



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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2 April 2020

John Smith

By email: foi+request-6216-44f6ce4c@righttoknow.org.au

Dear Mr Smith,

Notice of Freedom of Information Decision – Ref 041-2020

I refer to your email received by the Australian Securities and Investments Commission (**ASIC**) on 11 March 2020 in which you seek access to the following under the *Freedom of Information Act 1982* (Cth) (**FOI Act**):

Please provide a copy of ASIC's guidelines for determining whether to pursue a case as a criminal matter, rather than a civil matter.

The 30 day statutory time period for processing your request commenced on the day after the day on which your request was received (s 15(5) of the FOI Act). The due date to issue a decision on your request is therefore 10 April 2020. As 10 April 2020 is a public holiday, the due date is extended to **14 April 2020**, being the next day that is not a Saturday, Sunday or a holiday.¹

Authority to make decision

I am an officer authorised under s 23(1) of the FOI Act to make decisions in relation to FOI requests.

Decision

I have conducted searches of ASIC's records and have identified two documents falling within the scope of your request, comprising a total of 15 pages.

These documents comprise the following:

1. Draft paper titled 'Criminal & civil penalty enforcement – factors to be addressed' dated 5 December 2019 (8 pages) (**Document 1**); and
2. Memorandum of Understanding (MOU) between ASIC and the Commonwealth Director of Public Prosecutions (CDPP) dated 1 March 2006 (7 pages) (**Document 2**).

In addition, on 30 September 1992 the Attorney-General issued a direction to the CDPP and to the then Australian Securities Commission to develop and implement policies for the exercise and discharge of their respective powers and functions so as to comply with guidelines set out in the direction. This direction provides some guidance to ASIC in determining 'whether to pursue a case as a criminal matter, rather than a civil matter'. The direction can be found at page 2720 of the General Notice Gazette No 40 dated 7 October

¹ *Acts Interpretation Act 1901* (Cth) s 36(2)

1992 and is available to download through the Federal Register of Legislation at: <http://www.legislation.gov.au/file/1992GN40>.

I have decided to grant access in full to document 2 and to refuse access in full to document 1 on the basis that it is exempt in full under s 47C of the FOI Act.

Document 2 is **attached**.

The reasons for my decision are set out below.

A schedule of documents, which details my decision in relation to each document, can be found at the end of this letter.

Information considered:

In reaching my decision, I have considered the following:

- the FOI Act, in particular s 47C;
- the Australian Information Commissioner's FOI Guidelines issued under s 93A of the FOI Act (**FOI Guidelines**);
- relevant case law;
- the terms of your request; and
- the documents within scope.

Reasons for decision

Document 1

Section 47C of the FOI Act – deliberative processes

Section 47C of the FOI Act relevantly provides:

- (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...
- (2) Deliberative matter does not include either of the following:
 - (a) operational information (see section 8A);
 - (b) purely factual material

The FOI Guidelines provide that “deliberative matter” is a shorthand term for “opinion, advice and recommendation” and “consultation and deliberation” that is recorded or reflected in a document.² The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.³

² FOI Guidelines [6.63]

³ FOI Guidelines [6.58] (footnotes omitted)

The meanings of the words 'opinion', 'advice' and 'recommendation' all involve consideration, followed by the formation of a view either about a certain subject or about a course of action and the subsequent transmission of that view.⁴ A deliberative process may include the recording or exchange of interim decisions and drafts.⁵

Document 1 is a draft paper addressed to ASIC's Commission Enforcement Committee (CEC). The document contains material in the nature of preliminary advice, analysis and conclusions of ASIC staff regarding their views on various factors that should be considered by ASIC in choosing between criminal and civil penalty proceedings. The document was provided to the CEC for its consideration and has not yet been approved or adopted.

The document is constantly subject to further revision, is still in draft form and is being deliberated by ASIC's CEC. The document was discussed at a CEC meeting on 5 December 2019 and was sent to the Chair of the CEC on 29 January 2020 for further consideration. The Chair of the CEC is authorised to give final approval for the issue of this paper but the paper has not yet been approved. The paper is therefore part of an ongoing deliberation.

I am satisfied that the document contains deliberative matter in the nature of opinion, advice and recommendation of ASIC staff. This matter was obtained, prepared or recorded for the purposes of ASIC's deliberative process, being the development of a final set of guidelines.

I am satisfied that the material in the document is deliberative matter for the purposes of s 47C. Significantly, the deliberative processes remain ongoing as the document is still being considered by the CEC.

The document is therefore conditionally exempt under s 47C of the FOI Act.

Public Interest Test

Where a document is conditionally exempt, access must be given unless in the circumstances giving access would, on balance, be contrary to the public interest (s 11A(5) of the FOI Act). As I have decided that document 1 is conditionally exempt under s 47C, I am required to consider whether disclosure would be contrary to the public interest, taking into consideration s 11B of the FOI Act and part 6 of the FOI Guidelines.

One factor in favour of access is that disclosure could promote the objects of the FOI Act. The objects of the FOI Act explain that Parliament intends the FOI Act to promote Australia's representative democracy,⁶ and increase recognition that information held by Government is to be managed for public purposes, and is a national resource.⁷

However, the discussions in the document are draft and preliminary in character, and express the views of the author rather than a final ASIC position. For this reason, I attach low weight to the factor favouring disclosure.⁸

The public interest factor favouring disclosure must be balanced with any public interest factors against disclosure.

⁴ *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945 [39]

⁵ FOI Guidelines [6.61]

⁶ *Freedom of Information Act 1982* (Cth) s 3(2)

⁷ *Freedom of Information Act 1982* (Cth) s 3(3)

⁸ *'BJ' and Australian Taxation Office* [2014] AICmr 22 [22]

Section 11A(5) requires a decision maker to undertake a balancing exercise of public interest factors. The Guidelines also include a non-exhaustive list of factors against disclosure.⁹ I consider the relevant factors against disclosure are that disclosure could reasonably be expected to:

- prejudice the effectiveness of ASIC's decision-making and deliberative processes;¹⁰
- prematurely expose for public comment a document that was prepared for internal consultation and consideration;¹¹ and
- prejudice law enforcement.¹²

In *Australian Broadcasting Corporation and Civil Aviation Safety Authority*,¹³ the Information Commissioner noted:

Generally speaking, the purpose of inviting commentary on a confidential draft report would be undermined if draft ideas that are amended or abandoned are then published or released alongside the final report. The public interest is better served by release of the final or considered views adopted by the authors of the report.¹⁴

Given the document is still undergoing revision and has not been finalised, I consider the factors against disclosure are more relevant in this case. The public release of the preliminary advice and recommendations in the document may expose matters under deliberation to premature scrutiny which would undermine the integrity of the decision-making process of government. This could reasonably be expected to prejudice the effective development of enforcement policy. I consider that release of the preliminary and inconclusive advice in the draft paper would be contrary to the public interest.

Based on these factors, I have decided that the public interest is weighted more heavily against disclosure and that giving access to the conditionally exempt material would, on balance, be contrary to the public interest.

Review Rights

In the event that you are dissatisfied with my decision:

You may, within 30 days after the day on which you have been notified of this decision, apply in writing to ASIC for a review of my decision by another ASIC officer under section 54 of the FOI Act. This request should be addressed to the Senior Manager, Freedom of Information, by email to foirequest@asic.gov.au

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 54L 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

⁹ FOI Guidelines [6.22]

¹⁰ See *Parker and Australian Securities and Investments Commission* [2016] AATA 767 [56] and *Baker and Australian Securities and Investments Commission* [2019] AATA 4898 [30]

¹¹ *Timmins and Attorney-General's Department* [2015] AICmr 32 [27]

¹² FOI Guidelines [6.22(c)]

¹³ [2015] AICmr 21

¹⁴ *Ibid* [19]

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 described above.

Questions about this decision

If you wish to discuss this decision, I can be contacted by phone or email as below.

Yours sincerely

Haydar Tuncer
 Senior Freedom of Information Officer
 Australian Securities and Investments Commission
 Phone: 03 9280 4416
 Email: haydar.tuncer@asic.gov.au

SCHEDULE OF DOCUMENTS

No	Date	Pages	Description	Decision on access	Exemptions
1	5 December 2019	8	Criminal & civil penalty enforcement – factors to be addressed	Exempt in full	s 47C
2	1 March 2006	7	Memorandum of Understanding between ASIC and the Commonwealth Director of Public Prosecutions dated 1 March 2006	Release in full	