



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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18 January 2021

Phillip Sweeney

By email only: foi+request-6903-695b6953@righttoknow.org.au

Dear Mr Sweeney

Freedom of Information Request No. FOI 238-2020

Notice of decision

I refer to your request received by us on 18 November 2020 under the *Freedom of Information Act 1982 (FOI Act)* in which you have sought information from the Australian Securities and Investments Commission (**ASIC**).

Your request seeks access to the following:

'The document I seek is the terms of engagement for Egon Zehnder for conducting a 'behavioural' review of ASIC's leadership team in late 2019.'

I am an authorised decision maker for the purposes of section 23(1) of the FOI Act and this letter contains notice of my decision in respect of your request.

Decision

I have identified one document that falls within the scope of your request. This document is a copy of the Commonwealth Contract – Strategic Consultancy executed between ASIC and Egon Zehnder International Pty Ltd on 21 August 2019.

I advise that I have decided to grant access to this document in part with some material exempted under sections 47 and 47F of the FOI Act.

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

- the content of the document that is the subject of your request;
- the FOI Act (specifically sections 22, 47 and 47F);
- the submissions from the parties consulted under section 27 of the FOI Act; and
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the **FOI Guidelines**).

Exemptions

Section 47 – Documents disclosing trade secrets or commercially valuable information

Section 47(1) of the FOI Act relevantly provides that:

(1) A document is an exempt document if its disclosure under this Act would disclose:

(a) trade secrets; or

(b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

The FOI Guidelines at 5.204 indicate that for material to be exempt under section 47(1)(b) of the FOI Act, a document must satisfy two criteria, that is:

- the document must contain information that has a commercial value either to an agency or to another person or body, and
- the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed

Egon Zehnder have submitted that the information exempted contains the organisation's solution design, details of their personnel and payment structures that '*contain inherently valuable insights and design decisions that are required in our profession*'. Egon Zehnder maintain that the release of this information would allow their competitors to have access to this information and thus damage their '*distinctive proposition and destroy commercial value*'.

I am satisfied that the information provided by Egon Zehnder as part of the executed contract represents material that describes the organisation's methodology and that this information is not widely known. Given the relatively recent engagement between ASIC and Egon Zehnder, I am also satisfied that these details are still current, and that disclosure would have a detrimental impact upon the inherent commercial value of Egon Zehnder's consultancy offering.

For these reasons I find that the information discloses information of a commercial value and is therefore exempt under section 47(1)(b) of the FOI Act.

Section 47F - Public interest conditional exemptions—personal privacy

Material in the identified document has been exempted under section 47F of the FOI Act which relevantly provides that:

'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).'

"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.'*

Section 47F(2) sets out factors that must be considered when determining if disclosure would be unreasonable. These factors are as follows:

1. the extent to which the information is well known;
2. 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;
3. the availability of the information from publicly accessible sources; and
4. any other matters that ASIC considers relevant.

The material that I have decided to exempt under section 47F includes the telephone numbers of the representative of Egon Zehnder and the signatures of the parties who executed the contract between ASIC and Egon Zehnder and the witnesses to the contract. The names of the signatories remain available within the document.

I am satisfied that it would be unreasonable to disclose this personal information for the following reasons:

- the information is not well known or available from publicly accessible sources; and
- the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.

I therefore find that the release of the identified material would be unreasonable for the purposes of s47F and the material is therefore conditionally exempt under s47F of the FOI Act.

Conditional exemptions are subject to the public interest test which is considered below.

Section 47G - Public interest conditional exemptions - business

Section 47G(1) provides that:

(1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:

- (a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business*

or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs;

I note that the FOI Guidelines at 6.190 suggest that the exemption under s 47G is more likely to protect documents obtained from third party businesses. The material exempted under s 47G was information provided to ASIC by Egon Zehnder in the course of executing a contract for services.

With respect to the third parties identified, I consider that the release of this information would be unreasonable on the basis that it would expose the business affairs of Egon Zehnder to potential scrutiny by its competitors and has the potential to undermine the organisations competitive offering. I am satisfied that the release of this material would unreasonably impact upon the affairs of Egon Zehnder.

For the above reasons I am satisfied that this material is conditionally exempt under section 47G(1)(a) of the FOI Act.

As conditionally exempt material is subject to a further public interest test, I will consider the public interest 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 s 11A of the FOI Act I have considered whether release of the conditionally exempt material in the Report would, on balance, be contrary to the public interest. In particular, I have had regard to the following factors outlined in s 11B(3) as being factors favouring access to the documents 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 the material exempted under s 47F. 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 identified material would support the objects of the FOI Act by making available information which is held by ASIC.

Against the above factors must be balanced the factors against disclosure. The FOI Act does not specify any factors against disclosure in the public interest however the FOI Guidelines at 6.22 include a non-exhaustive list factors which

may be relevant to these considerations. Of these factors I have identified two that are relevant to this decision; that is that disclosure:

- could reasonably be expected to prejudice the protection of an individual's right to privacy;
- could reasonably be expected to harm the interests of an individual or group of individuals

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.

Section 47F

Release of the material in full would promote the objects of the FOI Act by making information held by ASIC available to the public. Against this must be weighed a consideration of the public interest in protecting individuals from the unreasonable disclosure of their personal information.

In this instance, the release of this material would certainly have an adverse impact upon the personal privacy of the affected individuals without providing any broader public benefit. Accordingly, I am satisfied that the public interest weighs more heavily in favour of protecting the personal privacy of the affected individuals and that the material found to be conditionally exempt is exempt from release under section 47F of the FOI Act.

Section 47G

Release of the material exempted under section 47G in full would promote the objects of the FOI Act by making information held by ASIC available to the public, however, release also has the potential to unreasonably impact upon the business affairs of the individuals and organisations to whom the information relates.

The information is not otherwise publicly available and was originally provided to ASIC for the specific purpose of identifying the individuals tasked with working on the contract and the relevant allocation of time. I believe that the public interest in this instance is more heavily weighted toward upholding the confidentiality of information that relates to the private commercial dealings of third parties, as the release of this information does not further inform public debate but has the potential to disclose the internal operations of Egon Zehnder to its competitors.

I am therefore satisfied that the public interest favours the protection of the commercial interests of these individuals and entities. I therefore consider that this material is also exempt under section 47G of the FOI act.

Section 22 Access to edited copies

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

I consider that it is reasonably practicable to prepare an edited copy of the document with the exempt material deleted in this instance.

Review rights

I provide you with the following information as required by section 26 of the FOI Act.

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 an internal review of my decision under section 54B of the FOI Act. This review is an independent process conducted by a Senior Freedom of Information Officer at ASIC. 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

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 set out above.

Yours faithfully,



Justin Frank

Lawyer, FOI & Privacy

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