



23 February 2021

FOI ref: 2811

Phillip Sweeney

By email: foi+request-6835-bbcd743c@righttoknow.org.au

Dear Mr Sweeney

Freedom of Information Request – Amended Internal Review Decision

I refer to my decision dated 18 December 2020 regarding your internal review request to the Treasury on 20 November 2020. Since that decision, I have been advised that the Treasury does have a document in scope of your request. Accordingly, I am providing you with a new decision in the matter.

Your original request and Treasury decisions

On 26 October, you made a request under the *Freedom of Information Act 1982 (FOI Act)* in the following terms:

The ASIC Chairman, James Shipton, and Deputy Chairman, Daniel Crennan, are required to make 6-monthly written disclosures of their personal business interests, both direct and indirect, to the Responsible Minister as required by Section 123 of the ASIC Act 2001 and related ministerial instructions.

The documents I seek are copies of:

- i. the written disclosures of James Shipton to the Responsible Minister for the period 1 February 2018 to the present; and*
- ii. the written disclosures of Daniel Crennan to the Responsible Minister for the period 16 July 2018 to the present.*

The covering letters dated 12 October 2018, 1 October 2019 and 13 October 2020 for the last three ASIC annual reports have been addressed to the Treasurer, the Hon Josh Frydenberg MP.

On 20 November 2018, Ms Angela Barrett refused your request on the basis that the Treasury did not have any documents in scope of your request. On that day you sought internal review of that decision. On 18 December 2018 I affirmed Ms Barrett's decision. As set out in my letter of that date, further searches were conducted for disclosures made under s 123 of the ASIC Act made by Mr Shipton and Mr Crennan without locating any documents. Further, I advised that the disclosures made under that provision are not provided to the Treasury as a matter of practice.

That advice about the usual practice in relation to s 123 disclosures remains correct. However, a recent search of one of our systems (for another purpose) found that one of Mr Crennan's disclosures was provided by the Treasurer's office to the Treasury, but was incorrectly filed.

FIND TREASURY ON   

As a result, it was not found in the searches conducted in processing your first request, nor when additional searches were conducted on internal review. I am advised that further checking has taken place and can confirm that no other s 123 disclosures have been provided to the Treasury by the Treasurer's office. I apologise for the oversight in processing your requests. I am advised that steps have been taken to avoid this kind of filing error, and to try to ensure that if such an error were to occur again, documents would nevertheless be found.

It is now appropriate that I provide you with an amended internal review decision, set out as follows.

Decision

In view of the discovery of the document mentioned above (document 1), I have decided to overturn the Treasury's original decision of 20 November 2020. That decision refused your request under section 24A(1) of the FOI Act that no documents within scope of your request existed. I have decided to amend my previous internal review decision by refusing access in full to document 1 as it is exempt under sections 45, 47E(c) and 47F of the FOI Act. The reasons for my decision follow.

Request for internal review

For completeness, I again set out your submissions on internal review. You submitted the following in support of your request for internal review:

The Treasury has previously provided me with copies of the six-monthly disclosures of Greg Medcraft when he was an ASIC Commissioner and then ASIC Chairman. If the Treasury was able to locate the six-monthly disclosures of Greg Medcraft then it should be able to locate the disclosures of James Shipton and Daniel Crennan.

Please check the FOI Disclosure Log. A full history of my FOI request and all correspondence is available on the Internet at this address:

https://www.righttoknow.org.au/request/disclosure_obligations_of_james

As previously noted, the link you provided was to your correspondence with the Treasury regarding your current request posted on the Right To Know website, and does not concern documents concerning Mr Medcraft, to which you referred in your submissions. On 21 November 2020, you further submitted the following:

Further to my request for an Internal Review, please refer to FOI response from The Treasury dated 2 March 2012 {File Number ER2012/00228} and related Internal Review dated 13 April 2012 (File Number ER2012/00228) which included a Schedule of Documents with Author Greg Medcraft and Addressee as follows

- 1 - Chris Bowen MP (30/7/2009) Disclosure of Interest - s 123 of ASIC Act*
- 2- Chris Bowen MP (17/2/2010) Disclosure of Interest - s123 of ASIC Act*
- 3- David Bradbury MP (21/10/2010) Disclosure of Interest - s123 of ASIC Act*
- 4 - David Bradbury MP (4/4/2011) Disclosure of Interest - s123 of ASIC Act*
- 5 - David Bradbury MP (13/4/2011) Disclosure of Interest - s123 of ASIC Act*

This confirms that, if the required disclosures have been made, then the Treasury will hold copies.

Material Considered

I have had regard to the following in making my decision:

- the scope of your request and your submissions on internal review;
- one document relevant to your request;
- advice from Treasury officers, the relevant provisions in the FOI Act and the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**).

Reasons for decision

Material obtained in confidence - Section 45

Section 45(1) of the FOI Act provides:

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.

To found an action for breach of confidence (which means section 45 would apply), the following five criteria must be satisfied in relation to the information:

- it must be specifically identified;
- it must have the necessary quality of confidentiality;
- it must have been communicated and received on the basis of a mutual understanding of confidence;
- it must have been disclosed or threatened to be disclosed, without authority; and
- unauthorised disclosure of the information has or will cause detriment.

Document 1 comprises financial information provided by an ASIC officer to the Treasurer, as required by section 123 of the *Australian Securities and Investments Commission Act 2001 (ASIC Act)*. I find that this communication was made in a mutual understanding of confidence between the ASIC officer and the Treasurer.

The Treasurer, ASIC and the Treasury maintain a policy of strict confidentiality with respect to financial information of this nature. This type of information, provided as part of ASIC Act compliance, will not be shared with third parties unless the Government has authority to do so or is ordered to do so by a court of competent jurisdiction. There is no requirement under the ASIC Act to publish ASIC officers' personal interest declarations, nor does ASIC publish them on a voluntary basis. The provision of the document to the Treasury, the agency with policy responsibility for ASIC, is not inconsistent with its confidentiality.

I find that the information in document 1 was provided on the basis of an understanding that it is confidential information and handled accordingly, and confidentiality has been maintained. Although the Treasury did not expect to receive document 1, it was nevertheless communicated to the Treasury in a secure environment consistent with the maintenance of confidentiality.

In my view, disclosure of the individual's financial information in document 1 could expose that individual to the detriment of possible criticism or ridicule in the public domain. I am satisfied that document 1 was

provided in confidence and would, if released, found an action for breach of confidence against the Commonwealth by the party to whom the financial information pertains. I have therefore decided that document 1 is exempt in full under section 45 of the FOI Act.

Agency management of personnel - Section 47E(c)

Section 47E(c) 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 management or assessment of personnel by the Commonwealth or by an agency.

ASIC commissioners are high-profile individuals recruited from the Australian business community. Their remuneration and allowances paid from the public purse are reported in ASIC's annual reports. I consider that public disclosure of their private financial dealings as to how they spend that remuneration would likely lead to a reluctance by similar business executives to apply for positions with ASIC in future for fear of adverse public scrutiny and commentary on their private financial affairs. This reluctance would, in my view, have a substantial adverse effect on ASIC's ability to recruit its senior managers in future by limiting the pool of potential executive candidates for ASIC to consider. I therefore find that document 1 is conditionally exempt under section 47E(c) of the FOI Act.

Section 11A(5) of the FOI Act provides that conditionally exempt documents must be disclosed unless doing so would be contrary to the public interest. My considerations of the public interest are set out below.

Personal Information – Section 47F

Section 47F of the FOI Act provides that a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information about any person. In determining whether the disclosure of the document would involve the unreasonable disclosure of such personal information, an agency must have regard to:

- 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.

The FOI Guidelines further provide that the personal privacy exemption is designed to prevent the unreasonable invasion of a third party's privacy. The test of unreasonableness implies a need to balance the public interest in disclosure of government-held information, and the private interest in the privacy of individuals.

I consider that expenditure of public money on ASIC executives is properly reported by ASIC, but how those individuals spend their remuneration, and their financial interests generally is a private matter for them. I am satisfied that disclosure of document 1 would be unreasonable and this personal information is therefore conditionally exempt under section 47F of the FOI Act. My considerations of the public interest are set out below.

Public Interest

Section 11A(5) of the Act provides that conditionally exempt material must be released unless its disclosure would, on balance, be contrary to the public interest. Section 11B(3) sets out public interest factors that are regarded as favouring release and section 11B(4) sets out factors that must not be taken into account in this process. I have not taken into account any irrelevant factors set out in section 11B(4) in making this decision. The FOI Guidelines, to which regard must be had in making decisions of this nature, also set out factors in favour of release and factors against release.

I recognise that the allowances paid by ASIC to Msrs Shipton and Crennan are matters of prominent current debate in the public domain. In this respect, I have had regard to the public interest factors favouring disclosure of the conditionally exempt material, in particular, the promotion of the objects of the Act, promotion of public participation in government decision-making and the benefits of informed public debate based on accurate information.

I have also considered factors against disclosure. There is a strong public interest in preserving personal privacy in relation to an individual's financial affairs, especially when that individual's remuneration from ASIC is a matter of public record. In this respect, I consider that ASIC's annual reports sufficiently serve the public interest. I have also considered the importance of not impeding an agency's ability to recruit executives from the widest possible pool of potential candidates. I find that encouraging the widest range of potential candidates to take up the opportunity of recruitment into executive positions in Australia's statutory authorities is very much in the public interest.

On balance, I find that the factors against disclosure outweigh the factors in favour of disclosure. I therefore consider that disclosure of the conditionally exempt information would, on balance, be contrary to the public interest. I have therefore decided that document 1 is exempt in full under sections 47E(c) and 47F of the FOI Act.

Rights of Review

A statement setting out your rights of review in this matter is attached.

Yours sincerely



Roxanne Kelley
Deputy Secretary
Corporate and Foreign Investment Group

INFORMATION ON RIGHTS OF REVIEW

APPLICATION TO AUSTRALIAN INFORMATION COMMISSIONER (INFORMATION COMMISSIONER) FOR REVIEW OF DECISION

Section 54L of the FOI Act gives you the right to seek a review of the decision from the Information Commissioner. An application for review must be made within 60 days of receiving the decision.

An application for review must be in writing and must:

- give details of how notices must be sent to you; and
- include a copy of the notice of decision.

You should send your application for review to:

The Information Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

AND/OR

COMPLAINTS TO THE INFORMATION COMMISSIONER

Section 70 of the FOI Act provides that a person may complain to the Information Commissioner about action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. A complaint to the Information Commissioner must be in writing and identify the agency the complaint is about. It should be directed to the following address:

The Information Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

The Information Commissioner may decline to investigate the complaint in a number of circumstances, including that you did not exercise your right to ask the agency, the Information Commissioner, a court or tribunal to review the decision.