



Australian Government

Australian Sports  
Anti-Doping Authority

16 June 2014

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Mr Martin Hardie  
School of Law  
Faculty of Business and Law  
Geelong Waterfront Campus  
Geelong VIC 3220

By email only: [mhardie@deakin.edu.au](mailto:mhardie@deakin.edu.au)

Dear Mr Hardie

**Re: Freedom of Information Request**

I refer to your email dated 16 May 2014.

In that email you referred to a document (relating to 'the so-called secret deal struck between ASADA and the Government') outlined in The Age on 15 May 2014 and under the *Freedom of Information Act 1982 (FOI Act)*, you sought access to:

*"a copy of the document and/or any other documents relating to the framework and terms of the joint investigation, including the negotiations between the AFL and ASADA, and the provision of the interim report to the AFL."*

I also refer to your telephone conversation with Alexie Finucan, Lawyer, ASADA, on 3 June 2014 in which you clarified the scope of that request so as to include access to:

- a) all documents relating to the 'secret deal struck between ASADA and the Government' which allegedly took place on 20 February 2013 (as stated to in The Age, 15 May 2014);
- b) all documents relating to the framework and terms setting up the joint investigation between the AFL and ASADA;
- c) all documents relating to any discussions or negotiations between the AFL and ASADA about the investigation being conducted jointly; and
- d) all documents relating to the circumstances that gave rise to the provision of the interim report to the AFL (**your Request**).

The FOI Act provides a statutory scheme for the release of documents held by the Commonwealth. I note that where no document is found to satisfy an FOI request, ASADA is not required under the FOI Act to create a new document to answer the request.

A Statement of Reasons for my decision is attached, together with a schedule of documents (**Attachment A**). The attached schedule outlines each document covered by your Request, and whether the document has been released or not. Where relevant, it also sets out the sections of the FOI Act under which an exemption has been claimed and any applicable public interest factors weighed up in considering whether it would be contrary to the public interest to release that document.

Should you wish to seek review of my decision in relation to the exempt nature of the documents relevant to your request, a copy of your review options is attached (**Attachment B**).

Yours Sincerely

Steve Fitzgerald  
Chief Operating Officer A/g

## STATEMENT OF DECISION

Name of Decision Maker: Stephen Fitzgerald

Designation of Decision Maker: Chief Operating Officer A/g

Date of Decision: 16 June 2014

Applicant: Martin Hardie

Decision: Ninety nine (99) documents were found to be within the scope of the request.

I have determined to refuse access to all ninety nine (99) documents.

I rely on the exemptions outlined in sections 37(2), 42, 45(1), 47C and 47F of the FOI Act in making my decision.

### Materials on which the findings are based:

- Your Freedom of Information (FOI) Request;
- The Freedom of Information Act 1982 (FOI Act); and
- The Office of the Australian Information Commissioner's FOI Guidelines – Part 5 – Exemptions and Part 6 – Conditional Exemptions (which includes guidelines in relation to the public interest test).

### Scope of the request

The Applicant, Mr Martin Hardie, made a valid Freedom of Information request to the Australian Sports Anti-Doping Authority (ASADA) which was received by ASADA on 16 May 2014. That request referred to an article written by Caroline Wilson in The Age dated 15 May 2014. That article referred to a document outlining a "so-called February 20 secret deal struck between ASADA and the Government" which provided "a framework for the investigation". In the Applicant's request, dated 16 May 2014, the Applicant sought:

*"a copy of the document and/or any other documents relating to the framework and terms of the joint investigation, including the negotiations between the AFL and ASADA, and the provision of the interim report to the AFL."*

On 3 June 2014, Alexie Finucan, Lawyer, ASADA, sought clarification on the scope of the request. The Applicant advised that the scope of his request included:

- a) all documents relating to the 'secret deal struck between ASADA and the Government' which allegedly took place on 20 February 2013 (as stated to in The Age, 15 May 2014);
- b) all documents relating to the framework and terms setting up the joint investigation between the AFL and ASADA;
- c) all documents relating to any discussions or negotiations between the AFL and ASADA about the investigation being conducted jointly; and
- d) all documents relating to the circumstances that gave rise to the provision of the interim report to the AFL (your Request).

I have interpreted any reference to an 'investigation' as relating to ASADA's investigation into possible Anti-Doping Rule Violations at the Essendon Football Club.

### Background information

ASADA conducted the following searches to locate the documents requested by the Applicant:

- searches of ASADA's electronic document management system;
- searches of ASADA's electronic emailing system using relevant email addresses and key dates;



## Attachment A

- searches of ASADA's physical files which relate to documents covered by your Request; and
- consultation with key ASADA staff.

Through the above searches ninety nine (99) documents were found to be in scope of your Request. The results have been carefully considered and the decision set out in this Statement has been made in accordance with the FOI Act.

### REASONS FOR THE FINDINGS AND DECISIONS

I am authorised under section 23 of the FOI Act to make decisions to release documents and to refuse access to documents considered to be exempt under the FOI Act.

I have reviewed ASADA's records and identified ninety nine (99) documents which fall within the scope of your Request.

I have determined to refuse access to those documents.

Please refer to the 'Schedule to Attachment A' which lists each document that fell within the scope of your Request and on what grounds I have denied access. Where a public interest test has been applied, I also include the factors I weighed up in applying that test.

These documents are **attached**.

I have relied on the exemptions outlined in sections 37(2), 42, 45(1), 47C and 47F of the FOI Act in making my decision. It should be noted that more than one exemption may apply to one document.

#### Documents affecting enforcement of law and protection of public safety (section 37(2)(a))

I consider that ninety eight (98) documents within the scope of your Request are exempt under subsection 37(2)(a) of the FOI Act. A document is exempt under this provision if its disclosure would or could reasonably be expected to prejudice the fair trial of a person or the impartial adjudication of a particular case.

Federal Court proceedings *Hird v CEO of ASADA* [2014] FCA 328 and *Essendon Football Club v CEO of ASADA* [2014] FCA 327 are currently on foot. These ninety eight (98) documents contain information that is the subject of those proceedings. As such, the release of these documents may prejudice the impartial adjudication of the matters being litigated and are wholly exempt under subsection 37(2)(a) of the FOI Act.

#### Documents subject to legal professional privilege (section 42)

I consider thirty two (32) documents within the scope of your Request are exempt under section 42 of the FOI Act (documents subject to legal professional privilege). The relevant test for whether a document is subject to legal professional privilege is outlined in the case of *Grant v Downs*.<sup>1</sup>

Each of the thirty two (32) documents was produced for the dominant purpose of giving and receiving legal advice. The legal advice was given on the basis that it was independent and confidential, and was prepared for use by ASADA in connection with actual or anticipated litigation. I have determined that these documents meet the test in *Grant v Downs* and are privileged. As such, these documents are wholly exempt pursuant to section 42 of the FOI Act.

#### Information obtained in confidence (section 45(1))

I consider that one (1) document within the scope of your Request is exempt under section 45(1) of the FOI Act (information obtained in confidence). This document was obtained by ASADA from the AFL in confidence and disclosure of that information would found an action for breach of confidence by the AFL.

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<sup>1</sup> *Grant v Downs* (1976) 135 CLR 674.

## Attachment A

### Documents disclosing deliberative processes (section 47C)

Division 1 of the *Australian Sports Anti-Doping Authority 2006 (Cth) (ASADA Act)* outlines the functions and powers of ASADA's Chief Executive Officer. Subsection 21(1)(h) of the ASADA Act outlines one such function as "to collect, analyse, interpret and disseminate information about sports doping and safety matters". When I refer to ASADA's investigative function, I am specifically referring to our function as outlined in subsection 21(1)(h) of the ASADA Act.

I consider fifty eight (58) of the documents within the scope of your Request are exempt under section 47C of the FOI Act (deliberative processes). These are documents which relate to opinions, advice or recommendations that have been obtained or prepared as part of deliberative processes relating to the investigative function of the agency. It also includes documents produced by ASADA staff during consultations or deliberations occurring by reason of ASADA's investigative function.

### Personal Privacy (section 47F)

I consider that four (4) of the documents within the scope of your Request are exempt under section 47F of the FOI Act (Personal Privacy). These documents contain personal information. Further, the release of these documents in full would constitute an unreasonable disclosure of the personal information. The information in these documents is not well known or available from publicly accessible sources.

### Public Interest test (sections 47C, 47F)

In making my decision in relation to sections 47C and 47F of the FOI Act, I consider that in the circumstances, providing full access to the relevant documents listed in the 'Schedule to Attachment A' would, on balance, be contrary to the public interest.

I consider that the following factors are in favour of the release of those documents:

1.	It promotes the objects of the FOI Act
2.	It may inform debate on the issues surrounding the ASADA investigation
3.	It promotes effective oversight of public expenditure
4.	It promotes education of the public regarding ASADA's investigation and prohibited substances

Factors 1 to 4 above are weighed against those factors which indicate it is against the public interest to fully release the documents.

In relation to the exemption outlined in section 47C of the FOI Act (deliberative processes), the factors indicating it is against the public interest to fully release the documents are:

5.	Disclosure would hinder openness and frankness between the parties in future matters should each party be fearful that their comments might be released to the public without the ability to provide justification
6.	The role of ASADA in managing relationships with external stakeholders such as the AFL is paramount to ASADA's functions and may be hindered by disclosing deliberative processes that involve the AFL
7.	It is not in the public's interest that the Commonwealth Government forfeit its rights in relation to anticipated litigation so to provide transparency under the FOI Act
8.	ASADA's ability to fulfil its investigative function could be undermined if documents outlining ASADA's deliberative processes are released to the public before the outcome of the investigation
9.	The deliberative content of these documents are the subject of litigation and early disclosure may hinder the ability of ASADA (or third parties) to defend itself

In relation to the exemption outlined in section 47F of the FOI Act (personal privacy), the factors indicating it is against the public interest to fully release the documents are:

10.	The content of the documents are not well known or available from publicly accessible sources
11.	Disclosure of the personal information contained in the document would not shed any light on



## Attachment A

	the proper functioning of government and would only serve to satisfy mere curiosity about the individual whose details are being disclosed
12.	Disclosure of the personal information could reasonably be expected to impede the flow of information to ASADA from members of the public, and prejudice ASADA's ability to obtain similar information in the future
13.	Disclosure of the personal information would unreasonably affect a person's right to privacy
14.	Disclosure of the personal information could reasonably be expected to prejudice the conduct of ASADA's investigation and its management functions
15.	Disclosure of the personal information may be in breach of the <i>Privacy Act 1988</i> (Cth)
16.	Disclosure of the personal information may be in breach of the ASADA Act and Regulations

Please refer to the 'Schedule to Attachment A' where it is indicated what factors were weighed up against factors 1 to 4 above in determining whether it is in the public interest to disclose the document.

### Relevant legislation

As outlined above, I rely on sections 37, 42, 45, 47C and 47F of the FOI Act in my decision. These sections of the FOI Act and the relevant sections of the ASADA Act are outlined below:

#### Section 21 ASADA Act

(1) *The CEO has the following functions:*

...

(h) *to collect, analyse, interpret and disseminate information about sports doping and safety matters; ...*

#### Section 37(2) of the FOI Act – Documents affecting enforcement of law and protection of public safety

(2) *A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:*

(a) *prejudice the fair trial of a person or the impartial adjudication of a particular case;*

#### Section 42 of the FOI Act – 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.*

#### Section 45(1) of the FOI Act - 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.*

#### Section 47C FOI Act - Public interest conditional exemptions—deliberative processes

##### General rule

## **Attachment A**

(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; or
- (d) the Government of Norfolk Island.

### **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).

## **Section 47F FOI Act - 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.

## Attachment A


### Charges

I have determined that there will be no charge for the processing of your Request.

### Conclusion

I consider that ninety nine (99) documents are within the scope of your request. I refuse access to those documents. I rely on the exemptions outlined in sections 37(2), 42, 45(1), 47C and 47F of the FOI Act.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Steve Fitzgerald', with a large, stylized flourish at the end.

Steve Fitzgerald  
Chief Operating Officer A/g