

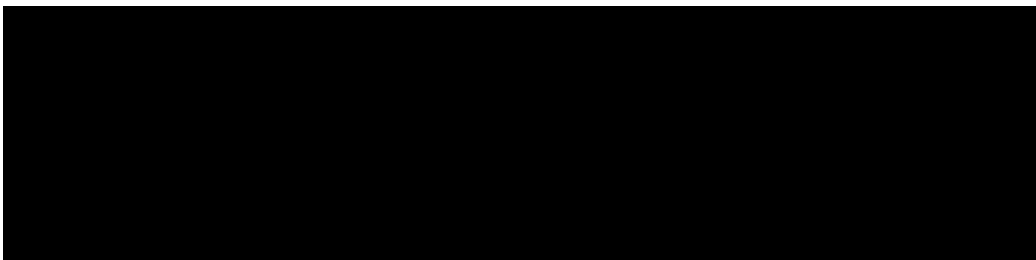


In reply please quote:

FOI Request: FA 16/06/02674

File Number: ADF2016/30306

19 August 2016



Dear [REDACTED]

I refer to your email dated 29 June 2016 in which you request access to documents held by the Department of Immigration and Border Protection (the Department) under the *Freedom of Information Act 1982* (the FOI Act).

1 Scope of Request

You have requested access to the following documents held by the Department:

1. *any document in the possession of the Department which records that an entity [REDACTED] has imported a therapeutic good into Australia containing fingolimod as an active ingredient, and*
2. *any document in the possession of the Department which records that a company [REDACTED] has sought to import a therapeutic good into Australia containing fingolimod as an active ingredient.*

On 13 July 2016, you agreed to limit the type of data that is subject to your request to:

- *the date of import;*
- *the name of the Consignee/Importer;*
- *the quantity/weight of the goods, and*
- *goods description.*

This letter is to notify you of the Department's decision on access to the documents subject to your request.

2 Charges

On 15 July 2016, the Department notified you of the estimated charges associated with processing this request in the amount of [REDACTED]. On 18 July 2016, you paid the charges in full.

3 Authority to make decision

I am an officer authorised under section 23 of the FOI Act to make decisions to in respect of requests to access documents or to amend or annotate Departmental records.

4 Relevant material

In reaching my decision, I have considered the following:

- the terms of your request;
- the documents relevant to your request;
- the FOI Act;
- Guidelines published by the Office of the Australian Information Commissioner under s 93A of the FOI Act;
- consultation responses from third parties consulted in accordance with the FOI Act, and
- advice from Departmental officers with responsibility for matters relating to the documents to which you sought access.

5 Decision on access

In accordance with section 17 of the FOI Act, the Department has used its computer system to produce two documents that contain the requested information. The data produced in these documents existed in the possession of the Department on 29 June 2016 when your FOI request was received.

The decision in relation to the documents in the possession of the Department which come within the scope of your request is to release two documents in part with deletions.

6 Reasons for Decision

My reasoning in relation to the application of each section to particular documents is set out below.

6.1 Section 22 of the FOI Act – irrelevant to request

Section 22 of the FOI Act provides that if giving access to a document would disclose information that would reasonably be regarded as irrelevant to the request, it is possible for the Department to prepare an edited copy of the document, modified by deletions, ensuring that the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request.

I note that your request is specifically in relation to the "*therapeutic good ... containing fingolimod as an active ingredient*". Some consignments include products that are not *Fingolimod* or *Fingolimod Hydrochloride*. As such, the goods that do not relate to your request have been regarded as outside the scope of your request.

I have therefore decided that parts of document would disclose information that could reasonably be regarded as irrelevant to your request, and have therefore prepared an edited copy of the document, with the irrelevant material deleted pursuant to section 22(1)(a)(ii) of the FOI Act. The remainder of the documents have been considered for release to you as it is relevant to your request.

6.2 Section 45 of the FOI Act – Documents containing material obtained in confidence

Section 45 of the FOI Act provides that a document is an exempt document if its disclosure under this Act would found an action, by a person for breach of confidence.

Both documents contain data extracted from the Department's Integrated Cargo System (ICS). The ICS is the Department's electronic clearance and reporting system for imports and exports and links the Department with owners of goods or their agents and automates procedures for the reporting of imports and exports.

The role of the Department in the import and export of goods is to:

- ensure that all goods being imported and exported from Australia are reported as required;
- administer controls on behalf of permit issuing agencies on the import and export of restricted or prohibited goods; and
- gather information regarding the nature and volume of imports and exports to assist government and industry in policy and decision-making.

Therefore, the information entered into the ICS system is a mandatory legislative requirement completed by owners to ensure compliance with the Customs Act.

The majority of declarations are submitted electronically in the ICS and the authentication process associated with that procedure makes the data being transferred as part of that transaction implicitly secure and confidential.

I further note that:

- the data within the documents specifically outlines particular importation data that is commercially sensitive including the importers' details and the nature and quantity of the goods imported;
- the data within the document is sufficiently secret in that only the importer itself (or those acting on their behalf) would be aware of the data relating to their importation activities. The information is not common knowledge or in the public domain;
- an importer/exporter would not be aware, and is certainly not advised, that the Department may disclose the sensitive commercial information they provide to the Department to applicants under the FOI Act.

The data contained in these documents relates to a large number of third party organisations ("the importers"). Where it has been reasonably practicable to do so, the Department has consulted the relevant importers.

Some of those importers have consented to the release of the certain data relating to their organisations, and as such, their consent to disclose that specific information results in the obligation of confidentiality over that information being removed from the Department. I have therefore decided to release the data relating to those companies.

However, a number of the importers have expressly maintained their contention that this information is held by the Department in confidence, and have expressly objected to its release under the FOI Act. As such, the obligation on the Department to maintain the confidentiality of this information remains, and the disclosure of that information would found an action for breach of confidence.

In addition, there are a number of importers that the Department was not able to consult as it was not reasonably practicable to do so. As a result, those importers have not provided their consent to the release of that information, and the Department is obliged to maintain the confidentiality of that information.

I am satisfied that the nature of the exempt information is inherently confidential as:

- The information is specifically identified by the importers as being confidential;
- The information has the necessary quality of confidentiality as it contains information that is not common knowledge or in the public domain;
- The information was provided to the Department and received on the basis of a mutual understanding of confidence;
- If the information was disclosed, it would be without the authority of the importers; and
- Disclosure of the information will likely cause detriment to the importers.

I am of the view that the disclosure of parts of the information within the documents would found an action by the relevant importers for breach of confidence and as such I have decided that these documents are exempt from disclosure under section 45 of the FOI Act.

6.3 Section 47F of the FOI Act – Personal Privacy

Section 47F of the FOI Act provides that a document is conditionally exempt if its disclosure under FOI would involve the unreasonable disclosure of personal information of any person. 'Personal information' 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 (see s 4 of the FOI Act and s 6 of the Privacy Act 1988).

I consider that disclosure of parts of the document would disclose personal information relating to third parties. This information consists of individual's names.

The FOI Act states that, when deciding whether the disclosure of the personal information would be 'unreasonable', I must have regard to four factors set out in s.47F(2) of the FOI Act. I have therefore considered each of these factors below:

- *the extent to which the information is well known;*
- *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;*
- *the availability of the information from publicly available resources;*
- *any other matters that I consider relevant.*

The third parties' information is not well known and would only be known to a limited group of people with a business need to know. As the third parties' information is only known to a limited group of people, the individuals concerned are not generally known to be associated with the matters discussed in the document. This information is not available from publicly available sources.

I do not consider that the third parties' information would be relevant to the broader scope of your request, as you are seeking access to data regarding the importation of Fingolimod rather than information which relates to the individuals concerned.

I am satisfied that the disclosure of the information within the document would involve an unreasonable disclosure of personal information about a number of individuals.

I have decided that the information referred to above is conditionally exempt under section 47F of the FOI Act. Access to a conditionally exempt document must generally be given unless it would be contrary to the public interest to do so. I have turned my mind to whether disclosure of the information would be contrary to the public interest, and have included my reasoning in that regard at paragraph 6.5 below.

6.4 Section 47G(1)(a) of the FOI Act – Business Affairs

Section 47G(1)(a) of the FOI Act permits conditional exemption of documents containing business information where disclosure of that information would, or could reasonably be expected to, unreasonably affect the organisation adversely in respect of its lawful business, commercial or financial affairs.

In determining whether disclosure of the information within the documents would or could reasonably be expected to adversely affect the lawful business, commercial or financial affairs of an organisation, I have had regard to the following factors:

- (a) The extent to which the information is well known;
- (b) Whether the organisation or undertaking is known to be associated with the matters dealt with in the documents;
- (c) The availability of the information from publicly accessible sources; and
- (d) Any other matters that the Department considers relevant.

I have also had regard to the submissions made by the affected third parties who have been consulted in relation to the release of their business affairs information. Some of these affected third parties have made submissions that the disclosure of this information would, or could reasonably be expected to, unreasonably affect their organisation adversely in respect of their lawful business, commercial or financial affairs.

Those submissions include:

- The goods were not ordered or received by the organisation consulted and were included in documentation from the shipper in error. *Fingolimod Hydrochloride* is an immunomodulation drug, mostly used for treating multiple sclerosis. The organisation concerned has no need for such a drug based on the focus of their business. *Fingolimod Hydrochloride* is a controlled drug and can only be procured and used under license. It would be an offence for the organisation to purchase such a product without a licence to do so, and substantial fines exist for breach of the relevant legislation. As such, any implication that the organisation has ordered a drug that it is not licensed for and has not been approved for use by, would be detrimental to the business affairs of that organisation. As a listed Company, such false information would adversely impact on the organisation's share price causing shareholders financial loss, and would result in the organisation being required to issue an announcement to the market to correct a false understanding of the organisation's business and its usual activities.
- The relevant organisation contends that as far as they can ascertain, the goods were ordered for use in research. As such disclosure of information concerning the research activities of the organisation could reasonably be expected to adversely affect that organisation and its ability to protect its intellectual property in the field of research that is undertaken.
- The relevant organisation has imported *Fingolimod* products for laboratory research use only. The product was used by qualified scientific personnel at universities and hospitals for research purposes only. It is not administered for human use or for human or veterinary diagnostic or therapeutic use, hence the organisation does not sell *Fingolimod* as a therapeutic good or as an active ingredient.

I am satisfied that the information contained within these documents is not in the public domain, the organisation concerned is not generally known to be associated with the matters referred to in these documents, and the information is not available from publicly accessible sources, such as the organisation's website. I am therefore satisfied that the disclosure of the information would, or could reasonably be expected to, unreasonably affect the relevant organisations in respect of their lawful business, commercial or financial affairs.

As such, I have decided that the parts of the documents are conditionally exempt under section 47G of the FOI Act. Access to a conditionally exempt document must generally be given unless it would be contrary to the public interest to do so. I have turned my mind to whether disclosure of the information would be contrary to the public interest, and have included my reasoning in that regard at paragraph 6.5 below.

6.5 *The public interest – section 11A of the FOI Act*

As I have decided that parts of the documents are conditionally exempt, I am now required to consider whether access to the conditionally exempt information would be contrary to the public interest (section 11A of the FOI Act).

A part of a document which is conditionally exempt must also meet the public interest test in section 11A(5) before an exemption may be claimed in respect of that part.

In summary, the test is whether access to the conditionally exempt part of the document would be, on balance, contrary to the public interest.

In applying this test, I have noted the objects of the FOI Act and the importance of the other factors listed in section 11B(3) of the FOI Act, being whether access to the document would do any of the following:

- (a) *promote the objects of this Act (including all the matters set out in sections 3 and 3A);*
- (b) *inform debate on a matter of public importance;*
- (c) *promote effective oversight of public expenditure;*
- (d) *allow a person to access his or her own personal information.*

Having regard to the above:

- I am satisfied that access to the documents would promote the objects of the FOI Act.
- I consider that the subject matter of the documents does not, in itself, seem to have the character of public importance. The matter has a very limited scope and, in my view, would be of interest only to a very narrow section of the public.
- I consider that no insights into public expenditure will be provided through examination of the documents.
- I am satisfied that you do not require access to the documents in order to access your own personal information.

Disclosure of all aspects of the documents would not provide a person with sufficient information to assess the rigour or efficiencies of internal decision making processes within the Department, promote scrutiny of government decision making or reveal the reasoning for a government decision. I consider these considerations as neutral.

I have also considered the factors that weigh against the release of the conditionally exempt information in the documents:

- The disclosure of the personal information which is conditionally exempt under section 47F of the FOI Act could reasonably be expected to prejudice the protection of those individuals' right to privacy. It is my view that it is firmly in the public interest to uphold the rights of individuals to their own privacy. I consider that this factor weighs heavily against disclosure.
- I consider that the disclosure of the parts of the documents that are conditionally exempt under section 47G of the FOI Act could reasonably be expected to prejudice the competitive commercial activities of third party organisations. I consider that this factor weighs heavily against disclosure.

I have also had regard to section 11B(4) which sets out the factors which are irrelevant to my decision, which are:

- (a) *access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;*
- (b) *access to the document could result in any person misinterpreting or misunderstanding the document;*
- (c) *the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;*
- (d) *access to the document could result in confusion or unnecessary debate.*

I have not taken into account any of those factors in this decision.

Upon balancing all of the above relevant public interest considerations, I have concluded that the disclosure of the conditionally exempt information in the documents is not in the public interest and therefore exempt from disclosure under the FOI Act.

7 Contextual information

A number of the importers who have provided their consent to the release of their data have identified that the data contained in the quantity column is not precise and have surmised that this may be a rounded number – for example, a quantity of not more than 0.5 kgs. It is noted that it is unlikely that every consignment would have been 0.5kgs. One organisation in particular has indicated that the quantities actually imported are in the mg size, and that the weight recorded in the ICS data may include the whole package size, including packaging and ice blocks.

8 Legislation

I have attached an extract of the exemption provisions of the FOI Act and the public interest test for your information at **ATTACHMENT A**.

9 Your Review Rights

Internal Review

If you disagree with this decision, you have the right to apply for an internal review by the Department of this decision. Any request for internal review must be provided to the Department within 30 days of you being notified of the decision. Where possible please attach reasons why you believe a review of the decision is necessary. The internal review will be carried out by an officer other than the original decision maker and the Department must make a review decision within 30 days. Applications for review should be sent to:

Freedom of Information Section
Department of Immigration and Border Protection
PO Box 25
BELCONNEN ACT 2617

OR

By email to: foi@border.gov.au

Review by the Office of the Australian Information Commissioner

You may apply directly to the Office of the Australian Information Commissioner (OAIC) for a review of this decision. You must apply in writing within 60 days of this notice. For further information about review rights and how to submit a request for a review to the OAIC, please see Fact Sheet 12 "Freedom of information – Your review rights", available online at <http://www.oaic.gov.au/freedom-of-information/foi-reviews>.

10 Making a Complaint

You may complain to the Australian Information Commissioner about action taken by the Department in relation to your request.

Your enquiries to the Australian Information Commissioner can be directed to:

Phone 1300 363 992 (local call charge)

Email enquiries@oaic.gov.au

There is no particular form required to make a complaint to the Australian Information Commissioner. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to the request should be investigated and identify the Department of Immigration and Border Protection as the relevant agency.

11 Contact

Should you wish to discuss this decision, please do not hesitate to contact the FOI Section at foi@border.gov.au.



Authorised Decision Maker
Department of Immigration and Border Protection

ATTACHMENT A

Relevant Legislation

Section 22 - Access to edited copies with exempt or irrelevant matter deleted

- (1) This section applies if:
 - (a) an agency or Minister decides:
 - (i) to refuse to give access to an exempt document; or
 - (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
 - (b) it is possible for the agency or Minister to prepare a copy (an **edited copy**) of the document, modified by deletions, ensuring that:
 - (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
 - (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and
 - (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
 - (i) the nature and extent of the modification; and
 - (ii) the resources available to modify the document; and
 - (d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

Access to edited copy

- (2) The agency or Minister must:
 - (a) prepare the edited copy as mentioned in paragraph (1)(b); and
 - (b) give the applicant access to the edited copy.

...

Section 45 - Documents containing material obtained in confidence

- (1) A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for breach of confidence.
- (2) Subsection (1) does not apply to a document to which subsection 47C(1) (deliberative processes) applies (or would apply, but for subsection 47C(2) or (3)), that is prepared by a Minister, a member of the staff of a Minister, or an officer or employee of an agency, in the course of his or her duties, or by a prescribed authority or Norfolk Island authority in the performance of its functions, for purposes relating to the affairs of an agency or a Department of State unless the disclosure of the document would constitute a breach of confidence owed to a person or body other than:
 - (a) a person in the capacity of Minister, member of the staff of a Minister or officer of an agency; or
 - (b) an agency, the Commonwealth or Norfolk Island.

Section 47F - 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.
- (3) Subject to subsection (5), subsection (1) does not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

...

Section 47G - Public interest conditional exemptions—business

- (1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:
 - (a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
 - (b) could reasonably be expected to prejudice the future supply of information to the Commonwealth, Norfolk Island or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.
- (2) Subsection (1) does not apply to trade secrets or other information to which section 47 applies.
- (3) Subsection (1) does not have effect in relation to a request by a person for access to a document:
 - (a) by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or
 - (b) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or
 - (c) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.
- (4) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Commonwealth, Norfolk Island or a State or by a local government authority.
- (5) For the purposes of subsection (1), information is not taken to concern a person in respect of the person's professional affairs merely because it is information concerning the person's status as a member of a profession.

11B - Public interest exemptions—factors

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

Factors favouring access

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
 - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
 - (b) inform debate on a matter of public importance;
 - (c) promote effective oversight of public expenditure;
 - (d) allow a person to access his or her own personal information.

Irrelevant factors

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
 - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
 - (aa) access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;
 - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
 - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
 - (d) access to the document could result in confusion or unnecessary debate.

Guidelines

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.