

Our Reference: 7593/15



ASIC

Australian Securities & Investments Commission

17 March 2015

Mr Culley Palmer

By email: foi+request-864-3bb5118a@righttoknow.org.au

Level 5, 100 Market Street,
Sydney NSW 2000
GPO Box 9827, Sydney NSW 2001
DX 653 Sydney

Telephone: +61 2 9911 2000
Facsimile: +61 2 9911 2414
www.asic.gov.au

Dear Mr Palmer

Request for Internal Review under the *Freedom of Information Act 1982*

I refer to your email of 15 February 2015 in which you requested that ASIC conduct an internal review (**Review Request**) under section 54B of the *Freedom of Information Act 1982* (FOI Act) in respect of our decision of 11 February 2015 (**Original Decision**).

In our Original Decision we refused access to certain documents requested by you in relation to Metgasco Ltd (ASX:MEL) (**Metgasco**), and decided to neither confirm nor deny the existence of documents which may, among other things, disclose the existence, non-existence or identity of a confidential source of information.

Particular Issues Raised on Review

In your Review Request, you have raised the following particular issues:

- 1) The public interest in ASIC avoiding an adverse effect on a company's market performance if information was released, does not outweigh the public interest in public knowledge of a company's conduct
- 2) ASIC withholding information artificially protects the market performance of companies
- 3) ASIC not releasing information on the basis that it would provide an incomplete picture is illogical, as the converse is true – that the public now only has an incomplete picture.
- 4) Whether ASIC's intelligence gathering "sources and methods" are explicitly exempt from release under the FOI Act.

These issues are addressed below in my Review Decision.

Decision on Review - Searches

Scope

In the Original Decision your request was interpreted to be about the New South Wales Government's suspension of Metgasco's activity approval under PEL 16. This was notified to you in correspondence dated 19 January 2015. The Original Decision-maker therefore searched for documents created after 14 May 2014.

I note that the scope adopted by the Original Decision-maker was not raised as an issue in your Review Request. However, in order to consider the other issues you have raised above, I have searched more widely across information held by ASIC which mentions or concerns Metgasco's activities in PEL 16.

Documents Identified

I have identified five documents that come within the terms of your request. These documents are internal ASIC documents and are listed in **Schedule A**.

Documents which may be in our Possession

I confirm the view in our Original Decision about "Non-identified documents" which may be in ASIC's possession within the scope of your request.

As set out in our Original Decision, subsection 37(1) of the FOI Act provides an exemption from release of documents if that release would or could reasonably be expected to prejudice the enforcement or proper administration of the law; or disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information.

In my decision, the release of any reports of misconduct which may fall within the scope of your request could prejudice the full and frank submission of such reports to ASIC in the future, and consequently prejudice the enforcement or proper administration of the law. We rely on these reports as an important source of intelligence and we conduct a detailed assessment of each such report to determine what action, if any, might be appropriate. We also rely on our sources being able to raise these issues with us without being under the pressure of possible disclosure of their actions. The release of the information provided to us may expose our sources to actions or response by third parties who may be affected by that information.

The release of documents disclosing confidential sources of information would also breach our undertaking of confidentiality to any persons providing reports of misconduct. This undertaking of confidentiality is imposed by the *Australian Securities and Investments Commission Act 2001*, and supported by ASIC's policies which prevent us from disclosing at all times that we have received reports of misconduct, unless by lawful compulsion.

Again as set out in our Original Decision, section 25 of the FOI Act provides that ASIC may give notice that we neither confirm nor deny the existence of a document if information as to its existence would, if included a document, make the document exempt under section 37(1).

I confirm our Original Decision to invoke these provisions in respect of reports of misconduct, and consequently neither confirm nor deny that we have such documents in our possession.

Publicly Available Documents

As in our Original Decision, searches of ASIC's databases revealed a number of documents that potentially fall with the scope of your request. These documents can be purchased from ASIC's website (www.connectonline.asic.gov.au). Documents which

the public can purchase from an agency are not subject to the FOI Act. These documents are also available from Metgasco and/or the ASX website (www.asx.com.au).

Decision on Review – Access Decision

Documents 1, 2, 4 and 5 – Internal Reports

I have decided that Documents 1, 2, 4 and 5 in Schedule A are conditionally exempt from release under the FOI Act under subsection 47C(1) of the FOI Act.

Subsection 47C(1) provides that a document is conditionally exempt if its disclosure would disclose “deliberative matter” relating to recommendations prepared or recorded in the course of deliberative processes involved in the functions of an agency. Where subsection 47C(1) applies, ASIC must release the documents unless the public interest favours non-disclosure.

Documents 1, 2, 4 and 5 contain substantial amounts of information held internally to ASIC, or obtained by ASIC, and were prepared in the course of performing ASIC’s objectives as set out in section 1(2) of the *Australian Securities and Investments Commission Act 2001*. In particular, these Documents were prepared as part of ASIC’s deliberative processes, and exercise of judgement on an appropriate course of action in order to enforce and give effect to the laws which confer our functions and powers.

After consideration of the factors in favour of and against whether disclosure is in the public interest, I have decided not to release them.

Public Interest Factors in Favour of Disclosure

Factors favouring access to documents are set out in section 11B(3) of the FOI Act , and I have considered them below.

(a) Access to the Documents would promote the objects of the FOI Act

I have considered the general objects set out in section 3 of the FOI Act.

(b) Access to the Documents would inform debate on a matter of public importance

As you are aware, as the markets regulator, ASIC performs its functions in relation to listed companies by monitoring market conduct to ensure the public and the market is informed in a fair and open way of information about a company’s activities. In performing this function, we frequently review the information which we have available, to perform our statutory functions of ensuring compliance with the obligations set out in the corporations legislation.

As the markets regulator, ASIC acts with caution in releasing information to the market, on the basis that, as you have noted, there may be adverse effects on a company’s market performance, or alternatively, an entity or individual may take steps to avoid detection if our regulatory activities or deliberative processes are known.

It is known from the media and Metgasco’s own announcements to the ASX that in 2014, some issues arose in Metgasco’s presence as a listed company. I acknowledge the public interest in considering any entity’s conduct as a listed company.

However, at this time, I find that the information which we have that falls within the terms of your request, that is, concerning or mentioning Metgasco's activities in PEL 16, is not of a nature that it would inform debate on a matter of public importance. While ASIC does regulate Metgasco's conduct as a listed company, this does not necessarily mean that ASIC has a full and complete picture of Metgasco's activities under other regulatory regimes, such as its activities in PEL 16. Where ASIC receives confidential information about an entity's conduct, we undertake an assessment to determine whether regulatory action is required. We would not, in the usual course, release that information to the public in any way other than in compliance with our policies on enforcement and public comment and in consideration of an orderly, fair and informed market.

It is the principle of ensuring a fair and open market which informs ASIC's decisions about making public comment and releasing information into the public, rather than consideration of a company's market performance. I make this comment with reference to Issues (1) and (2) above.

In relation to Issue (3) raised by you, for the reasons set out above, I have decided that the information held by ASIC would not inform debate on a matter of public importance or provide a complete picture in relation to the activities of Metgasco in PEL 16. However the release could adversely impact other aspects of ASIC's operation, and these are considered in the factors against disclosure below.

(c) Access to the Documents would promote effective oversight of public expenditure.

Releasing the Documents would not have any impact or bearing on effective oversight of public expenditure.

(d) Access to the Documents would allow a person to access their own personal information.

Releasing the Documents would not allow you to access your own personal information.

Consideration of Public Interest Factors Against Disclosure

The FOI Act does not set out any specific factors against disclosure which must be considered.

As you have raised in Issue (4), ASIC's sources and methods are not explicitly exempt from release under the FOI Act. As you would be aware, there are categories of documents, such as documents affecting national security (FOI Act section 33), and certain Cabinet documents (FOI Act section 34) which are exempt, without further consideration of public interest, from release.

I have decided that the release of Documents 1, 2, 4 and 5, is not in the public interest as it would substantially disclose information, not within the scope of your request, which ASIC utilises or has utilised to perform its functions. In particular, one factor against disclosure is that it could reasonably be expected to impede the flow of information to ASIC, as well as prejudice our ability to obtain confidential information.

An additional factor against disclosure is that the release of Documents 1, 2, 4 and 5 could reasonably be expected to impede the administration of justice, and procedural fairness. As mentioned above, we perform our deliberative processes to the fullest

extent, and review extensive information in detail, identifying confidential sources of information and strategic lines of inquiry. In the course of this process, we exercise a high level of caution in providing information to the public, in order to protect any strategic advantage in the performance of our functions, as well as to ensure a fair and informed market.

Document 3 – Internal Briefing

I have decided that Document 3 in Schedule A is conditionally exempt from release under the FOI Act under subsection 47E(d) of the FOI Act.

Subsection 47E(d) provides conditional exemption for documents where disclosure would, or could reasonably be expected to, prejudice or have a substantial adverse effect on the proper and efficient conduct of the operations of an agency such as ASIC. Where subsection 47E(d) applies, ASIC must release the documents unless the public interest favours non-disclosure.

Document 3 contains a detailed collation of confidential information provided to ASIC, background information, intelligence information and ASIC's consideration of this information. This includes information from Documents 1, 2, 4 and 5.

As set out above, in performing its functions of monitoring and ensuring a fair and open market, ASIC is highly cautious in releasing information to the public or disclosing details of its operational activities, in order to ensure fairness in the market and protection of its operational methods which provide regulatory advantage.

After consideration of the factors in favour of and against whether disclosure is in the public interest, I have decided not to release Document 3.

Public Interest Factors in Favour of Disclosure

I have considered again the factors favouring access to documents set out in section 11B(3) of the FOI Act, as they apply to Document 3.

(a) Access to the Documents would promote the objects of the FOI Act

I have considered the general objects set out in section 3 of the FOI Act.

(b) Access to the Documents would inform debate on a matter of public importance

In the course of its market and general regulatory function, ASIC has collated and recorded the information in Document 3, including identification of confidential sources of information which enable ASIC to perform its functions.

As Document 3 is in a large part an amalgamation of information from Documents 1, 2, 4 and 5, my consideration of the public interest in the release of those documents is applicable to Document 3.

I find that the information in Document 3 is not of a nature that would inform debate on a matter of public importance, where the information in question is a collation of confidential information and internal consideration of that information, which has not previously been disclosed on the basis that ASIC has a duty to ensure an orderly and fair market in performing its functions.

(c) Access to the Documents would promote effective oversight of public expenditure.

Releasing the Documents would not have any impact or bearing on effective oversight of public expenditure.

(d) Access to the Documents would allow a person to access their own personal information.

Releasing the Documents would not allow you to access your own personal information.

Consideration of Public Interest Factors Against Disclosure

Similar to the consideration of factors against the release of Documents 1,2, 4 and 5, I have decided that the release of Document 3, is not in the public interest as it would substantially disclose confidential sources and information, including information not within the scope of your request, which ASIC utilises or has utilised to perform its functions. The further factor against disclosure, that it could reasonably be expected to impede the flow of information to ASIC, as well as prejudice our ability to obtain confidential information, also applies.

I find that the public interest in releasing Document 3 to you to provide information within the scope of your request is outweighed by the public interest in protecting ASIC's confidential sources of information, and deliberative consideration of that information. Such release could be expected to adversely affect the proper and efficient conduct of our operations by discouraging potential sources of confidential information from approaching ASIC and giving full information with the protection of ASIC's confidence. In addition the disclosure could be expected to adversely affect the proper and efficient conduct of our operations by notifying the public and market participants of internal deliberative criteria and methods, such that misconduct could be modified to avoid regulatory action.

Preparation of edited copy of Documents (Section 22)

I have considered whether, under section 22 of the FOI Act, it is possible to release the exempt documents with deletions so that the documents would no longer be exempt. After this consideration, I determined that the deletions would extend to a majority of each of Documents 1-5 in order to make the copies non-exempt documents.

Consequently, I have formed the view that it would not be reasonably practicable for ASIC to make such a copy of any of Documents 1-5.

Appeal Rights

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

In the event you are dissatisfied with the decision:

1. You may within 60 days after the day on which you have been notified of this decision, apply in writing to the Australian Information Commissioner for a review of my decision under section 54N of the FOI Act. Correspondence should be addressed to the Office of the Australian Information Commissioner at GPO Box 2999 Canberra ACT 2601 OR GPO Box 5218 Sydney NSW 2001.

2. You may lodge a complaint to the Commonwealth Ombudsman in respect to the conduct of ASIC in the handling of this request. To do so, you can contact the Ombudsman's office either: by e-mail to ombudsman@ombudsman.gov.au, by letter to GPO Box 442 Canberra ACT 2601, or by fax to (02) 6276 0123.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Leigh Coughlan', written in a cursive style.

Leigh Coughlan
(Authorised internal-reviewer under subsection 54(1) of the FOI Act)
for the Australian Securities and Investments Commission

SCHEDULE A

No	Description of document	Date	Pages	Decision on access	Relevant section
1	Internal Report	17/4/2014	7	Exempt	47C(1)
2	Internal Report	13/5/2014	4	Exempt	47C(1)
3	Internal Brief	23/5/2014	3	Exempt	47E(d)
4	Internal Report	12/6/2014	6	Exempt	47C(1)
5	Internal Report	9/7/2014	8	Exempt	47C(1)