



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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Phillip Sweeney

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Our Reference: FOI 191-2023

20 September 2023

Dear Mr Sweeney

Freedom of Information Request No. 191-2023

Notice of Access Decision

I refer to your request dated 8 September 2023 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 seeks access to the following:

"Dear Australian Securities and Investments Commission,

In 2014 the SENATE ECONOMICS REFERENCES COMMITTEE undertook an "Inquiry into the performance of ASIC".

Included in the "Questions on notice for ASIC" was a question from the Committee related to a Defined Benefit Regulated Superannuation Fund that was constituted and established by a Trust Deed made on 23 December 1913 and which was closed to new members on 30 November 1997. This fund is legally identified by the original Trust Deed and not by the various "names of convenience" used over the last century which have included "The Provident Fund".

This superannuation fund was established as a "private trust" but became a Regulated Superannuation Fund in 1994 and was registered by APRA in 2006.

The Senate Committee sought a response from ASIC related to:

"Submissions 277, 109, 133 and 146) – The Provident Fund The committee has received several submissions regarding the Provident Fund, an employee benefit fund (superannuation fund) that was established in 1913. The submissions claim that qualifying male officers are entitled to a pension for life and their widows are then entitled to a survivorship pension. The submissions allege that the original trust deed was fraudulently altered and the conditions of the original trust deed are not being complied with (i.e. the pensions are not being paid)."

If pensions are not being paid then is is an ongoing offence, since former trustees cannot pay benefits fall due after the trustee has retired from the office of trustee. The

innumbent trustee must pay pensions from the date that the trustee accepted the office of trustee.

In ASIC's written testimony to the Committee the following was stated:

"ASIC notes that a large number of the complaints and FOI requests received in relation to the Fund have not principally concerned allegations of fraudulent behaviour, but rather allegations that the trustee of the Fund has failed to comply with its disclosure obligations under section 1017C of the Act. Section 1017C of the Act requires trustees to provide a concerned person – typically a member of the fund within the preceding 12 months – with certain information, including information they reasonably require for the purposes of understanding any benefit entitlements that they may have under the relevant superannuation product."

Now ASIC only makes reference to the provisions of Subsection 1017C(2) of the Corporations Act 2001 which is more relevant to members of Defined Contribution funds.

ASIC fails mention the provisions of Subsection 1017C(5) of the Corporations Act and related Regulation 7.9.45 and the penalty of two years imprisonment for the contravention of this subsection in Schedule 3 of the Corporations Act 2001 which is relevant to members and beneficiaries (eg widows) of Defined Benefit funds.

Trustees must provide a copy of the original Trust Deed that constituted and established the fund as well as copies of any amending Deeds following a written request by a person with a "beneficial interest" in the fund.

Why did ASIC seek to conceal this important information from the Senate Committee?

In a letter dated 11 February 2014 to former Senator John Williams, Gerard Fitzpatrick, Senior Executive Leader, Investment Managers and Superannuation also attempted to mislead the Senator as to the provisions of Ssection 1017C of the Corporations Act 2001.

Mr Fitzpatrick was caught out and had to correct his misleading letter of 11 February 2014 in a letter dated 3 March 2014 and advise the Senator of the provisions of Subsection 1017C(5).

In this second letter Mr Fitzpatrick states:

"We understand that the Previous Trustee also took the view that access to copies of the earlier trust deeds was not available under subsection 1017C(2). For the reasoning set out above, access to copies of earlier trust deeds is unlikely to be available under subsection 1017C(5) and associated regulations."

There are no such thing as "earlier trust deeds"

There is an original Trust Deed that constituted and established the trust (fund) and if an amending power was reserved in the original Trust Deed then the provisions of the original Trust Deed may be amended to improve benefit entitlements, but not decrease or eliminate benefits.

The original Trust Deed and all VALID amending Deeds must be read as "one legal document" and a trustee should seek judicial advice if any doubt arises in reading these deeds a "one legal document".

If a trustee has been engaged in a "Deed Substitution Fraud" and paying much lower benefits than prescribed in the original Trust Deed and VALID amending Deeds, with a later dated fraudulent document represent as the "Trust Deed", then the trustee would not want fund members and beneficiaries having access to the genuine deeds that would confirm a major fraud.

Mr Fitzpatrick in his letter dated 3 March 2014 to Senator John Williams essentially confirmed that members and beneficiaries of this particular Defined Benefit fund had been the victims of a "Deed Substitution Fraud", where widows of former members get no benefits and members only get a benefit worth around 20% of their lawful entitlement based on average life expectancy.

If ASIC had enforced subsection 1017C(5) of the Corporations Act 2001 with a direction to PFS Nominees Pty Ltd (purported trustee from 20 January 2014 to 30 June 2016) and to NULIS Nominees (Aust) Ltd (purported trustee from 1 July 2016 to the present) to comply with subsection 1017C(5), then the "Deed Substitution Fraud" would have been quickly exposed.

Royal Commissioner Hayne stated the following in his Final Report in section 3.1:

"ASIC is charged with enforcing financial services laws on behalf of the community. One of ASIC's objectives is to 'Take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth'. The community is entitled to expect and does expect, that financial services entities will comply with those laws."

In his letter dated 3 March 2014, Mr Fitzpatrick made no mention to Senator Williams that the maximum penalty for a contravention of Subsection 1017C(5) of the Corporations Act 2001 is two years imprisonment

The document I seek is a copy of any correspondence from Gerard Fitzpatrick (or other ASIC Officer) to Senator Williams further clarifying the 3 March 2014 letter which itself had clarified the 11 February 2014 letter.

The search period is from 3 March 2014 to the present.

Yours faithfully,

P.C. Sweeney"

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

Information considered:

In reaching my decision, I have considered the following:

- the FOI Act, in particular s 24A;
- the Australian Information Commissioner's FOI Guidelines issued under s 93A of the FOI Act (**FOI Guidelines**);
- the terms of your request; and
- the details of the searches conducted by ASIC staff.

Decision and reasons for the decision

Section 24A of the FOI Act

Section 24A of the FOI Act, provides:

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
 - (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.

The FOI Guidelines relevantly provide:

Agencies and ministers should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:

- *the subject matter of the documents;*
- *the current and past file management systems and the practice of destruction or removal of documents;*
- *the record management systems in place;*
- *the individuals within an agency or minister's office who may be able to assist with the location of documents, and*
- *the age of the documents.¹*

Enquiries were made with the Superannuation and Life Insurance team for documents in response to your request. Searches for correspondence/emails were conducted for "Senator Williams". The team has advised that no documents falling within the terms of your request were identified.

My decision is therefore to refuse your request for access to documents under section 24A of the FOI Act on the basis that all reasonable steps have been taken to find the document(s) that fall within the scope of your request. I am satisfied that the document(s) do not exist. I have therefore decided to refuse your request pursuant to section 24A(1)(b)(ii) of the FOI Act.

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 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.
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.

¹ FOI Guidelines [3.89].

Right to complain

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 set out above.

If you have any questions or wish to discuss, please contact me at krystal.fung@asic.gov.au.

Yours sincerely,

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

Krystal Fung
(Authorised decision maker pursuant to subsection 23(1) of the FOI Act)
For the Australian Securities and Investments Commission