



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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Mr Philip Sweeney

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Our Reference: FOI 070-2021

1 July 2021

Dear Mr Sweeney

**Freedom of Information Request No. 070 - 2021
Notice of third-party consultation**

I refer to your request dated 2 May 2021 under the *Freedom of Information Act 1982 (FOI Act)* in which you seek access to documents in the possession of the Australian Securities and Investments Commission (**ASIC**).

Your request seeks access to the following documents:

"copies of any documents provided by John Hempton to ASIC as part of this "schooling" engagement"

I have taken your request to be for any documents provided by Mr Hempton to ASIC as notes, papers or presentations to assist him in the communication of his perspective on the detection of frauds.

Decision

I am the authorised decision-maker for the purposes of section 23 of the FOI Act in respect of your request.

I have identified the **two** documents that are captured by the terms of your request. These documents are PowerPoint documents provided to ASIC by Mr Hempton as part of the presentations he delivered.

I advise that I have decided to refuse access in full to these two documents under section 47G of the FOI Act.

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 and the circumstances under which they were provided to ASIC.
- the FOI Act (specifically section 47G).
- the submissions from the parties consulted under section 27 and 27A 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 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;

The documents I have identified are the PowerPoint documents used by guest trainer Mr Hempton as part of the presentations he gave to ASIC staff on two occasions in 2020. The documents are expressly marked as not for distribution outside of ASIC or Bronte Capital.

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 Mr Hempton in advance of the presentations he provided to ASIC staff members. The information contain details of the commercial affairs of Mr Hempton and Bronte Capital. The release of this material has the potential to adversely impact upon this business should it be made available to the public at large.

I have considered the submissions of the consulted third party and I am satisfied that the release of this material would unreasonably impact upon the affairs of Mr Hempton and Bronte Capital.

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 identified material in each of the documents. 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 conditionally exempt 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 of thirteen such factors. Of these factors one is relevant to this decision; that is that disclosure:

- could reasonably be expected to harm the interests of an individual or group of individuals (47G)

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.

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 facilitating two presentations by Mr Hempton at ASIC. 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, particularly in the circumstances where the material was provided to ASIC with an expectation of confidentiality.

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 exempt under section 47G of the FOI act.

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 my 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 sincerely



Justin Frank

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