



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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24 December 2020

Phillip Sweeney

By email: foi+request-6839-2c5240d7@righttoknow.org.au

Dear Mr Sweeney,

Notice of Freedom of Information Decision – Ref 213-2020

I refer to your email received by the Australian Securities and Investments Commission (**ASIC**) on 26 October 2020 in which you sought access to the following under the *Freedom of Information Act 1982* (Cth) (**FOI Act**):

The document I seek is a copy of advice provided to James Shipton on 11 October 2018 that the full amount for professional advice by KPMG on personal taxation matters for James Shipton would be paid by ASIC.

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). This timeframe was extended by 30 days in order to consult with an affected party, Mr James Shipton, pursuant to s 15(6) of the FOI Act. The due date to issue a decision on your request is therefore 25 December 2020. As 25 December 2020 is a public holiday, the due date is extended to 29 December 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. This letter gives notice of my decision.

Decision

I have coordinated searches of ASIC's records and have identified one document falling within the scope of your request. While there were no relevant documents dated 11 October 2018, I have identified a relevant document dated 10 October 2018 and have proceeded on the basis that this is the document you are seeking.

The following steps were taken to search for the relevant document:

- Searches were conducted by staff in the Chief Legal Office (CLO); and
- Searches were conducted electronically utilising ASIC's SharePoint database, and across ASIC's systems.

I have decided to refuse access in full to this document, on the grounds that the document is exempt in full under ss 47C, 47E(c), 47E(d) and 47F of the FOI Act.

Information considered:

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

In reaching my decision, I have considered the following:

- the FOI Act, in particular ss 47C, 47E(c), 47E(d) and 47F;
- 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;
- searches conducted by ASIC staff;
- the document within scope; and
- submissions received from Mr Shipton, as an affected third party consulted under s 27A of the FOI Act. Mr Shipton has objected to disclosure of the document. I have therefore had regard to Mr Shipton's submissions objecting to disclosure.

Reasons for decision

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 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

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

I consider that the document within scope contains deliberative matter for the purposes of s 47C. For the reasons below, I consider the document to be conditionally exempt in full under s 47C.

The document contains advice and opinion exchanged between the Chair of ASIC and internal ASIC staff in relation to the payment of fees for the provision of taxation services to the Chair

² FOI Guidelines [6.63]

³ FOI Guidelines [6.58] (footnotes omitted)

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

⁵ FOI Guidelines [6.61]

by KPMG. This advice involves the weighing up and evaluation of various considerations going to the coverage of the costs. This is clearly 'deliberative matter' within the meaning of s 47C of the FOI Act. These deliberations are directed to the provision of human resources advice to the Chair regarding relocation expenses, and therefore made in the course of ASIC's functions.

I note the Treasurer has asked the Treasury to undertake an independent review into the findings of the ANAO financial statements audit.⁶ The document within scope is likely to be relevant to the review currently conducted by Treasury. As such, the document is an important part of an ongoing deliberation.

I am satisfied that the disclosure of the advice and recommendations in the document would disclose deliberative matter for the purposes of an ongoing deliberative process, given it is to be considered by the independent review. The document is therefore conditionally exempt under s 47C.

Section 47E(c) of the FOI Act – management and assessment of personnel
Section 47E(d) of the FOI Act – certain operations of agencies

For the reasons below, I have also formed the view that the document is conditionally exempt under ss 47E(c) and 47E(d) of the FOI Act.

Sections 47E(c) and (d) of the FOI Act relevantly provide:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

...

- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

The FOI Guidelines relevantly explain:

There must, based on reasonable grounds, be at least a real, significant or material possibility of prejudice.⁷ The term 'substantial adverse effect' broadly means 'an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person'. The word 'substantial', taken in the context of substantial loss or damage, has been interpreted as 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal.'⁸

For the exemption in s 47E(c) to apply, the documents must relate to either:

- the management of personnel – including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety; or
- the assessment of personnel – including the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and under performance, counselling, feedback assessment for bonus or eligibility for progression.⁹

⁶ Treasurer, 'Australian Securities and Investments Commission' (Media Release, 23 October 2020) <<https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/australian-securities-and-investments-commission>>

⁷ FOI Guidelines [5.18]

⁸ FOI Guidelines [5.20]

⁹ FOI Guidelines [6.114]

As discussed above in relation to s 47C, the document comprises deliberations that are directed to the provision of human resources advice to the Chair regarding relocation expenses, and therefore made in the course of ASIC's human resources policies and activities regarding recruitment and onboarding of personnel.

The document is marked "Treat as In Confidence: Staff." Premature disclosure of confidential advice and deliberations that are not in the public domain could undermine confidence and inhibit candour in the recruitment process. I am satisfied that the information in the document was obtained in circumstances where there was an expectation of confidentiality and provided to a limited audience and for a specific purpose. For these reasons, I am satisfied that disclosure of the document could reasonably be expected to have a substantial adverse effect on ASIC's management of its personnel. I therefore find the document conditionally exempt under s 47E(c).

In relation to s 47E(d), I note the Treasurer has asked the Treasury to undertake an independent review into the findings of the ANAO financial statements audit. As noted above in relation to s 47C, the document is likely to be relevant to the review currently conducted by Treasury. As such, I consider that disclosure of the document, while the review is ongoing, would 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 findings, policy options and recommendations in relation to the review.

Consequently, I consider that disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of the review currently being conducted by Treasury. I therefore find the document conditionally exempt under s 47E(d).

Section 47F of the FOI Act – personal privacy

For the reasons below, I have also formed the view that the document is conditionally exempt under s 47F of the FOI Act.

Section 47F relevantly provides:

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.

The term, 'personal information', is defined in s 4 of the FOI Act to have the same meaning as in the *Privacy Act 1988* (Cth) (**Privacy Act**). Section 6 of the Privacy Act defines personal information 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 a material form or not.

The FOI Guidelines state that key factors for determining whether disclosure of a document would involve an unreasonable disclosure of personal information include:

- 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; and
- no public purpose would be achieved through release.¹⁰

As discussed in *'FG' and National Archives of Australia* [2015] AICmr 26, other relevant factors 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;
- 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.¹¹

I am satisfied that the document contains the personal financial information of Mr Shipton. It is generally accepted that financial information about an individual is more sensitive than other kinds of information and should be subject to a higher level of protection.¹²

Further, Australian Privacy Principle (APP) 6 to the Privacy Act provides that information collected by an APP entity for a primary purpose must not be disclosed for a secondary purpose unless the individual consents or a listed exception applies. Disclosure of Mr Shipton's personal financial information would be disclosure for a secondary purpose without his consent, as he has objected to disclosure.

As noted above in relation to s 47E(c), the document is marked "Treat as In Confidence: Staff." Plainly, the document contains personal information and was written with an understanding that it would not be made publicly available.

Having regard to the factors in s 47F(2), the Guidelines and *'FG' and National Archives of Australia* [2015] AICmr 26, I am satisfied that it would be unreasonable to disclose this personal information for the following reasons:

- the personal information is not well known or available from publicly accessible sources;
- the personal information was collected for the primary purpose of providing the Chair with relocation support and advice;
- disclosure of the information could reasonably be expected to cause detriment to the person to whom the information relates;
- Mr Shipton has objected to disclosure;

¹⁰ FOI Guidelines [6.142]

¹¹ FOI Guidelines [6.143]

¹² *'QP' and the Commonwealth Bank of Australia Limited (Privacy)* [2019] AICmr 48 [60]

- disclosure is unlikely to advance the public interest in government transparency and integrity; and
- the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.

On balance, I am satisfied that disclosure of Mr Shipton's personal information would be an unreasonable disclosure of personal information. The document is therefore conditionally exempt under s 47F 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 the document is conditionally exempt in full under ss 47C, 47E(c), 47E(d) and 47F of the FOI Act, 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,¹³ and increase recognition that information held by Government is to be managed for public purposes, and is a national resource.¹⁴ Another factor in favour of access is that disclosure would inform debate on a matter of public importance.¹⁵

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.¹⁶ I consider the relevant factors against disclosure are that disclosure could reasonably be expected to:

- impede the administration of justice generally,¹⁷ by prejudicing and/or prejudging the conduct of the review;
- prejudice the conduct of reviews by the Treasury;¹⁸
- prejudice the effectiveness of an agency's decision-making and deliberative processes,¹⁹ by harming the development of sound decision-making;
- prejudice the management function of an agency;²⁰
- prejudice the protection of an individual's right to privacy;²¹ and
- harm the interests of an individual.²²

The FOI Guidelines state that, while frankness and candour claims may still be contemplated when considering deliberative material and weighing the public interest, they should be approached cautiously.²³ Generally, the circumstances will be special and specific. That is, a

¹³ *Freedom of Information Act 1982* (Cth) (FOI Act) s 3(2)

¹⁴ FOI Act s 3(3)

¹⁵ FOI Act s 11B(3)(b)

¹⁶ FOI Guidelines [6.22]

¹⁷ FOI Guidelines [6.22(d)]

¹⁸ FOI Guidelines [6.22(l)]

¹⁹ See '*BJ*' and *Australian Taxation Office* [2014] AICmr 22 [24], *Parker and Australian Securities and Investments Commission* [2016] AATA 767 [56] and *Baker and Australian Securities and Investments Commission* [2019] AATA 4898 [30].

²⁰ FOI Guidelines [6.22(n)]

²¹ FOI Guidelines [6.22(a)]

²² FOI Guidelines [6.22(k)]

²³ FOI Guidelines [6.85]

confidentiality or candour claim carries no weight by itself but must be related to some particular practice, process, policy or program in government.²⁴

I am satisfied that frankness and candour is a relevant consideration in this case, in combination with my view that disclosure could reasonably be expected to prejudice the conduct of the current review, prejudice the management function of an agency, prejudice the protection of an individual's right to privacy and harm the interests of an individual. Disclosure could reasonably be expected to prejudice both the deliberative processes themselves and potentially also future deliberations.

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.

Your review rights

If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the decision.

Internal review

Under section 54 of the FOI Act, you may apply in writing to ASIC for an internal review of my decision by another ASIC officer. The internal review application must be made within 30 days of the date of this letter. This request should be addressed to the Senior Manager, Freedom of Information, by email to foirequest@asic.gov.au

Information Commissioner review

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

online:

https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10

email: foidr@oaic.gov.au

post: GPO Box 5218 Sydney NSW 2001

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

FOI Complaints

You may lodge a complaint with the Australian Information Commissioner in relation to the conduct of ASIC in the handling of this request. A complaint to the Information Commissioner must be made in writing. Complaints can be lodged in one of the following ways:

²⁴ FOI Guidelines [6.81]

online: https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1

email: foidr@oaic.gov.au

post: GPO Box 5218 Sydney 2001

More information about complaints is available on the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>.

If you are not sure whether to lodge an Information Commissioner review or an Information Commissioner complaint, the Office of the Australian Information Commissioner has more information at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>

Questions about this decision

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

Yours sincerely

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