



ASIC

Australian Securities & Investments Commission

Your ref: VOFF #451

20 December 2016

Mr John Telford

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Dear Mr Telford

Request pursuant to the Freedom of Information Act 1982 for access to documents

I refer to your request for access to documents under the Freedom of Information (FOI) Act 1982 dated 1 December 2016 addressed to the Chairman of the Australian Securities and Investments Commission (ASIC). Your request has been referred to me for a response.

Your request seeks access to:

Documentation concerning James Campbell Sutherland and Jack William Flader and companies they operated that ASIC sent to the United Kingdom Serious Fraud Office (SFO) in late 2015 early 2016.

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

Decision

I note that you have previously made a request for similar documents (VOFF request #426). Request #426 sought access to correspondence from ASIC to the UK SFO regarding James Campbell Sutherland and Jack William Flader in the period 5.3.2010 and 17.3.2016. You were given a decision on request #426 on 26 April 2016.

The time frame for documents concerning your current request is "late 2015 early 2016". For the purposes of processing your current request I have interpreted the time frame of "late 2015 early 2016" as including all of 2015 and the period of 2016 ending on 17 March 2016. I have applied 17 March 2016 as the cut-off date as this is the date that Flader and Sutherland were acquitted of money laundering charges and it therefore represents the end of the UK SFO's enforcement action in relation to Flader and Sutherland.

Notice of non-disclosure of the existence or non-existence of a document pursuant to section 25(2) of the Act

I have decided to utilise the provision contained in section 25(2) of the Act in relation to your request.

Section 25 of the Act states that :

- (1) *"Nothing in this Act shall be taken to require an agency...to give information as to the existence or non-existence of a document where information as to the existence or non-existence of that document, if included in a document of an agency, would cause the last-mentioned document to be an exempt document by virtue of section 33 or subsection 37(1).*
- (2) *Where a request relates to a document that is, or if it existed would be of a kind referred to in sub-section (1), the agency.. dealing with the request may give notice in writing to the applicant that the agency ...neither confirms nor denies the existence, as a document of the agency..., of such a document but that, assuming the existence of such a document, it would be an exempt document under section 33 or subsection 37(1)...".*

In relation to your request, only section 33 is applicable in that if the document/(s) sought in your request did exist, it/they would be exempt under section 33 of the Act (in particular section 33(a)(iii)) which states that:

- " A document is an exempt document if disclosure of the document under this Act:*
- (a) *would, or could reasonably be expected to, cause damage to:*
 - (i) *the security of the Commonwealth;*
 - (ii) *the defence of the Commonwealth; or*
 - (iii) *the international relations of the Commonwealth; or*
 - (b) *would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.*

Disclosure of such a document, if it exists, would constitute a breach of confidentiality between ASIC and the foreign government and agencies, which would or could reasonably be expected to cause damage to the international relations of the Commonwealth. This damage could include damage to Australia's international reputation, lessening the confidence which another country would place on the government of Australia, and damage to ongoing mutual assistance and cooperation including the free flow of information to and from foreign law enforcement bodies critical to enforcement activities;

"Damage" for the purpose of this exemption is not confined to loss or damage in monetary terms. The relevant damage may comprehend intangible damage to Australia's reputation. Such damage may include inhibiting future negotiations or flow of confidential information between ASIC and a foreign government or agency.

The phrase "international relations" has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations to protect the flow of confidential information between them. In my opinion, disclosure to you of the document/(s) sought in your request, if it/they existed, would disclose, or enable you to ascertain, the existence of a confidential source of information. Confidential informants to ASIC have a reasonable expectation that any information provided will be treated in confidence and their identity protected.

Accordingly, I neither confirm nor deny the existence of the document/(s) sought in your request.

A decision to give a notice under section 25(2) of the Act is deemed by that section to be a decision refusing to grant access to the relevant document/(s), for the reason that the document/(s) would, if it/they existed, be exempt under (in this case) section 37(1)(b) of the Act. As such, the decision to give a notice under section 25(2) is reviewable in the following ways.

Review Rights

In the event that you are dissatisfied with the decision:

1. You may, within 30 days after the day on which you have been notified of this decision, apply in writing to ASIC for a review of my decision by another ASIC officer under section 54B of the FOI Act. This request should be addressed to me or to the Senior Manager, Administrative Law GPO Box 9827 SYDNEY or by email to foirequest@asic.gov.au
2. You may within 60 days after the day on which you have been notified of this decision, apply in writing to the Office of the Australian Information Commissioner (OAIC) for a review of my decision under section 54N of the FOI Act. You may contact the OAIC by post at GPO Box 5218 Sydney NSW 2001, by email at enquiries@oaic.gov.au or by telephone on 1300 363 992
3. You may lodge a complaint with the OAIC in relation to the conduct of ASIC in the handling of this request. You may contact the OAIC as described above.

Yours faithfully



Mirijana Soldatic
(Authorised decision-maker under subsection 23(1) of the FOI Act)
for the Australian Securities and Investments Commission