



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

Office address (inc courier deliveries):
Level 7, 120 Collins Street,
Melbourne VIC 3000

Mail address for Melbourne office:
GPO Box 9827,
Brisbane QLD 4001

Tel: +61 1300 935 075
Fax: +61 1300 729 000

www.asic.gov.au

23 September 2019

Our Ref: FOI 199-2019

Mr Philip Sweeney

By Email only: foi+request-4783-594051a6@righttoknow.org.au

Dear Mr Sweeney

Freedom of Information Request No. 199 - 2019
Notice of decision

I refer to your request of 8 September 2018 under the *Freedom of Information Act 1982 (FOI Act)* in which you sought access to documents in the possession of the Australian Securities and Investments Commission (**ASIC**). I also refer to your email to David Asadi, the previous ASIC decision maker, of 22 August 2019.

The previous ASIC decision maker decided you were liable to pay a charge in relation to your 8 September 2018 request and wrote to you on 7 December 2018 confirming the charge decision. On 22 August 2019, you wrote to the previous ASIC decision maker and agreed to pay the charge, you also offered to submit a fresh request. ASIC has taken your email of 22 August 2019 as a fresh request in the same terms as your request of 8 September 2018, as revised through consultation with the previous ASIC decision maker.

Your request seeks access to the following:

a letter [from Mr O'Connor] dated 27 December 2017... to Nicole Smith, the then Chairman of NULIS for copies of Deeds of the fund in which Mr O'Connor has a beneficial interest.

Decision

I am an authorised decision maker for the purposes of section 23(1) of the FOI Act.

I have identified **1** document (the **document**) that is responsive to your request. The document is described in the schedule attached to this letter.

I advise that I have decided: to grant access in part to the document with material exempted under section 47F of the FOI Act.

I have taken the following material into account in making my decision:

- the content of the documents that fall within the scope of your request
- the FOI Act (specifically sections 11A and 47F), and
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**the FOI Guidelines**).

Exemptions

Section 47F - Public interest conditional exemptions—personal privacy

Material in the document has been removed under section 47F of the FOI Act which relevantly provides that:

'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).'

"Personal information" is defined in the FOI Act by reference to section 6 of the *Privacy Act 1988* as:

'information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) Whether the information or opinion is true or not; and*
- (b) Whether the information or opinion is recorded in material form or not.'*

Section 47F(2) sets out factors that must be considered when determining if disclosure would be unreasonable. These factors are as follows:

1. the extent to which the information is well known;
2. 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;
3. the availability of the information from publicly accessible sources; and
4. any other matters that ASIC considers relevant.

I identified that the address of the author of the letter is conditionally exempt under section 47F.

The author of the letter did not respond to ASIC's consultation which enquired whether he consented to the release of his information contained within the document. The information was provided to ASIC for a specific purpose, being the exchange of correspondence with ASIC. The information is not available in the public domain or widely known and I consider that the unrestrained release of this information would, in the circumstances be unreasonable.

I am satisfied that it would be unreasonable to disclose the personal information in the document for the following reasons:

- the information is not well known or available from publicly accessible sources;
- disclosure is unlikely to advance the public interest in government transparency and integrity;
- disclosure of the information could reasonably be expected to cause detriment to the persons to whom the information relates; and
- the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act

I find therefore that the identified material is conditionally exempt under s47F of the FOI Act.

Conditional exemptions are subject to the public interest test which is considered below.

Public Interest Test

The FOI Act provides that access must be given to a conditionally exempt document unless access would be contrary to the public interest.

As required by section 11A of the FOI Act I have considered whether release of the conditionally exempt material in the document would, on balance, be contrary to the public interest.

In particular, I have had regard to the following factors outlined in section 11B(3) as being factors favouring access to the document in the public interest:

1. Access to the documents would promote the objects of the FOI Act (including all matters set out in sections 3 and 3A).
2. Access to the documents would inform debate on a matter of public importance.
3. Access to the documents would promote effective oversight of public expenditure.
4. Access to the documents would allow a person to access his or her personal information

Of the above factors I find factor 1 to be relevant to the document. The objects of the FOI Act include providing for a right of access to information in the possession of Commonwealth government agencies and promoting accountability and transparency in government decision making. In this case, the release of the document supports the objects of the FOI Act by making available information which is held by ASIC.

Against the above factors must be balanced the factors against disclosure. The FOI Act does not specify any factors against disclosure in the public interest however the FOI Guidelines at 6.22 include a non-exhaustive list of thirteen such factors. Of these factors, three are relevant to this decision; that is that disclosure could reasonably be expected to:

- to prejudice the protection of an individual's right to privacy (47F)
- harm the interests of an individual or group of individuals (47F)

Determining whether disclosure would be contrary to the public interest requires that I weigh the relevant factors to determine where the public interest lies.

I have not taken into account the factors outlined in s11B(4) of the FOI Act as factors that are irrelevant in deciding whether access to the documents would be contrary to the public interest.

Section 47F

In my view, the factors against disclosure of the documents exempted under section 47F outweigh the factors in favour of disclosure. Whilst the release of the material in full would promote the objects of the FOI Act by making information held by ASIC available to the public, release in this instance would come at the expense of an individual's personal privacy. I consider that in this matter the public interest is weighted

toward the fair treatment of the individual and the protection of his right to privacy. Accordingly, I am satisfied that the material is exempt under section 47F of the FOI Act.

Section 22 Access to edited copies

Section 22(2) of the FOI Act requires an agency to provide an applicant access to an edited copy of a document with the exempt matter deleted if it is reasonably practicable for the agency to prepare an edited copy, having regard to:

- the nature and extent of the modifications (s22(1)(c)(i)); and
- the resources available to modify the document (s22(1)(c)(ii)).

I consider that it is reasonably practicable to prepare an edited copy of the document with the exempt material deleted.

Review rights

I provide you with the following information as required by section 26 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 an internal review of my decision under section 54B of the FOI Act. This review is an independent process conducted by a Senior Freedom of Information Officer at ASIC. This request should be addressed to me or to the Senior Manager, Freedom of Information, GPO Box 9827, Brisbane QLD 4001 or by email to foirequest@asic.gov.au.
2. You may within 60 days after the day on which you have been notified of this decision, apply in writing to the Office of the Australian Information Commissioner (OAIC) for a review of my decision under section 54N of the FOI Act. You may contact the OAIC by post at GPO Box 5218 Sydney NSW 2001, by email at enquiries@oaic.gov.au or by telephone on 1300 363 992.

Right to complain

You may lodge a complaint with the OAIC in relation to the conduct of ASIC in the handling of this request. You may contact the OAIC as set out above.

Yours faithfully,



Tim Homel

Lawyer

Assessment & Intelligence

Australian Securities & Investments Commission

(Authorised decision-maker pursuant to subsection 23(1) of the FOI Act)

Schedule of Documents

No.	Description of document	Date	No. of folios	Decision on access	Relevant section(s)
1.	Letter to Nicole Smith	27/12/2017	5	Access in part	47F