



1 May 2019

Mr Oscar Thompson

Via email only: [foi+request-5281-825b06b0@righttoknow.org.au](mailto:foi+request-5281-825b06b0@righttoknow.org.au)

Dear Mr Thompson

### Freedom of Information request 19-11

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 28 February 2019 you made an FOI request to the Australian Public Service Commission (APSC) for access to:

*Report/s provided by the APSC to ASADA from the 2018 APS Staff Census*

Your request was transferred to the Australian Sports Anti-Doping Authority (ASADA) by the APSC on 20 March 2019. ASADA sent to you an acknowledgment of your request via email on 26 March 2019. Following a need for ASADA to undertake third party consultation, the decision date was extended to **Wednesday 1 May 2019**.

### 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;
- Consultation with affected third parties; and
- Relevant Tribunal and Federal Court decisions concerning the operation of the FOI Act.

### Summary of Decision

I have identified three (3) documents as being within the scope of your request. The documents are outlined at **Annexure A**. One of these documents is the '**State of the Service Report 2017-18**' which is in the public domain which you would be able to access at the following link: <https://apsc.govcms.gov.au/state-service-report-2017-18>. I have also included a copy of that document with this decision.

I have refused your request for access to the other two documents under the exemption outlined below. A copy of the exemption provision relied on in reaching this decision is at **Annexure B**. We note that in accordance with Government's policy on open data, de-identified, non-sensitive APS employee census data has been made available on [data.gov.au](http://data.gov.au).

## Reasons for Decision

### ***Section 47 – Documents disclosing commercially valuable information***

Section 47 of the FOI Act provides that a document is exempt if its disclosure would disclose information having a commercial value that would be or could reasonably be expected to be diminished if the information were disclosed to the public at large through the FOI process. The information in these reports are still current as the 2019 APS Employee Census has not been completed.

These documents were provided to ASADA through a fee for service and the information is collected for the purpose of providing ASADA management with relevant data to enable it to make an assessment of its employee's views in order to improve on a range of people management strategies. This information is not publically available nor is it available for purchase by an agency other than the responding agency (that is, the agency that participated in the Census – in this case, ASADA).

As the documents were produced for ASADA's purpose and have only been disclosed to a limited number of senior staff members (for the purpose of further discussions with the employees in their individual sections), it is my view that the information collected through the Census should only be disclosed for the purpose in which it was collected. As the information was collected on a confidential basis, public disclosure would erode the trust in the activity and discourage employee participation and impact on the sample size and value of the data with the effect that ASADA's ability obtain reliable and effective data (and therefore the commercial value of the reports) would be diminished.

Section 47 of the FOI Act is not a conditional exemption and accordingly not subject to an application of the public interest test.

### ***Section 47C – Deliberative documents***

Section 47C of the FOI Act provides that a document is conditionally exempt if disclosure 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.

The identified documents constitute the opinions and recommendations of ASADA staff (albeit provided through a de-identified survey process). The opinions and recommendations were solicited for the purposes of ASADA assessing and managing its personnel and to allow it to make informed decisions about staffing matters. Accordingly, I am satisfied that the documents in question contain deliberative material.

Section 47C is a conditional exemption and accordingly is subject to the proper application of the public interest test.

***Section 47E(c) – substantial adverse effect on the management or assessment of personnel by the agency***

Section 47E(c) of the FOI Act conditionally exempts documents containing information which would or could reasonably be expected to have a substantial adverse effect on the management or assessment of personnel. This exemption is a conditional exemption and accordingly subject to the public interest test.

The information contained in these documents are used by the agency to gauge employees' views on various aspects of the agency and senior staff members in order to allow management to effectively determine the implementation of improvement activities and human resource policies and strategies. Public disclosure of these reports would have an adverse effect on employee's participation in future census and therefore management's ability to properly assess employees' views and implement appropriate policies and programs. As such, the disclosure of these documents could reasonably be expected to have a substantial adverse effect on the management and assessment of ASADA staff.

***Section 47E(d) – substantial adverse effect on the proper and efficient conduct of the operations of the agency***

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 of the operations of an agency. The exemption is subject to the public interest test. As I have noted under section 47E(c) exemption, if public disclosure of these reports would have an adverse effect on management's ability to properly assess employees' views and implement appropriate policies and programs, this would then also affect the agency's ability to effect proper and efficient conduct of the operations of the agency.

***Application of the public interest test – sections 47E(c), 47E(d) and 47C of the FOI Act***

Sections 47E(c), 47E (d) and 47C of the FOI Act are conditional exemptions, meaning that they are subject to the proper application of the public interest test. The public interest test is required by section 11A(5) of the FOI Act. I have applied the public interest test jointly across all three exemptions as they cover the same material in the documents.

I have identified the following factors as being in favour of releasing the documents:

- Disclosure would promote the objects of the FOI Act; and
- Disclosure would promote effective oversight of public expenditure.

I have identified the following factors as weighing against the release of the documents:

- Disclosure could reasonably be expected to reduce future participation in the employee census;
- Disclosure would be contrary to undertakings given to staff about the confidential nature of the survey process;
- Disclosure would diminish the ability of ASADA to properly manage its staff and address personnel issues; and

- Disclosure would undermine the commercial functions of a related third party, namely the APSC in the performance of its functions under the *Public Service Act 1999*.

On balance I have placed greater weight on the factors weighing against release because of the adverse effect on the operations of ASADA and the effect this would also have on our commercial partner, the APSC. In particular I note that organisations need to be able to seek feedback from staff on a confidential basis in order to ensure accurate and fulsome responses which can lead to issues being addressed as efficiently and effectively as possible. The disclosure of the documents sought would undermine this key undertaking. As such, I have determined that the test falls against release of the documents and that it is therefore exempt in full pursuant to sections 47, 47E(c), 47E(d) and 47C of the FOI Act.

### **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 [foi@asada.gov.au](mailto:foi@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:

Vicky Tran-Rowlands, Lawyer

[foi@asada.gov.au](mailto:foi@asada.gov.au)

Yours sincerely

A handwritten signature in black ink, appearing to read 'B McDonald', followed by a period.

Brian McDonald APM  
Deputy CEO – Operations

**ANNEXURE A**

*FOI 19-11 – Oscar Thompson – ASADA 2018 Census Reports*

<u>Doc No.</u>	<u>Full Name</u>	<u>Release</u>	<u>Exemption(s)</u>
1	The Australian Public Service Employee Census 2018 – Highlights	No	S 47, 47E(c), 47E(d) and 47C
2	ASADA Census	No	S 47, 47E(c), 47E(d) and 47C
3	State of the Service Report (public information)	N/A	N/A

## ANNEXURE B

### **FREEDOM OF INFORMATION ACT 1982**

#### **S47 Documents disclosing trade secrets or commercially valuable information**

(1) A document is an exempt document if its disclosure under this Act would disclose:

(a) trade secrets; or

(b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

(2) 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.

(3) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by:

(a) the Commonwealth or a State; or

(b) an authority of the Commonwealth or of a State; or

(c) a Norfolk Island authority; or

(d) a local government authority.

#### **S47C 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).

#### **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 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).