



ASIC
Australian Securities &
Investments Commission

**Australian Securities
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Phillip Sweeney

By email: foi+request-6439-42573ead@righttoknow.org.au

Our Reference: FOI 110-2020

31 August 2020

Dear Mr Sweeney

Freedom of Information Request No. 110-2020
Notice of Access Decision

I refer to your five (5) requests for access to documents made under the *Freedom of Information Act 1982 (FOI Act)* received between 28 June 2020 and 30 June 2020 by which you requested access to documents in the possession of the Australian Securities and Investments Commission (**ASIC**).

Revised request and consultation

On 10 July 2020, I sent you a notice under section 24AB of the FOI Act. The notice advised you that the five FOI requests may be treated as a single request under section 24(2) of the FOI Act because the subject matter of the requests were the same or substantially the same. The notice also advised that a practical refusal reason existed in relation to your request because it did not provide information reasonably necessary to allow me to identify the documents you were seeking. On 10 July 2020, you responded to the notice with a revision to your request and withdrew part 5 of your request, leaving four (4) clustered requests.

On 20 July 2020, I sent you a second notice under section 24AB of the FOI Act. The second notice advised that additional practical refusal reasons existed in relation to your request because your request did not provide information reasonably necessary to allow me to identify the documents sought by your request. You responded to this notice on 21 July 2020.

Your request is described in the **attached** schedule of requests.

Decision and reasons for decision

I am the authorised decision-maker for the purposes of section 23 of the Act and this letter gives notice of my decision.

I have identified **4** documents that is responsive to your request. The documents are described in the schedule **attached** to this letter.

I advise that I have decided to grant access in full to all the documents in the schedule other than document 4 (the **exempt document**).

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, 22 and 47F);
- the guidelines (**FOI Guidelines**) issued by the Office of the Australian Information Commissioner (**OAIC**) under section 93A of the FOI Act; and
- the views of a third party consulted by ASIC under section 27 of the FOI Act.

My reasons for refusing access to the exempt document is set out in this letter.

In your request and your emails dated 10 July 2020 and 21 July 2020, you provide a series of assertions of opinion and general commentary relating to your previous dealings with ASIC. I do not consider any of these statements as relevant to the determination of your request. This type of information is not required under the FOI Act and impedes on ASIC's processing of your request efficiently. Please see the Office of the Information Commissioner's [how to make an FOI request](#) webpage for further information.

However, considering my above comments, I have been mindful not to take a narrow approach to the construction of your FOI request. As such, I advise that I have identified the documents listed in the **attached** schedule based exclusively on the authors, timeframes and dates you have provided. The documents were identified by searching ASIC case management systems and ASIC archives.

Section 22 – Access to edited copies

Section 22(2) of the FOI Act requires an agency to give 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 (section 22(1)(c)(i)); and
- the resources available to modify the document (section 22(1)(c)(ii)).

It is my view that it would not be reasonably practicable to prepare an edited copy of document 4. Doing so would leave only a skeleton of the document that would convey little of its content or substance.¹ Applying these considerations, I am of the view that deletions to the document would be so extensive that the remaining document would be of little or no value, as the resulting editing would render the document unintelligible.

Section 47F – Public interest conditional exemptions – personal privacy

Section 47F provides that a document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any 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.’*

¹ FOI Guidelines [3.98]

In determining if disclosure would involve the unreasonable disclosure of personal information, an agency must consider the following:

- the extent to which the information is well known;
- 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;
- the availability of the information from publicly accessible sources;
- any other matters that the agency considers relevant

The subject of the exempt document did not respond to ASIC's consultation which enquired whether he consented to the release of his information contained within document 4. Document 4 contains the name, and/or employment details of the third party. The information was provided to ASIC for a specific purpose, being the exchange of correspondence with ASIC. I am satisfied that this information is personal information. 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 have also considered the current relevance of the information and the outcome of ASIC inquiries. I have determined that disclosure of the personal information would be unreasonable.

I find therefore that document 4 is conditionally exempt under section 47F of the FOI Act.

This is a conditional exemption subject to the public interest test.

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. As I have decided that the relevant material is conditionally exempt under section 47F, I am required to consider whether disclosure would be contrary to 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 document 4. 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.

I have also considered the following factors against disclosure and that disclosure could reasonably be expected to:

- to prejudice the protection of an individual's right to privacy (47F); and
- 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 s 11B(4) of the FOI Act as factors that are irrelevant in deciding whether access to the documents would be contrary to the public interest.

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 24A - Requests may be refused if documents cannot be found, do not exist or have not been received

Your request (at request 3) also seeks access to "a copy of the original Trust Deed made on the 23 December 1913 in the State of South Australia when the original sponsoring employer was Elder Smith & Co Ltd". I note that ASIC has previously considered FOI requests received from you on, but not limited to, 25 January 2013 (ref. 4318/13), 16 July 2017 (ref. 26485/17) and 6 August 2019 (ref. FOI 158-2019) requesting the same document.

Section 24A of the Act provides that requests may be refused if documents cannot be found, do not exist or have not been received. Section 24A states:

- (1) An agency or Minister may refuse a request for access to a document if:
 - (a) all reasonable steps have been taken to find the document; and
 - (b) the agency or Minister is satisfied that the document
 - (i) is in the agency's or Minister's possession but cannot be found; or
 - (ii) does not exist.

The right of access under section 11 of the FOI Act is to a 'document of an agency.' This is defined in the section 4 of the FOI Act as:

"a document is a *document of an agency* if:

- (a) the document is in the possession of the agency, whether created in the agency or received in the agency; or
- (b) in order to comply with section 6C, the agency has taken contractual measures to ensure that it receives the document."

The document is not a document created by ASIC and is not in the possession of ASIC. Section 6C of the FOI Act is not relevant to this document.

I have searched our electronic records, including ASIC's case management systems and made enquiries with relevant staff and confirm that ASIC does not have the document, or the document does not exist. I am satisfied that all reasonable steps have been taken to locate documents relevant to your FOI request.

Review rights

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 a review of my decision by another ASIC officer under section 54B of the FOI Act. 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 foidr@oaic.gov.au or by telephone on 1300 363 992.

Right to complain

3. 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.

If you have any questions, please contact me at krystal.fung@asic.gov.au.

Yours sincerely



Krystal Fung
Escalated Matters & Government
Assessment & Intelligence

Schedule of Phillip Sweeney requests 28 June 2020 to 30 June 2020

Request No.	Date of Request	Documents sought in Request
1.	28 June 2020	"...The document I seek is a copy of the letter dated around mid-2010 in which Warren Day reported on the "investigation" into his own "Straw Man" complaint."
2.	29 June 2020	"...The document I seek is a copy of the response sent by Ms Tenaski to former Senator John Williams sometime after 6 January 2014."
3.	29 June 2020	<p>"...The first document I seek is a copy of the response sent by Warren Day to former Senator John Williams sometime after 18 July 2013.</p> <p>I am also seeking a copy of the original Trust Deed made on the 23 December 1913 in the State of South Australia when the original sponsoring employer was Elder Smith & Co Ltd that should have been obtained by Warren Day in 2013 or at a later date by ASIC."</p>
4.	30 June 2020	"...The document I seek is a copy of the response sent by Gerard Fitzpatrick to former Senator John Williams sometime after 28 January 2014 where no mention of subsection 1017C(5) was made."

Schedule of Documents

No.	Description of document	Date	Decision on access	Relevant Section(s)
1.	ASIC letter to Phillip Sweeney	2 July 2010	Release	
2.	ASIC letter to Senator John Williams	6 August 2013	Release	
3.	ASIC letter to Senator John Williams	17 January 2014	Release	
4.	ASIC letter to Senator John Williams	14 February 2014	Exempt in full	47F