



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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Phillip Sweeney

By email: foi+request-6594-4e815515@righttoknow.org.au

12 October 2020

Dear Mr Sweeney

Freedom of Information Request No. FOI 158-2020

I refer to your request made under the *Freedom of Information Act 1982 (FOI Act)* dated 12 August 2020 by which you requested access to documents in the possession of the Australian Securities and Investments Commission (**ASIC**).

Your request sought access to:

- 1) the "No Action" letter sent to Andrew Thorburn (former NAB CEO) by ASIC in or around December 2019; and
- 2) a similar "No Action" letter that ASIC would have sent to Dr Ken Henry (former NAB Chairman) after his testimony at the Royal Commission.

I am the authorised decision-maker for the purposes of s23 of the FOI Act and this letter gives notice of my decision. All references to sections hereafter are, unless otherwise stated, references to sections of the FOI Act.

Document Searches

Searches were conducted on 18 August 2020 for documents falling within the terms of your request by ASIC's Wealth Management Enforcement team. The team searched ASIC's internal database (SharePoint) and emails on Outlook using the following terms: "Andrew Thorburn" and "no further action"; and "Ken Henry" and "no further action". The searches were completed in approximately 20 minutes. I am satisfied that all reasonable steps have been taken to locate the documents falling within the terms of your request.

I have identified **one** document that falls within the terms of your request. I consulted third parties on the release of this document. My decision on the release of this document is set out below.

Decision and Reasons for the Decision

I advise that I have decided to refuse access to the document.

I have taken the following material into account in making my decision:

- the terms of your FOI request;

- the content of the documents that fall within the scope of your request;
- the FOI Act (specifically s47F); and
- the guidelines issued by the Office of the Australian Information Commissioner (**OAIC**) under s93A (**FOI Guidelines**).

Public interest conditional exemption: Section 47F – personal privacy

Section 47F(1) provides:

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).

The FOI Act adopts the *Privacy Act 1988* definition of 'personal information', which means:

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 a material form or not.*¹

The term 'personal information' encompasses a broad range of information. In this instance, the document contains information about an identifiable individual's personal business affairs. I am satisfied that this information is 'personal information' as defined above.

The following factors must be considered when determining if the disclosure of personal information would be unreasonable:

- (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.*²

The key factors for determining whether disclosure is unreasonable include whether:

- the author of the document is identifiable;
- the documents contain third party personal information;
- release of the documents would cause stress on the third party;
- no public purpose would be achieved through release.³

Other factors that are considered to be relevant include:

- the nature, age and current relevance of the information;
- any detriment that disclosure may cause to the person to whom the information relates;
- any opposition to disclosure expressed or likely to be held by that person;

¹ Section 4 of the FOI Act; section 6 of the Privacy Act 1988.

² Section 47F(2).

³ FOI Guidelines [6.142].

- the circumstances of an agency's collection and use of the information;
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act;
- any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information; and
- whether disclosure of the information might advance the public interest in government transparency and integrity.⁴

I consider that it would be unreasonable to disclose the personal information contained in the document because:

- release of the documents would cause stress on the third party;
- disclosure of the information would jeopardise the personal privacy of a third party/third parties; and
- the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.

Section 47F is a conditional exemption and therefore, subject to the public interest test discussed below.

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 s11A, I have considered whether release of the conditionally exempt material would, on balance, be contrary to the public interest. In particular, I have had regard to the following factors outlined in s11B(3) as being factors favouring access to the documents in the public interest:

- Access to the documents would promote the objects of the FOI Act (including all matters set out in ss3 and 3A);
- Access to the documents would inform debate on a matter of public importance;
- Access to the documents would promote effective oversight of public expenditure; and
- 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 in that the release of the documents would support the objects of the FOI Act by providing information relevant to a government agency decision as well as background and context information that informed it.

The above factor must be balanced against the factors against disclosure. The FOI Act does not specify any factors against disclosure in the public interest however the FOI Guidelines issued by the OAIC include a non-exhaustive list of thirteen such

⁴ FOI Guidelines [6.143].

factors. Of these factors, two are relevant to this decision. The disclosure of the documents:

- could reasonably be expected to prejudice the protection of an individual's right to privacy; and
- could reasonably be expected to harm the interests of an individual.

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 s11B(4) as they are factors that are irrelevant in deciding whether access to the documents would be contrary to the public interest.

The factors against disclosure of the identified material exempted under s47F 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 the personal privacy of the relevant third party. In the circumstances, I consider that there is little public benefit to be gained from the release of the details about the third party's personal business affairs. This benefit is outweighed by the expected harm that would occur with respect to the privacy of the individuals concerned and would cause stress to the third party. Therefore, I am satisfied that the document is fully exempt under s47F.

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.

The FOI Act provides that charges may be assessed for time spent processing a request. I have decided that there are no charges applicable to the processing of your request in this instance.

If you have any questions or wish to discuss, please contact me on Mabel.Say@asic.gov.au or (02) 9911 5269.

Yours sincerely,

MS.

Mabel Say

Freedom of Information Officer

(Authorised decision maker under section 23(1) of the FOI Act)