



Australian Government

**Australian Sports
Anti-Doping Authority**

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15 October 2014

Mr Martin Hardie

By email only: foi+request-741-c093390d8@righttoknow.org.au

Dear Mr Hardie

Re: Freedom of Information Request

I refer to your email of 18 August 2014 in which you sought access under the *Freedom of Information Act 1982 (FOI Act)*, to:

"all documents including emails and file notes relating to communications to and from ASADA investigators (including John Nolan Sharon Kerrison, Matt Sheens and Aaron Walker) and journalists at the Age newspaper (including but not limited to Nick McKenzie and Richard Baker) between 1 February 2013 and 30 August 2013 (your Request)."

The FOI Act provides a statutory scheme for the release of documents held by the Commonwealth. I note that where no document is found to satisfy an FOI request, ASADA is not required under the FOI Act to create a new document to answer the request.

A Statement of Reasons for my decision is attached, together with a schedule of documents (**Attachment A**). The attached schedule outlines each document covered by your Request, and whether the document has been released or not. Where relevant, it also sets out the sections of the FOI Act under which an exemption has been claimed and any applicable public interest factors weighed up in considering whether it would be contrary to the public interest to release that document.

Should you wish to seek review of my decision in relation to the exempt nature of the documents relevant to your request, a copy of your review options is attached (**Attachment B**).

Yours sincerely

Trevor Burgess
National Manager Operations

STATEMENT OF DECISION

Name of Decision Maker: Trevor Burgess

Designation of Decision Maker: National Manager Operations

Date of Decision: 15 October 2014

Applicant: Martin Hardie

Decision: Seven (7) documents were found to be within the scope of the request.

I have determined to refuse access to seven (7) documents.

I rely on the exemptions outlined in sections 37(2), 45(1) and 47(1) of the FOI Act in making my decision.

Materials on which the findings are based:

- Your Freedom of Information (FOI) Request;
- The *Freedom of Information Act 1982 (FOI Act)*; and
- The Office of the Australian Information Commissioner's FOI Guidelines – Part 5 – Exemptions and Part 6 – Conditional Exemptions (which includes guidelines in relation to the public interest test).

Scope of the request

The Applicant, Mr Martin Hardie, made a valid FOI request to the Australian Sports Anti-Doping Authority (ASADA) which was received by ASADA on 18 August 2014. The Applicant sought:

"all documents including emails and file notes relating to communications to and from ASADA investigators (including John Nolan Sharon Kerrison, Matt Sheens and Aaron Walker) and journalists at the Age newspaper (including but not limited to Nick McKenzie and Richard Baker) between 1 February 2013 and 30 August 2013." (your Request)

Background information

ASADA conducted the following searches to locate the documents requested by the Applicant:

- searches of ASADA's electronic document management system;
- searches of ASADA's electronic emailing system using relevant email addresses and key dates;
- searches of ASADA's physical files which relate to documents covered by your Request; and
- consultation with key ASADA staff.

Through the above searches seven (7) documents were found to be in scope of your Request. The results have been carefully considered and the decision set out in this Statement has been made in accordance with the FOI Act.

REASONS FOR THE FINDINGS AND DECISIONS

I am authorised under section 23 of the FOI Act to make decisions to release documents and to refuse access to documents considered to be exempt under the FOI Act.

I have reviewed ASADA's records and identified seven (7) documents which fall within the scope of your Request.

I have determined to refuse access to all seven (7) documents.

Please refer to the 'Schedule to Attachment A' which lists each document that fell within the scope of your Request and on what grounds I have denied access.

Attachment A

I have relied on the exemptions outlined in 37(2), 45(1) and 47(1) of the FOI Act in making my decision. It should be noted that more than one exemption may apply to each document.

Information disclosing trade secrets or commercially valuable information (section 47(1))

I consider that seven (7) documents within the scope of your Request are exempt under section 47(1) as they would disclose information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed. In coming to my decision I have taken into consideration the submissions prepared by The Age dated 3 October 2014.

I consider that this information is of inherent commercial value to The Age, because:

1. the information contained in the documents was collected by The Age by its investigative journalists for the purpose of uncovering a significant story in relation to ASADA's investigation into drugs in sport and that this involved significant cost to The Age;
2. the information is known only to a select group and is not known by its competitors;
3. the information is still up-to-date and its value remains unchanged since the date of its disclosure; and
4. the information would confer on The Age a competitive advantage over other news providers who do not have this information and who would not be in a position to be the first to 'break the story'.

I also accept, given the nature of the Age's commercial activities and the nature of the information contained within the documents, that the commercial value of the information would be destroyed or significantly diminished if that information was disclosed to the Applicant.

Information obtained in confidence (section 45(1))

I consider that seven (7) documents within the scope of your Request are also exempt under section 45(1) of the FOI Act (information obtained in confidence). Section 45(1) provides that a document is an exempt document if its disclosure would found an action by a person (other than an agency or the Commonwealth) for breach of confidence.

I have considered the information and the circumstances of the disclosure of the information to ASADA by employees of the Age and I believe that the disclosure of the information would found an action for breach of confidence. I have made my determination on the basis that:

1. the information contained in the documents has the necessary quality of confidence (i.e. they are only known to a very limited class of persons) and have not subsequently been made publicly available;
2. the information was communicated to ASADA and received on the basis of a mutual understanding of confidence;
3. the information was disclosed or threatened to be disclosed, without authority; and
4. the disclosure of the information would cause detriment to the Age (including its employees) if it were to be disclosed. Specific detriment to The Age would include financial loss (i.e. loss of the commercial value of the information, waste of time and resources obtaining the information and a loss of trust and confidence with third party sources) if such information were to be disclosed by ASADA under FOI.

I also note that the documents are not documents which s47C(1) (deliberative processes) applies (or would apply, but for subsection 47C(2) or (3)).

Documents affecting enforcement of law and protection of public safety (section 37(2)(a))

I consider that five (5) documents within the scope of your Request are also exempt under subsection 37(2)(a) of the FOI Act. A document is exempt under this provision if its disclosure would or could reasonably be expected to prejudice the fair trial of a person or the impartial adjudication of a particular case.

Attachment A

The documents contain information about individuals under investigation, who depending on the outcome of the investigation, may be served with an infraction notice alleging an anti-doping rule violation or violations. Individuals served with an infraction notice are entitled to a fair and impartial hearing under Article 8 of the World Anti-Doping Code, as replicated in the relevant anti-doping policy provisions.

If the documents which necessarily provide an incomplete snapshot of the investigation, are disclosed publicly now I am concerned that an individual served with an infraction notice will argue before the relevant sporting tribunal that their ability to obtain a fair and impartial hearing has been prejudiced. The investigation and related matters have received extensive media coverage. The disclosure of the contents of the documents before any hearing would generate a great deal of further media attention and risks interfering with the fairness of any subsequent hearing.

Other grounds for exemption

It is not necessary to consider other exemptions. Nevertheless, I am of the view that it is probable that the relevant documents are exempt from release on other grounds, including:

- disclosure of information that would or could reasonably be expected to affect a person or organisation adversely in respect of their business affairs (conditional exemption section 47G);
- disclosure that could affect the certain operations of agencies (conditional exemption s 47E); and
- disclosure of the documents would amount to an unreasonable disclosure of personal information (conditional exemption s 47F).

Relevant legislation

As outlined above, I rely on sections 37(2), 45(1) and 47(1) of the FOI Act in my decision. These sections of the FOI Act are outlined below for your convenience.

Section 37(2) of the FOI Act – Documents affecting enforcement of law and protection of public safety

...

(2) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

- (a) prejudice the fair trial of a person or the impartial adjudication of a particular case;*

...

Section 47(1) Documents disclosing trade secrets or commercially valuable information

(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.

(2) Subsection (1) does not have effect in relation to a request by a person for access to a document:

- (a) by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or

Attachment A

- (b) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or
 - (c) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.
- (3) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Commonwealth, Norfolk Island or a State or by a local government authority.

Section 45(1) of the FOI Act - Documents containing material obtained in confidence

- (1) 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.
- (2) Subsection (1) does not apply to a document to which subsection 47C(1) (deliberative processes) applies (or would apply, but for subsection 47C(2) or (3)), that is prepared by a Minister, a member of the staff of a Minister, or an officer or employee of an agency, in the course of his or her duties, or by a prescribed authority or Norfolk Island authority in the performance of its functions, for purposes relating to the affairs of an agency or a Department of State unless the disclosure of the document would constitute a breach of confidence owed to a person or body other than:
- (a) a person in the capacity of Minister, member of the staff of a Minister or officer of an agency; or
 - (b) an agency, the Commonwealth or Norfolk Island.

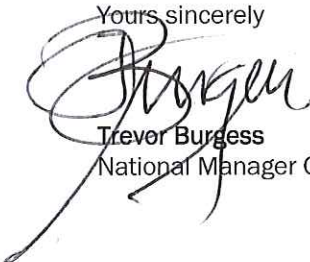
Charges

I have determined that there will be no charge for the processing of your Request.

Conclusion

I consider that seven (7) documents are within the scope of your request. I refuse access to those documents. I rely on the exemptions outlined in sections 37(2), 45(1) and 47(1) of the FOI Act.

Yours sincerely



Trevor Burgess
National Manager Operations

REVIEW OPTIONS UNDER THE FREEDOM OF INFORMATION ACT 1982

The *Freedom of Information Act 1982* (FOI Act) provides a right of access to government information and also ensures an appeal mechanism is available against a decision to deny access to documents. The appeal procedure has four elements:

- Optional internal review within the Australian Sports Anti-Doping Authority,
- External review at the Office of the Australian Information Commissioner (OAIC),
- External review at the Administrative Appeals Tribunal (AAT), and
- Commonwealth Ombudsman.

It is also possible to have a decision reviewed through court action, either directly via the *Administrative Decisions (Judicial Review) Act 1977* or on appeal following an AAT hearing.

Internal review

An optional internal review can be undertaken before external review and other forms of appeal. Internal review is a re-examination of the request and original decision making process.

Application for a review of the decision must be made in writing and within 30 days of receipt of the decision letter. No fees and charges are payable for internal review of a decision.

There is no set form for making an internal review application, but it would be helpful if you could outline the grounds on which you consider that the decision should be reviewed. A request for internal review must concern:

- the outcome of the request (e.g. refusal, deferral or part compliance),
- a decision concerning the amendment or annotation of personal records,
- the liability to pay charges before receiving the requested information, or
- a decision whether or not to remit all or part of an application fee.

OAIC

You can apply for review of an FOI decision by the OAIC either before or after internal review by the Australian Sports Anti-Doping Authority. OAIC review also involves re-examination of the decision. A written application form must be lodged:

- if the decision was to refuse access – within 60 days of the date of this letter.
- if the decision was to grant access – within 30 days of the date of this letter.

More information about making an application for review by the OAIC is available at www.oaic.gov.au/freedom-of-information/foi-reviews.

AAT

If you are dissatisfied with the review decision made by the OAIC, then you may apply to the AAT for review of the decision.

Further information about making an application to the AAT is available on the AAT website at <http://www.aat.gov.au/>.

Ombudsman

Applicants who wish to make a complaint to the Ombudsman will find information on the Ombudsman's website at <http://www.ombudsman.gov.au/>.

Contacting ASADA

Applicants can contact the FOI Contact Officer for assistance with the review process, if required, on (02) 6222 4259 or legal@asada.gov.au.

SCHEDULE TO ATTACHMENT A – MARTIN HARDIE FOI REQUEST – THE AGE

| # | Date | Description | Release | Exemption | Public interest factors |
|----|-------------|--|---------|---------------------|-------------------------|
| 1. | 13 Mar 2013 | Email from Nick McKenzie (NM) to John Nolan (JN) | N | 37(1), 45(1), 47(1) | N/A |
| 2. | 25 Apr 2013 | Email from NM to JN | N | 45(1), 47(1) | N/A |
| 3. | 29 Apr 2013 | Email from JN to NM | N | 45(1), 47(1) | N/A |
| 4. | 9 Jul 2013 | Email from Richard Baker (RB) to JN | N | 37(1), 45(1), 47(1) | N/A |
| 5. | 9 Jul 2013 | Email from RB to JN | N | 37(1), 45(1), 47(1) | N/A |
| 6. | 9 Jul 2013 | Email from RB to JN | N | 37(1), 45(1), 47(1) | N/A |
| 7. | 10 Jul 2013 | Email from RB to JN | N | 37(1), 45(1), 47(1) | N/A |