

Australian Prudential Regulation Authority

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APRA

Ref no: 15/001191

10 April 2015

Mr Philip Sweeney

Email via: foi+request-1016-932458a3@righttoknow.org.au

Dear Mr Philip Sweeney,

FOI Application dated 11 March 2015

I refer to your request dated 11 March 2015 (FOI request), which was received by APRA on 11 March 2015, in which you sought access under the *Freedom of Information Act 1982* to the following documents:

'Members of one of Australia's oldest superannuation funds, once known as the Elders IXL Superannuation Fund were advised that the Trust Estate of this fund was transferred to the Trust Estate of a fund administered by the National Australia Bank on 20 January 2014.

The Fund Auditor Clare Keating of PwC would have need to provide a Section 35C compliance report for the part year ending 20 January 2014.

The document I seek is a copy of this compliance report.

I am not seeking copies of compliance reports for earlier years

The ABN of the Fund is 60 171 679 448'

Notice of decision

I attach a notice of decision with statement of reasons. The statement of reasons sets out your rights of review.

Please contact me on 02 9210 3000 or foi@apra.gov.au if you have any queries.

Yours sincerely

FOI Officer
Australian Prudential Regulation Authority

**NOTICE OF DECISION MADE UNDER SECTION 23
OF THE FREEDOM OF INFORMATION ACT 1982 (the FOI Act)
WITH REASONS FOR DECISION PROVIDED UNDER SECTION 26**

- Applicant:** Mr Philip Sweeney
- Decision-maker:** An authorised officer of the Australian Prudential Regulation Authority (APRA) for the purposes of section 23(1) of the FOI Act.
- Relevant documents:** Request for section 35C compliance report for the transfer of the Trust Estate of the fund once known as the 'Elders IXL Superannuation Fund' to a Trust Estate Fund administered by the National Australia Bank on 20 January 2014.
- My decision:** *Refuse access*, under section 38 of the FOI Act, to the document specified in the Applicant's request.

MATERIAL FACTS

1. I refer to your request by email dated 11 March 2015, in which you sought access under the *Freedom of Information Act 1982* to copies of a section 35 compliance report:

'Members of one of Australia's oldest superannuation funds, once known as the Elders IXL Superannuation Fund were advised that the Trust Estate of this fund was transferred to the Trust Estate of a fund administered by the National Australia Bank on 20 January 2014.

The Fund Auditor Clare Keating of PwC would have need to provide a Section 35C compliance report for the part year ending 20 January 2014.

The document I seek is a copy of this compliance report.

I am not seeking copies of compliance reports for earlier years

The ABN of the Fund is 60 171 679 448'

By letter dated 24 March 2015, APRA acknowledged receipt of your request.

DOCUMENTS RELATING TO THIRD PARTIES

2. The Applicant's request is for a document which contains information relating to the business affairs of the Elders IXL Superannuation Fund and the Trust Estate of that fund administered by the National Australia Bank, which are entities regulated by APRA.

EVIDENCE AND MATERIAL RELIED ON

3. In making my decision, I have relied on the following evidence and material:
- a) the Applicant's request received by APRA on 11 March 2015;

- b) acknowledgment email with attached letter from FOI Officer to the Applicant dated 24 March 2015;
- c) email from Bradley Johnson, Manager Supervision Team on 7 April 2015;
- d) file note written by FOI Officer dated 7 April 2015;
- e) relevant sections of the *Superannuation Industry (Supervision) Act 1993*
- f) relevant sections of the *Australian Prudential Regulation Authority Act 1998*;
- g) relevant sections of the *Freedom of Information Act 1982*
- h) Guidelines issued by the Office of the Australian Information Commissioner to date.

REASONS FOR DECISION

4. Due to the 2013 amendments to the Superannuation Industry (Supervision) Act 1993 (SIS Act), the section 35C compliance report which is the subject of the request is now instead a requirement under the APRA Prudential Standard SPS 310 Audit and Related Matters (and not section 35C of the SIS Act). The current section 35C of the SIS Act relates to obligations for self-managed superannuation funds. Accordingly, the FOI Officer took the view that the report the subject of the request was a report made pursuant to APRA Prudential Standard SPS 310.
5. On 7 April 2015, the FOI Officer was advised by APRA staff of the steps APRA took to search for the documents relevant to the request and was advised that the relevant documents are protected for the purposes of section 38 of the FOI Act, and section 56 of the APRA Act.

Section 38 (Documents to which secrecy provisions of enactments apply)

6. Section 38 of the FOI Act provides:

- (1) Subject to subsection (1A), a document is an exempt document if:
 - (a) disclosure of the document, or information contained in the document, is prohibited under a provision of an enactment; and
 - (b) either:
 - (i) that provision is specified in Schedule 3; or
 - (ii) this section is expressly applied to the document, or information, by that provision, or by another provision of that or any other enactment.
- (1A) A person's right of access to a document under section 11 or 22 is not affected merely because the document is an exempt document under subsection (1) of this section if disclosure of the document, or information contained in the document, to that person is not prohibited by the enactment concerned or any other enactment.
- (2) Subject to subsection (3), if a person requests access to a document, this section does not apply in relation to the document so far as it contains personal information about the person.
- (3) This section applies in relation to a document so far as it contains personal information about a person if:
 - (a) the person requests access to the document; and

(b) disclosure of the document, or information contained in the document, is prohibited under section 503A of the *Migration Act 1958* as affected by section 503D of that Act.

(4) In this section:

"enactment" includes a Norfolk Island enactment.

7. An extract of section 56 of the APRA Act is attached.
8. Subsection 56(11) of the APRA Act expressly applies section 38 of the FOI Act so that any document that is a 'protected document' or contains 'protected information' within the meaning of subsection 56(1) of the APRA Act is also an exempt document under section 38 of the FOI Act.
9. I have taken the following approach in relation to the application of section 56 of the APRA Act and section 38 of the FOI Act:
 - (a) The prohibition in subsection 56(2) on disclosure of protected information or the production of a protected document is binding on me as a staff member of APRA (see the definition of 'officer' in subsection 56(1)). It is an offence punishable by 2 years imprisonment to contravene this prohibition.
 - (b) The definitions of 'protected information' and 'protected document' in subsection 56(1) cover: (1) information that was 'disclosed or obtained', and documents 'given or produced ... under, or for the purposes of, a prudential regulation framework law' where (2) the information or document relates to the affairs of a 'body regulated by APRA' or a related body corporate or customer, and (3) the information or document has not 'already been lawfully made available to the public from other sources'.
10. The documents set out in the attached Schedule contain information provided to APRA under or for the purposes of a prudential regulation framework law and contains information relating to the affairs of Elders IXL Superannuation Fund and the National Australia Bank, which are regulated by APRA.
11. The documents relevant to the request have not already been lawfully made available to the public from other sources.
12. On the basis of paragraphs 3-10 above I am satisfied that the documents relevant to the request are protected documents under section 56(1) of the APRA Act and that the documents are consequently exempt documents under section 38 of the FOI Act. Therefore, I have decided to refuse to give access to the documents sought by the Applicant.

Section 24A

13. Subsection 24A(1) of the FOI Act provides that an agency may refuse a request for access to a document if all reasonable steps have been taken to find the document, and the agency is satisfied that the document is either in the agency's possession but cannot be located, or does not exist.

14. Based on the information before me, APRA has taken all reasonable steps to locate the documents relevant to the request, and I am satisfied that no relevant documents exist. Accordingly, I have refused access under subsection 24A(1).

ADVICE TO APPLICANT AS TO RIGHTS OF REVIEW

Application for Internal Review of Decision

15. Pursuant to section 54 of the FOI Act, you have the right to apply for an internal review of the decision if you disagree with my decision. If you make an application for review, another officer of APRA will be appointed to conduct a review and make a completely fresh decision on the merits of the case.

16. Pursuant to section 54B of the FOI Act, you must apply in writing for a review of the decision within 30 days after the day the decision has been notified to you.

17. You do not have to pay any other fees or processing charges for an internal review, except for providing access to further material in the document released as a result of the review (for example, photocopying, inspection, etc).

18. No particular form is required to apply for review although it is desirable (but not essential) to set out in the application the grounds on which you consider that the decision should be reviewed.

19. Application for an internal review of the decision should be addressed to:

*FOI Officer, Secretary Group
Australian Prudential Regulation Authority
GPO Box 9836, Sydney NSW 2001
Telephone: (02) 9210 3000
Facsimile: (02) 9210 3020*

20. If you make an application for internal review and we do not make a decision within 30 days of receiving the application, the agency is deemed to have affirmed the original decision. However, under section 54D of the FOI Act, APRA may apply, in writing to the Information Commissioner for further time to consider the internal review.

Application for review by Information Commissioner

21. Pursuant to section 54L of the FOI Act, you have the right to apply to the Information Commissioner for a review of the original decision or a review of a decision made on review.

22. Any application must be in writing and must give details of an address where notices may be sent and include a copy of the original decision or the decision made on internal review.

23. An application for review by the Information Commissioner should be sent:

- Online: www.oaic.gov.au;
- Post: GPO Box 2999, Canberra ACT 2601
- Fax: +61 2 9284 9666
- Email: enquiries@oaic.gov.au
- In person:

Level 3, 25 National Circuit
Forrest, ACT, or at
Level 8, Piccadilly Tower, 133 Castlereagh Street, Sydney, NSW

Application for review by Administrative Appeals Tribunal

24. If the decision on review by the Information Commissioner is not to grant access to all of the documents within your request, you would be entitled to seek review of that decision by the AAT.
25. The AAT is a completely independent review body with the power to make a fresh decision. Your application to the AAT should be accompanied by a filing fee of \$816, unless you are granted legal aid or you come within an exempt category of persons. The AAT Registrar or Deputy Registrar may waive the fee on the ground that its payment would impose financial hardship on you. The fee may be refunded where you are successful. The AAT cannot award costs either in your favour or against you, although it may in some circumstances recommend payment by the Attorney-General of some or all of your costs. Further information is available from the AAT on 1300 366 700.

Complaints to the Information Commissioner

26. You may complain to the Commissioner concerning action taken by this agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. The Commissioner will conduct a completely independent investigation of your complaint.
27. You may complain to the Commissioner either orally or in writing, by any of the methods below.
- Telephone: 1300 363 992
 - email: enquiries@oaic.gov.au
 - GPO Box 2999, Canberra ACT 2601
 - website at www.oaic.gov.au

FOI Officer
Australian Prudential Regulation Authority
Date:

s 24A Freedom of Information Act 1982

24A Requests may be refused if documents cannot be found, do not exist or have not been received

Document lost or non-existent

(1) An agency or Minister may refuse a request for access to a document if:

(a) all reasonable steps have been taken to find the document; and Access to documents **Part III**
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(b) the agency or Minister is satisfied that the document:

- (i) is in the agency's or Minister's possession but cannot be found; or
- (ii) does not exist.

Document not received as required by contract

(2) An agency may refuse a request for access to a document if:

(a) in order to comply with section 6C, the agency has taken contractual measures to ensure that it receives the document; and

(b) the agency has not received the document; and

(c) the agency has taken all reasonable steps to receive the document in accordance with those contractual measures.