



Australian Government

Australian Sports
Anti-Doping Authority

24 November 2014

5 Tennant Street Fyshwick ACT 2609, PO Box 1744 Fyshwick ACT 2609
T 13 000 ASADA (13 000 27232) F +61 (0) 2 6222 4201 E asada@asada.gov.au
www.asada.gov.au ABN 91 592 527 503

Mr Martin Hardie

By email only: foi+request-618-a369348f@righttoknow.org.au

Dear Mr Hardie

Re: Internal review

The purpose of this letter is to advise you of my decision in relation to your request for internal review of ASADA's decision of 15 October 2014 to refuse access to documents you requested under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

Summary

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).

You were advised on 15 October 2014 of the decision to refuse access to seven (7) documents identified as being within scope of your Request (**Decision**). The decision maker relied upon sections 37(2), 45(1) and 47(1) of the **FOI Act** in making his decision.

On 24 October 2014, via email, you requested an internal review of the Decision. In that email you stated:

"I believe the list of documents you have provided me is incomplete as it does not contain any internal documents such as file notes or memos relating generated within ASADA which relate to the communications by Mr Nolan with the Age.

Furthermore, the reliance on section 47(1) appears as no more than a screen intended to prevent scrutiny of whether or not Mr Nolan provided NAD Scheme personal information to the journalists."

Decision and reasons for decision

I am an officer authorised under section 23(1) of the **FOI Act** to make decisions in relation to **FOI** requests. I completed the internal review on 14 November 2014. I was not involved in or consulted in the making of the decision under review.

I deal with each of your contentions below.

Contention 1: 'Inadequacy of Searches'

Taking into account your clarification of the scope of your request ASADA conducted the following additional searches to locate the documents requested by you:

- searches of ASADA's document management system (TRIM) using relevant keyword searches;

- searches of documents on Ringtail using relevant search terms; and
- consultation with key ASADA staff.

The above searches revealed a further twenty-two (22) documents which I consider are within the scope of your Request. My decision in relation to those documents is outlined below.

Contention 2: 'Reliance on section 47(1) of the FOI Act is a screen'

I have conducted my review of the Decision (including a review of the documents themselves) and I consider that your contention that ASADA's reliance on this exemption was "*a screen to prevent scrutiny of whether or not Mr Nolan provided NAD Scheme personal information to the journalists*" is misplaced. I find that the decision maker's reliance on the exemption contained in section 47(1) of the FOI Act was reasonable and appropriate in the circumstances.

I note that the Decision clearly provides that the relevant documents were exempt on the basis that they contain material that was "collected by The Age by its investigative journalists" and provided to ASADA. I also note that the documents were also found to be exempt on the basis that they contained material that was obtained in confidence (section 45(1)). That exemption only applies to confidential information of third parties and not the Commonwealth. Further, this exemption was applied on the basis that the material was obtained by ASADA, in confidence, from the Age and this is outlined in the Decision.

I also note that it was determined (and I accept) that all seven (7) documents were also exempt or potentially exempt under other sections of the FOI Act. As such, even if I accept your contention that section 47(1) was inappropriately applied in this matter (a finding which I have not made), all seven (7) documents would nevertheless be exempt under section 45(1) and five (5) documents would be exempt under 37(2)(a).

Taking into account the above and my review of the material, I agree with and adopt the reasons of the original decision maker in relation to the seven (7) documents which were originally identified as within scope of your Request. Accordingly, I refuse access to those documents pursuant to sections 37(2), 45(1) and 47(1) of the FOI Act.

Additional Documents found to be within scope of your Request

As outlined above, I have determined that a further twenty-two (22) documents are within scope of your Request. I have determined to refuse access to nineteen (19) documents and grant partial access to three (3) documents pursuant to sections 37(2), 47E and 47F of the FOI Act. My reasons are outlined below.

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

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

I consider that eighteen (18) documents within the scope of your Request are 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.

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, were to be disclosed publicly now, I would be concerned that an individual served with an infraction notice would argue before the relevant sporting tribunal that their ability to obtain a fair and impartial hearing had 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 this would create a risk of interference with the fairness of any subsequent hearing.

Certain operations of agencies (section 47E(d))

I consider that six (6) of the documents within the scope of your Request are exempt under section 47E of the FOI Act. Specifically, subsection 47E(d) conditionally exempts documents where disclosure would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

In order to perform its functions and responsibilities under its enabling legislation and under the World Anti-Doping Code it is imperative that ASADA work collaboratively with sporting administration bodies. That collaboration necessarily involves a flow of confidential information, personal information and intelligence in relation to possible anti-doping rule violations.

It is my view that disclosure of the documents under the FOI Act would reasonably be expected to hinder openness and frankness between the parties in future matters if such parties are fearful that their confidential communications might be released to the public. As such, I consider that ASADA's ability to fulfil its legislative investigative functions would be substantially adversely affected. Specifically, I consider that the disclosure of such information under FOI would hinder ASADA's ability to obtain such evidence and information from relevant stakeholders in the future and could lead to increased costs and inefficiencies in the conduct of investigations (where such assistance or collaboration is not provided).

Personal Privacy (section 47F)

I consider that nineteen (19) of the documents within the scope of your Request are exempt under section 47F of the FOI Act. Section 47F conditionally exempts a document to the extent that its disclosure would involve the unreasonable disclosure of personal information about any person.

The documents contain personal information about a number of people, including individuals under investigation. In my view, it would be unreasonable to disclose the personal information about those individuals contained in the documents and therefore those documents are conditionally exempt from release. The relevant documents include not only information about individuals under investigation, but also information about those who may have provided ASADA with information in connection with the investigation.

In deciding whether disclosure of personal information would be unreasonable, I have considered the matters set out in section 47F(2) of the FOI Act. In particular, the information about individuals contained in the documents is not well known or publicly available. I have also taken into account the circumstances in which the information was obtained, and the reasonable expectation of confidentiality that individuals under investigation and those who have provided information have, considering the requirements for ASADA to conduct investigations in a way that protects the privacy and rights of any affected individuals.

In my view, disclosure would cause a significant harm by prejudicing the current investigation and would prejudice ASADA's ability to undertake such investigations in the future. It is also reasonable, particularly given the secrecy provisions in the ASADA Act, for athletes and others involved in an ASADA investigation to expect that ASADA will keep their information confidential, at least until an anti-doping matter relating to them has been dealt with and all appeal periods have passed.

Public Interest test (sections 47E, 47F)

In making my decision in relation to the conditional exemptions under sections 47E and 47F of the FOI Act, I consider that in the circumstances, providing access to the relevant documents listed in 'Schedule A' would, on balance, be contrary to the public interest.

I consider that the following factors are in favour of the release of those documents:

1.	It promotes the objects of the FOI Act
2.	It may inform debate on the issues surrounding the ASADA investigation
3.	It promotes effective oversight of public expenditure
4.	It promotes education of the public regarding ASADA's investigation and prohibited substances

Factors 1 to 4 above are weighed against those factors which indicate it is against the public interest to fully release the documents.

Section 47E– Certain operations of Agencies

In relation to the exemption outlined in subsection 47E(d) of the FOI Act, the factors indicating it is against the public interest to release the documents are:

5.	The content of the documents are not well known and there is a reasonable expectation of confidentiality in relation to communications between ASADA and sporting bodies in relation to investigations of anti-doping rule violations
6.	Disclosure would hinder openness and frankness between the parties in future matters should each party be fearful that their comments might be released to the public
7.	The role of ASADA in managing relationships with external stakeholders is paramount to ASADA's functions and may be hindered by disclosing confidential information provided to ASADA
8.	It is not in the public's interest that ASADA disclose information which is relevant to anticipated litigation and which could prejudice those matters so to provide transparency under the FOI Act
9.	ASADA's ability to fulfil its investigative functions could be undermined if documents outlining ASADA's investigation into drugs in sport are released to the public before the outcome of the investigation or the matters proceeding to anti-doping tribunals
10.	The content of these documents are the subject of litigation and early disclosure may hinder the ability of ASADA (or third parties) to defend themselves
11.	Disclosure of the personal information contained in the documents may be in breach of the <i>Privacy Act 1988</i> (Cth)
12.	Disclosure of the personal information contained in the documents may be in breach of the ASADA Act and Regulations

Section 47F – Personal Privacy

In relation to the exemption outlined in section 47F of the FOI Act (personal privacy), the factors indicating it is against the public interest to release the documents are:

13.	The content of the documents are not well known or available from publicly accessible sources
14.	Disclosure of the personal information contained in the document would not shed any light on the proper functioning of government and would only serve to satisfy mere curiosity about the individual whose details are being disclosed
15.	Disclosure of the personal information could reasonably be expected to impede the flow of information to ASADA from members of the public, and prejudice ASADA's ability to obtain similar information in the future
16.	Disclosure of the personal information would unreasonably affect a person's right to privacy
17.	Disclosure of the personal information could reasonably be expected to prejudice the conduct of ASADA's investigation and its management functions
18.	Disclosure of the personal information may be in breach of the <i>Privacy Act 1988</i> (Cth)
19.	Disclosure of the personal information may be in breach of the ASADA Act and Regulations

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 would or could reasonably be expected to affect a person or organisation adversely in respect of their business affairs (conditional exemption section 47G); or
- disclosure of trade secrets or commercially valuable information (section 47(1)); or
- disclosure of material obtained in confidence (section 45(1)).

Material taken into account

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

- the searches conducted by ASADA staff (including further searches for additional materials);

- the content of the documents that fell within the scope of your Request;
- your email dated 24 October 2014;
- the FOI Act (specifically sections 37(2), 45(1), 47G, 47E, 47F and 47(1) and Part VI); and
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act.

Your review rights

If you are dissatisfied with my decision, you may apply to the Australian Information Commissioner for review. 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/aba/oaic/foi-review/>
email: enquiries@oaic.gov.au
post: GPO Box 2999, Canberra ACT 2601
in person: Level 3, 175 Pitt Street, Sydney NSW

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to www.oaic.gov.au/freedom-of-information/foi-reviews.

Questions about this decision

If you wish to discuss this decision, please contact the following officer:

Stephen White
Senior Lawyer
(02) 6222 4259
Stephen.White@asada.gov.au

Yours sincerely



Ben McDevitt AM APM
Chief Executive Officer

SCHEDULE A – MARTIN HARDIE INTERNAL REVIEW OF FOI DECISION – THE AGE

#	Date	Description	Release	Exemption	Public interest factors
8.	13 Feb 2013	Email from Mike O'Leary (MO) to Paul Simonsson (PS) and Tony Baccari (TB)	N	37(1), 47F	13 - 19
9.	13 Feb 2013	Email from PS to Rohan Lindeman (RL)	N	37(1), 47F	13 - 19
10.	15 Feb 2013	File Note of PS	Y (partial)	23	N/A
11.	18 Feb 2013	File Note of PS	N	37(1), 47F	13 - 19
12.	15 Feb 2013	Briefing Note of RL	N	37(1), 47F	13 - 19
13.	14 Mar 2013	Email from John Nolan (JN) to Elen Perdikiogiannis (EP), Michelle Heins (MH), PS, Mark Nichols (MN), MO, Sharon Kerrison (SK), Aaron Walker (AW) and Karen Smith (KS)	N	37(1), 47F	13 - 19
14.	4 Apr 2013	Email from JN to Brett Clothier (BC)	N	37(1), 47F	N/A
15.	4 Apr 2013	Email from KS to PS, JN, John Macnamara (JM), Trevor Burgess (TB), MN, Kane Morse (KM) and Douglas Stubbs (DS)	N	37(1), 47F	13 - 19
16.	4 Apr 2013	Email from TB to RL	N	37(1), 47F	13 - 19
17.	10 Apr 2013	Email from Helen Thorne (HT) to TB, MH and Tony Baccari (TB)	Y (partial)	23	N/A
18.	14 Apr 2013	Email from JN to PS and BC	N	37(1), 47E, 47F	5 - 8, 11 - 12, 13 - 19
19.	25 Apr 2013	Email from JN to BC	N	23, 47E, 47F	5 - 8, 11 - 12, 13 - 19
20.	29 Apr 2013	Email from JN to AW and SK	N	37(1), 47F	13 - 19
21.	26 Jun 2013	Email from JN to EP, Darren Mullaly (DM) and PS	N	37(1), 47F	13 - 19
22.	27 Jun 2013	Email from PS to JN	N	37(1), 47F	13 - 19
23.	4 Jul 2013	Email from JN to EP, DM and PS	N	37(1), 47F	13 - 19
24.	8 Jul 2013	Email from PS to TB	N	37(1), 47F	13 - 19
25.	10 Jul 2013	Email from JN to BC	N	37(1), 47E, 47F	5 - 12, 13 - 19
26.	18 Jul 2013	Email from JN to AW and SK	N	47E, 47F	5 - 8, 11 - 12, 13 - 19
27.	14 Aug 2013	Email from JN to SK, AW, MN, Matt Sheens (MS), BC, Abraham Haddad (AH) and Chris Whittock (CW).	Y (partial)	37(1), 47E, 47F	5 - 12, 13 - 19
28.	9 Sep 2013	Email from JN to BC	N	37(1), 47E, 47F	5 - 12, 13 - 19
29.	7 Nov 2013	Email from JN to PS	N	37(1), 47F	13 - 19