



Australian Government

Australian Sports  
Anti-Doping Authority

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](mailto:asada@asada.gov.au)  
[www.asada.gov.au](http://www.asada.gov.au) ABN 91 592 527 503

20 October 2014

Mr Martin Hardie

By email only: [foi+request-742-45dfe76@righttoknow.org.au](mailto:foi+request-742-45dfe76@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, file notes and phone records (including personal mobile phones used by the investigators) relating to communications to and from ASADA investigators (including but not limited to John Nolan, Sharon Kerrison, Matt Sheens and Aaron Walker) and journalists at The Daily Telegraph newspaper (including but not limited to Josh Massoud, James Hooper and Rebecca Wilson) between 1 February 2013 and the present time." (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: 20 October 2014

Applicant: Martin Hardie

Decision: Four (4) documents were found to be within the scope of the request.

I have determined to refuse access to one (1) and grant partial access to three (3) documents.

I rely on the exemptions outlined in sections 37(2) and 47F 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, file notes and phone records (including personal mobile phones used by the investigators) relating to communications to and from ASADA investigators (including but not limited to John Nolan, Sharon Kerrison, Matt Sheens and Aaron Walker) and journalists at The Daily Telegraph newspaper (including but not limited to Josh Massoud, James Hooper and Rebecca Wilson) between 1 February 2013 and the present time." (your Request)*

On 15 September 2014, ASADA issued the Applicant with a charge notice under s 29 of the FOI Act. On the 15 September 2014 the Applicant lodged a contention that the charge should reduce or not imposed. Accordingly, ASADA had until 16 October 2014 to provide its decision in relation to this contention. ASADA did not provide the applicant with a decision within the timeframe stipulated in the FOI Act. Accordingly, ASADA is taken to have made a decision that the amount of charge payable is the amount notified to the Applicant in its preliminary assessment of the amount of the charge. However, ASADA has subsequently determined that a charge will not be payable in this matter (see below). In light of the above, the due date for ASADA to provide its decision in this matter is Monday, 20 October 2014.

### 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.

## 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.



## **Attachment A**

I have reviewed ASADA's records and identified four (4) documents which fall within the scope of your Request.

I have determined to refuse access to one (1) and grant partial access to three (3) 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.

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

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

I consider that two (2) 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, 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.

### **Personal Privacy (section 47F)**

I consider that four (4) of the documents within the scope of your Request are exempt under section 47F of the FOI Act (Personal Privacy). 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 individuals contained in the documents and therefore it is conditionally exempt from release. This includes 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.

## Attachment A

### Public Interest test (section 47F)

In making my decision in relation to the conditional exemptions under 47F of the FOI Act, I consider that in the circumstances, providing full access to the relevant documents listed in the 'Schedule to Attachment 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 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 fully release the documents are:

5.	The content of the documents are not well known or available from publicly accessible sources
6.	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
7.	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
8.	Disclosure of the personal information would unreasonably affect a person's right to privacy
9.	Disclosure of the personal information could reasonably be expected to prejudice the conduct of ASADA's investigation and its management functions
10.	Disclosure of the personal information may be in breach of the <i>Privacy Act 1988</i> (Cth)
11.	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 also 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);
- Documents containing material obtained in confidence (s45(1)); and
- disclosure that could affect the certain operations of agencies (conditional exemption s 47E).

### Relevant legislation

As outlined above, I rely on sections 37(2) and 47F 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:

## Attachment A

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

...

### Section 47F FOI Act - Public interest conditional exemptions—personal privacy

...

- (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.

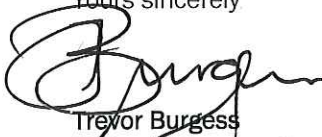
### Charges

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

### Conclusion

I consider that four (4) documents are within the scope of your Request. I refuse access to one (1) of those documents and grant partial access to three (3) documents. I rely on the exemptions outlined in sections 37(2) and 47F of the FOI Act.

Yours sincerely



Trevor Burgess  
National Manager Operations



**SCHEDULE TO ATTACHMENT A – MARTIN HARDIE FOI REQUEST – THE DAILY TELEGRAPH**

#	Date	Description	Release	Exemption	Public interest factors
1.	26 Jun 2014	Email from Paul Simonsson (PS) to Nick McKenzie (NM)	N	37, 47F	5 – 11
2.	23 Jul 2014	ASADA Telstra Mobile Phone Bill (124 pages in total (pp. 2 – 24 and pp. 26 – 124 completely redacted) Note: document starts at page 2.	Y (partial)	23, 47F	5, 6, 7, 8, 10 and 11
3.	6 Aug 2013	File note of conversation between PS and NM	Y (partial)	23, 37, 47F	5 – 11
4.	23 Aug 2014	ASADA Telstra Mobile Phone Bill (164 pages in total (pp. 2 – 30 and pp. 32 – 164 completely redacted). Note: document starts at page 2.	Y (partial)	23, 47F	5, 6, 7, 8, 10 and 11

## Attachment B

### 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](http://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](mailto:legal@asada.gov.au).



2

**Certifying Official**

Goods/Services Received by

Name: Troy Micallef

Signature: [Signature]

20/08/14

**YOUR BILL**

Account number

Bill number

AUSTRALIAN SPORTS ANTI-DOPING  
AUTHORITY  
P.O. BOX 345  
CURTIN ACT 2605

Delegation Approval (not required if PO in place)

Name: .....

Signature: .....

Title: .....

Date: ...../...../.....

Reg 9 Approval given prior to commitment: Y/N

Reg 9 Paper work held: Y/N

Reg 10 Approval given if applicable: Y/N

Pay immediately

Pay by 07 Aug '14

Total

**Account Activity**

Previous balance

We received

Overdue pay immediately

New charges pay by 07 Aug '14

Usage charges to 15 Jul '14

Services and equipment rental to 15 Aug '14

Other charges and credits for this bill

Group plan balance

**Total**

GST included in new charges

ENTERED  
28 AUG 2014  
BY: .....

E-10117

Please return this section with your payment



Total

AUSTRALIAN SPORTS ANTI-DOPING  
AUTHORITY  
P.O. BOX 345  
CURTIN ACT 2605

Account number

Bill number

Turn over for how to pay





Item **MobileNet National Direct Dialed Calls - Itemised** *continued***MobileNet National Direct Dialed calls** *continued*

Date	Time	Origin	Number	Rate	Min:Sec	Incl GST \$
MobileNe		MR. PAUL SIMONSON	<i>continued</i>			



5764	23 Jun	12:26 pm	Fyshwick	0401877402MNET	0:05	0.01
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Tuesday 6/8/13

(Message) conversation  
 at 6:42pm - told him - "recording the  
 conversation absolute retort the allegation  
 from William - if you put it I will  
 consider it highly defamatory." text  
 message sent back from Josh Maxwell  
 "In the meantime, do you have any comment  
 to make? In direct response to the claim  
 of Mr. Williams involving you for money  
 about a property deal? my reply "As  
 previously advised the allegation is absolutely  
 false & if it were to be printed  
 I would consider it highly defamatory.  
 "He has a right to make the claim and  
 to or the result. I will print your  
 response". Discussion held with Aurora,  
 Bill, Darren etc about the potential  
 defamatory comments - advised.

Telstra Corporation Limited  
ABN 33 051 775 556

Tax Invoice - issued 23 Aug '13

IT'S HOW  
WE CONNECT



Bill enquiries

1800 032072

Turn over for other enquiries

4

Mobiles

YOUR BILL

Account number

Bill number



AUSTRALIAN SPORTS ANTI-DOPING  
AUTHORITY  
P.O. BOX 345  
CURTIN ACT 2605

Pay immediately

Pay by 09 Sep '13

Total

### Account Activity

Previous balance

We received

Overdue pay immediately

New charges pay by 09 Sep '13

Usage charges to 15 Aug '13

Services and equipment rental to 15 Sep '13

Other charges and credits for this bill

Group plan balance

Total

GST included in new charges

#### Certifying Official

Goods/Services Received by:

Name: Troy Micallef

Signature:

Completed / Partial

Date: 29/08/13

Cost Cent. A/c Code:

Purchase Order No:

Delegate Approval (not required if PO in place)

Account number

Name:

Bill number

Signature:

Title:

Date:

Reg 9 Approval given prior to commitment: Y / N

Reg 9 Paper work held:

Reg 10 Approval given if applicable

ENTERED

E-30023



Total

AUSTRALIAN SPORTS ANTI-DOPING  
AUTHORITY  
P.O. BOX 345  
CURTIN ACT 2605

Turn over for how to pay





Item **MobileNet National Direct Dialed Calls - Itemised** *continued***MobileNet National Direct Dialed calls** *continued*

	Date	Time	Origin	Number	Rate	Min:Sec	Incl GST \$
	MobileNe'			MR. PAUL SIMONSON	<i>continued</i>		
7806	05 Aug	06:41 pm	Cremorne	0423347582		0:39	0.08