



11 December 2019

Mr Philip Nelson
Via email only: foi+request-5883-c631a39d@righttoknow.org.au

Dear Mr Nelson

Freedom of Information request 19-34

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 11 November 2019, you requested access to the following documents:

"CEO ASADA David Sharpe stated in the media that he had reviewed a number of cases that had come before ASADA, including the Essendon and Cronulla supplements cases, which had occurred before he commenced his role as CEO ASADA.

He also recently stated:

'Its automatically a process of ours that we will review [every case],'

"We've seen a lot of high-profile cases, do we sit there and say we got them right? No. We sit there and say what can we do better. What can we do if this happens next time."

I request access to those reviews and all information gathered/provided by other parties that facilitated the reviews of the Essendon and/or the Cronulla supplement cases. Specifically, any information might be, but is not limited to, the following:

- a). ministerial briefings,*
- b). talking points,*
- c). terms of reference for the review,*
- c). who signed off on the review (if it was done would have to be a senior executive officer),*
- d). general counsel advice,*
- e). advice sought from the Solicitor General,*
- f). minutes of interdepartmental committees,*
- g). minutes of meeting in relation to the review,*
- h). case officer notes pertaining to the review,*
- i). implementation program of the review,*
- j). what internal changes were made as a result of the review."*

Your request was received on Monday 11 November 2019. An acknowledgment of your request was sent to you via email on Friday 15 November 2019.

Authority and Materials Considered

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

In reaching my decision I have considered:

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

Summary of Decision

I have identified three (3) documents falling within the scope of your request. The documents are outlined at **Annexure A**. I have decided to grant access in part to one (1) document and refuse access to two (2) documents in full.

Documents Identified

Document 1 is a review of the Operation Cobia investigation, prepared by the Acting ASADA Deputy CEO - Legal, Education, and Corporate, that attaches Documents 2 and 3.

Document 2 is notes on the Operation Cobia investigation that were considered as part of the review. This document was drafted by the then CEO in 2015. They are point form notes outlining the then CEO's thoughts on 'lessons learned' from Operation Cobia.

Document 3 is meeting notes on the Operation Cobia investigation that are considered in Document 1. The document consists of point form notes taken from the "Lessons Learned" session held by ASADA at the conclusion of the Operation Cobia investigation.

Reasons for Decision

Section 47C – Deliberative Process

Section 47C provides that a document is conditionally exempt if its disclosure would disclose a deliberative matter. This exemption is subject to the public interest test.

Deliberative matter is content that is in the nature of, or relating to either:

- 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 any agency.

I have found that documents 1, 2 and 3, set out at Annexure A, contain information that is conditionally exempt from release under section 47C of the FOI Act.

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 staff and operations. Accordingly, I am satisfied that the documents in question contain deliberative material.

Document 2, being the notes of the then CEO, constitutes deliberation that has taken place in the course of, and for the purposes of, the deliberative processes involved in the functions of the agency. Specifically, the document is a consideration of 'lessons learned' from Operation Cobia, being a deliberation that took place in support of ASADA's evaluation of its functions and capabilities.

As outlined above, the session that culminated in Document 3, provided ASADA staff with the opportunity to not only reflect on the Cobia Investigation in a private and confidential setting, but importantly, to deliberate on those reflections and formulate potential operational strategies to

cope with investigations of a similar magnitude to Operation Cobia. On this basis I am satisfied that they formed part of the same type of deliberative process undertaken by the then CEO as outlined above as well as the subsequent formalised review.

Section 47E(d) – Certain operations of agencies

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. The exemption is subject to the public interest test.

I have found that Documents 1, 2 and 3, set out at Annexure A, contain information that is exempt from release under section 47E(d) of the FOI Act.

In order to effectively and efficiently undertake its operational functions ASADA is reliant on being able to properly audit and consider how an anti-doping investigation and/or other processes took place. This review process is key to ensuring that ASADA continues to improve how it undertakes its statutory functions.

Documents 1, 2 and 3 include detailed information about the structure and nature of the relationship between ASADA and law enforcement partners which, if disclosed, may negatively impact on the effectiveness of those relationships.

Documents 2 and 3 outline internal staff discussions and thoughts on Operation Cobia. Both documents, if released, would have a prejudicial effect on ASADA's capacity to undertake similar review processes in the future. Such review processes are critical to ASADA being able to undertake its statutory functions as required.

The Public Interest Test

Sections 47C and 47E(d) are conditional exemptions, meaning that they are subject to the application of the public interest test. The public interest test is required by section 11A(5) of the FOI Act.

I have determined that the following factors should be considered as weighing in favour of releasing the material identified as exempt pursuant to sections 47C and 47E(d):

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

Additionally, I have determined that the following factors should be considered as weighting against the release of these documents request:

- disclosure could reasonably be expected to prejudice the effectiveness of procedures or methods for the conduct of investigations by ASADA;
- disclosure could reasonably be expected to prejudice the conduct of future operational reviews;

- disclosure could reasonably be expected to prejudice the management of staff by ASADA; and
- disclosure could reasonably be expected to inhibit frank discussion about operational matters.

Based on the above factors, I have determined that the material found to be conditionally exempt should remain exempt as, on balance, those factors against release should be given greater weight than those favouring access.

I note that some sections of Document 1, despite being conditionally exempt, have been released. In respect of these parts of the document I have found that, on balance, those factors favouring release outweigh those favouring exemption. I have made this assessment on the basis that the material released would not result in the same prejudicial outcomes as that which is

released.

Journalist rights

My decision will not be subject to internal review. Information Commissioner review of the decision.

Internal review

Under section 64 of the IC Act, you may apply for 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, you may attach reasons why you believe review of the decision is necessary. The internal review will be carried out by an internal officer within 30 days.

Information Commissioner Review

Under section 61L of the IC Act, you may apply to the Australian Information Commissioner for a review of my decision. An application for review by the Information Commissioner must be made on or before 60 days of the date of this letter and can be done in one of the following ways:

online <https://my.business.gov.au/ica/ica/ikm/apply>
email ic@ic.gov.au
post GPO Box 2530, Canberra ACT 2531
in person Level 4, 175 Pitt Street, Sydney NSW

The Information Commissioner's office is located in the Office of the Australian Information Commissioner website: <http://www.oaic.gov.au/freedom-of-information/review>

Questions about this decision

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

Sally Cook
Lawyer
foi@asada.gov.au

Yours sincerely



Brian McDonald APM
Deputy Chief Executive Officer – Operations

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