



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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Mr Edward Shepherd

By email only: foi-request-9404-9e37ff91@righttoknow.org.au

Our Reference: FOI 181-2022

27 October 2022

Dear Mr Shepherd

Freedom of Information Request 181-2022 – Notice of Decision

I refer to your request dated 27 September 2022 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 was for:

- *All documents and correspondence (both internal and external) relating to Parkinson's NSW Limited (ABN 93023603545) and its conduct as a registered company under the Corporations Act 2001.*
- *This includes but is not limited to the following cases: CAS-66553-X6J0M7 & CAS-71706-M7N5S9.*

As part of the request consultation process, you agreed on 13 October 2022 to exclude the following documents from the scope of your request:

- Emails from Edward.shepherd@outlook.com in relation to CAS-66553-X6J0M7 and CAS-71706-M7N5S9
- Emails to Edward.shepherd@outlook.com in relation to CAS-66553-X6J0M7 and CAS-71706-M7N5S9

I am the authorised decision-maker for the purposes of section 23 of the FOI Act and this letter gives notice of my decision.

Searches

I have searched our internal database for documents lodged with ASIC and correspondence provided to ASIC by Parkinson's NSW Limited (ABN 93 023 603 545).

Additionally, I have searched our digital files for previous reports of misconduct, Freedom of Information requests and correspondence to the Commission of ASIC – this search included our digital files for CAS-66553-X6J0M7 and CAS-71706-M7N5S9. I have also asked key staff members to search their records.

Documents identified

I have identified 53 documents falling within the scope of your request:

- 28 documents lodged and correspondence with ASIC in relation to its powers under the *Corporations Act 2001* (**Lodged Documents**)
- 16 documents in file CAS-66553-X6J0M7 (**CAS-66553 Documents**)
- 9 documents in file CAS-71706-M7N5S9 (**CAS-71706 Documents**)

As noted in our letter dated 11 October 2022, under section 12(1)(c) of the FOI Act there is no entitlement to access documents which are available on a public register where access is subject to a fee. There were 23 documents in the Lodged Document category which are available from ASIC Connect. We have therefore excluded those documents from further consideration. We have considered the remaining 5 Lodged Documents that fall into the first part of your request (**Forms not available for purchase**).

The Forms not available for purchase, the CAS-66553 and CAS-71706 documents are described in the schedule attached to this letter.

Decision

I am an authorised decision maker under subsection 23(1) of the FOI Act. I have decided to:

- grant access in full to 1 document
- grant access in part to 3 documents
- deny access to 26 documents

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.
- the FOI Act (specifically sections 37(2)(b), 47C, 47E(d), 47F and 22).
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines)

My reasons for my decision are as follows:

Section 37 – documents affecting enforcement of law and protection of public safety

Paragraph 37(2)(b) of the FOI Act states:

A document is an exempt document if its disclosure under this Act would or could reasonably be expected to disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures.

This exemption applies to ASIC's methods and procedures about how ASIC:

- gathers and records intelligence

- triage reports of misconduct
- applies criteria and internal processes for deciding which cases to pursue
- uses confidential procedures about our approach to misconduct reports.

I consider that the disclosure of those methods and procedures would prejudice their effectiveness because if they are widely known, they will no longer work.

It is no surprise that ASIC has a system in place for these procedures and for selecting matters for enforcement, as set out in our Information Sheet 151 ASIC's approach to enforcement. However, parts of the exempt documents set out procedures in a level of detail which goes well beyond the publicly available information.

The FOI Guidelines at 5.111 provide that '...where a method might be described as 'routine', but the way in which it is employed can reasonably be said to be 'unexpected', disclosure could prejudice the effectiveness of the method.'

If this information were released, it would allow persons to know what ASIC will, and possibly won't, pursue. The disclosure of this information would be reasonably likely to prejudice the effectiveness of ASIC's methods and procedures by creating a risk that people would be able to use their knowledge of those methods and procedures to:

- Evade ASIC detection
- Strategically tailor their activities in a way that prevents ASIC effectively dealing with their misconduct
- Take steps to avoid ASIC enforcement action

In my view release of ASIC's instructions, internal database searches and assessments could reasonably prejudice the effectiveness of ASIC's work.

Section 47C – Public interest conditional exemption – deliberative processes

Section 47C of the FOI Act states:

A document is conditionally exempt if its disclosure under this Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared, or recorded, or consultation or deliberation that has taken place, during, or for the purposes of, the deliberative processes involved in the functions of an agency.

The FOI Guidelines provide that "deliberative matter" is a shorthand term for "opinion, advice and recommendation."

The parts of the documents to which I have applied the section 47C conditional exemption can be described as opinions, advice, and recommendations by ASIC staff as to how ASIC should proceed and deliberative processes and strategies for how to respond.

It is important that staff feel free to engage in open and honest deliberations. Some email chains set out advice and give opinions on options and views on next steps. In some instances, this information is intertwined with operational information. The documents contain advice, analysis, and conclusions of ASIC staff in assessing how to handle misconduct reports. The documents contain deliberative matter that was prepared and recorded for the purpose of ASIC's deliberative processes involved in its function of considering potential breaches of the law. ASIC's assessment of these reports, including how we prioritise, analyse and format this information is a significant part of ASIC's operations.

This is a conditional exemption, and the public interest test applies.

Section 47E – Public interest conditional exemptions – certain operations of agencies

Paragraph 47E(d) states:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

I have decided that the full disclosure of certain documents would have a substantial adverse effect on the proper and efficient conduct of ASIC's operations. This conditional exemption applies to the following material:

- ASIC's assessment documents
- Internal database searches
- Emails and documents discussing a proposed course of action
- Some ASIC position-based email addresses

Where the information concerns confidential intelligence inquiries and methods and procedures, my reasons are like those set out above concerning paragraph 37(2)(b) of the FOI Act. That is, if ASIC discloses the full details of assessment processes and procedures, they will no longer work. It is one thing for persons to suspect what may be an ASIC method and procedure, but it is another to disclose the ways in which these are being used in ASIC's own documents. The disclosure of ASIC's methods and procedures could assist persons to evade regulatory detection and action, as it would provide forewarning of ASIC's considerations.

Some of the documents contain position-based email addresses. In the past, when these types of emails have been disclosed, it has meant that members of the public have contacted ASIC directly through these means, as opposed to reporting misconduct online. As a result, it has impacted on our ability to collate intelligence, and in turn impacts on the proper and efficient conduct of ASIC's operations.

ASIC receives approximately 10,000 reports of misconduct each year. It is vital for ASIC's operations that our resources are used to have a proper and efficient method of collecting the intelligence received. I am satisfied that disclosure would have a substantial adverse effect on the proper and efficient conduct of ASIC's operations and I have based this view on the volume of misconduct reports and previous issues experienced with the release of these types of email addresses.

This is a conditional exemption, and the public interest test applies.

Section 47F – Public Interest Conditional Exemption - Personal Privacy

I have decided some material is exempt under section 47F of the FOI Act which provides that:

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).

The meaning of 'personal information' is taken from the Privacy Act (see s4(a) of the FOI Act) and means information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not, and whether the information or opinion is recorded in a material form or not.

Section 47F(2) sets out matters to which decision makers must have regard in determining whether disclosure of the relevant document would involve the unreasonable disclosure of personal information. I have considered these matters in making this decision.

Broadly, documents 1 to 5 contain personal information including the name, date of birth, address and identity documents. The documents also include personal information about an individual's circumstances.

I also consider that it would be unreasonable to disclose the mobile telephone numbers of certain ASIC staff members, particularly given the current remote working environment.

This is a conditional exemption and the public interest test applies.

Public Interest

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 section 11A of the FOI Act I have considered whether release of the conditionally exempt documents, as identified in the schedule, would, on balance, be contrary to the public interest. I have considered the following factors outlined in section 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

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 documents supports the objects of the FOI Act by making available information which concerns government agency decision making.

I acknowledge that this issue is important to you, but given the nature of the documents, I do not consider that access to these documents would overall inform debate on a matter of public importance. I also note that for factor 4, where the documents do contain your own personal information, this information is released.

The FOI Act does not specify any factors against disclosure in the public interest, however the FOI Guidelines include a list of factors. Based on the FOI Guidelines list of factors, I consider that four are relevant to this decision because disclosure could reasonably be expected to:

- prejudice law enforcement, by informing the entities ASIC regulates how and why we will act on specific information in specific circumstances
- prejudice the fair treatment of some individuals where the information concerns allegations of misconduct or unlawful conduct
- impede the flow of information to ASIC

I have weighed the relevant factors to determine where the public interest lies and whether disclosure would be contrary to the public interest. I have not considered the factors outlined in section 11B(4) of the FOI Act.

In my view, the factors against disclosure of the conditionally exempt documents outweigh the factors in favour of disclosure. This is because the public benefit that lies in disclosure is outweighed by the adverse effects on ASIC's operational activities and regulatory responsibilities. Those adverse effects include prejudice to efficiently assess reports of misconduct and have robust discussions.

I am satisfied that, as set out in the schedule, certain documents are exempt under sections 47C, 47E(d) and 47F of the FOI Act. This is as well as the section 37 exemption, where applicable.

Section 22

Section 22(2) of the FOI Act requires an agency to give an applicant access to an edited copy of a document with the exempt matter deleted if it is reasonably practicable for the agency to prepare an edited copy, having regard to:

- the nature and extent of the modifications (s22(1)(c)(i)); and
- the resources available to modify the document (s22(1)(c)(ii)).

I consider that it is reasonably practicable to prepare an edited copy of documents, as identified in the schedule, with the exempt matter deleted. In line with section 22, I have redacted the exempt information. I have also removed some information under section 22 where it is not relevant because it falls outside of the scope of your request. For example, email chains which capture emails that were excluded from the terms of the request. For the remaining exempt documents, any attempt to edit the documents would leave it meaningless.

Review rights

If you are dissatisfied with the decision you can seek a review.

Internal review

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.

Information Commissioner review

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. 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 online through their online smart form or in one of the following ways:

email: foidr@oag.gov.au

post: GPO Box 5218 Sydney NSW 2001

Right to complain

You may complain to the OAIC about the conduct of ASIC in the handling of this request and their website (www.oaic.gov.au) includes a complaint form.

If you have any questions, please contact me by email at fiona.crowe@asic.gov.au

Yours sincerely



Fiona Crowe

Authorised decision-maker pursuant to subsection 23(1) of the FOI Act

Schedule

Doc No	Date	Description	Decision on access	Relevant sections
Forms not available for purchase				
1	25/02/2021	Request for correction - supporting documentation	Exempt	47F
2	13/06/2019	General correspondence sent by the ASIC	Exempt	47F
3	03/06/2019	Application for consent to resign	Exempt	47F
4	17/05/2019	General correspondence sent by the ASIC	Exempt	47F
5	15/04/2019	Correction of data - roles and addresses	Exempt	47F
CAS-66553 Documents				
6	27/01/2021	Internal database searches	Exempt	37(2)(b) 47E(d) 47F
7 -12	03/03/2021	Internal database searches	Exempt	37(2)(b) 47E(d) 47F
13	12/01/2021	E-rom form	Release	
14	08/03/2021	ROM smart form	Exempt	37(2)(b), 47E(d)
15	19/01/2021	Internal email	Partial Release	47E(d), 47F
16	13/03/2021	Internal email to allocate	Exempt	47E, 47C
17	01/02/2021	Internal email reallocation	Exempt	37(2)(b), 47E, 22
18	28/01/2021	Internal email chain	Exempt	47E, 37(2)(b), 22
19	20/01/2021	Instructions	Exempt	37(2)(b), 47E(d)

20	08/03/2021	Substantive assessment	Exempt	37(2)(b), 47C, 47E(d), 47F
21	08/03/2021	Assessment	Exempt	37(2)(b), 47C, 47E(d), 47F
CAS-71706 Documents				
22	15/03/2021	Internal email to register	Exempt	47C, 37(2)(b)
23	30/03/2021	Internal email	Release	
24	28/06/2021	Internal email chain	Partial release	47E, 47F
25	01/07/2021	Internal email	Exempt	47C, 47E
26	22/03/2021	Instructions	Exempt	37(2)(b), 47E(d)
27	26/03/2021	Internal database search	Exempt	37(2)(b) 47E(d) 47F
28-29	17/06/2021	Internal database searches	Exempt	37(2)(b) 47E(d) 47F
30	17/06/2021	Assessment	Exempt	37(2)(b), 47C, 47E(d) 47F