

Your request was received on Saturday, 6 May 2017. An acknowledgement of your request was sent to you via email on 18 May 2017. That correspondence informed you that a decision was due to be made by **Monday, 5 June 2017**.

Authority and Material 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 a document as being within the scope of your request. The document is outlined at **Attachment A**. I have refused your request for access to this document under the exemptions outlined below in response to the document. A copy of the exemption provisions relied on in reaching this decision are at **Attachment B**.

Reasons for Decision

I have decided that the Downes Report is wholly exempt from disclosure. As outlined below I am of the view that it is appropriate to apply the exemptions found at sections 42, 45, 47F and 47E(d) to this document.

Section 42 – Legal professional privilege

Section 42 of the FOI Act holds that a document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege. The relevant test for what correspondence is subject to legal professional privilege is outlined in the case of *Grant v Downs*.¹ This exemption is not subject to the public interest test.

The report was prepared by the Honorable Garry Downes AM QC for the purpose of providing confidential and independent legal advice to ASADA. The advice was prepared for use by ASADA in connection with actual or anticipated litigation, including by not limited to litigation in relevant sporting tribunals and the Court of Arbitration for Sport. It is therefore my determination that the Report (and its contents) meets the test in *Grant v Downs* and is privileged and therefore wholly exempt pursuant to Section 42 of the FOI Act.

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:

1. it must be specifically identified;
2. it must have the necessary quality of confidentiality
3. it must have been communicated and received on the basis of a mutual understanding of confidence;
4. it must have been disclosed or threatened to be disclosed without authority; and
5. unauthorised disclosure of this information has or will cause detriment².

The report references a number of interviews that were undertaken by ASADA in conjunction with AFL and NRL players and support personnel. The report further relies on material obtained during the course of these interviews in forming the views presented and the recommendations made at its conclusion.

The interviews undertaken by ASADA with the players and support personnel during the course of Operation Cobia (the subject of the report) meet the five criteria outlined above and accordingly all references to those interviews as well as any material obtained from them is exempt under s45 of the FOI Act.

¹ *Grant v Downs* (1976) 135 CLR 674.

² See: *AF and Department of Immigration and Citizenship* [2013] AICmr 54 and *B and Department of Immigration and Citizenship* [2013] AICmr9.

Section 47F – Personal 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). This is a conditional exemption and as such is subject to the proper application of the public interest test.

The report references personal information related to a number of individuals who have no or limited public connection with Operation Cobia. Further, the report references sensitive medical information in relation to players and support personnel at both the Essendon Football Club and the Cronulla Sharks Football Club. The names of these individuals and any associated medical or additional personal information are conditionally exempt under s47F of the FOI Act as disclosure would be unreasonable.

Section 47E(d) – Certain operation of agencies (adverse effect on proper and efficient conduct)

Section 47E(d) of the FOI Act provides that a document is conditionally exempt if its disclosure under the FOI Act would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct on the operations of an agency. This exemption is subject to the public interest test.

ASADA has a legislative responsibility for delivering Australia's national anti-doping program which gives force to its mission of protecting the integrity of Australian sport through the elimination of doping. This program is undertaken through engagement, deterrence, detection and enforcement activities.

To release a document outlining confidential material obtained with the cooperation of relevant parties under these circumstances and without the consent of the interview subjects, would discourage individuals with potentially important information from providing that information to ASADA. This would have a substantial and adverse effect on the proper and efficient conduct of the operations of ASADA.

If the document requested was released under the FOI Act, ASADA would no longer be able to provide the confidence required to individuals who may wish to come forward with information critical to ASADA being able to undertake its statutory functions. Such an outcome would have a substantial and adverse effect on the operations of ASADA.

Accordingly, those parts of the report which rely on or make reference to those interviews undertaken with players and support staff are conditionally exempt under s47E(d) of the FOI Act.

The public interest test

Conditionally exempt material must be released unless, in the circumstances, access to it at this time would, on the 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 those exemptions claimed under s47F and s47E.

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

I have considered the factors favouring access in subsection 11B(3) of the FOI Act, in particular promoting the objects of the FOI Act. I also acknowledge that there is a public interest in information being made available about investigations into a serious matter such as doping in sport, so that the public may have confidence that a thorough investigation is undertaken.

In my view, public interest factors such as the following weigh against disclosure:

- the public interest in the effective enforcement of the ASADA Act;
- that disclosure of information in the Report could reasonably be expected to prejudice ASADA's ability to carry out future investigations, by discouraging individuals from fully cooperating with investigators for fear of information about them being disclosed; and
- the public interest in the protection of the personal privacy of individuals referred to in the Report.

In my view, the public interest factors against disclosure should be weighted more heavily in this case. Disclosure would in my view cause a significant harm by prejudicing ASADA's ability to undertake investigations in the future. It is also reasonable, particularly given the secrecy provisions in the ASADA Act, for athletes and others involved in an ASADA investigation or legal proceeding to expect that ASADA will keep their information confidential.

Your review rights

If you are dissatisfied with my decision, you may apply for an 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.

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 by 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 Officer 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, Darren Mullaly,
Director Legal Services at legal@asada.gov.au.

Yours sincerely



Judith Lind

Acting Chief Executive Officer
Australian Sports Anti-Doping Authority

ANNEXURE A

FOI 17-21 – Nelson – Reasoned Decision

<u>Date</u>	<u>Doc No.</u>	<u>Pages</u>	<u>Full Name</u>	<u>Release</u>	<u>Exemption(s)</u>
28 April 2014	1	102	"Performance Enhancing Drugs in the Australian Football League and the National Rugby League". Report to the Chief Executive Officer of ASADA on investigations into doping in the Australian Football League and the National Rugby League.	No - exempt in full	42, 45, 47E(d) and 47F.

FREEDOM OF INFORMATION ACT 1982 - SECT 42

Documents subject to legal professional privilege

(1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

(2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.

(3) A document is not an exempt document under subsection (1) by reason only that:

(a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and

(b) the information is operational information of an agency.

Note: For *operational information*, see section 8A.

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 47E

Public interest conditional exemptions--certain operations of agencies

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

- (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;
- (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;
- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth, by Norfolk Island or by an agency;
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

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](#)).