



ASIC
Australian Securities &
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**Australian Securities
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16 October 2013

Dear Mr Sweeney

Freedom of Information Request No. 196-2023

Notice of Decision

I refer to your request dated 14 September 2013 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 as follows:

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

Committee decided to receive late submissions until 10 January 2014 and the Committees's final report was tabled on 26 June 2014.

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 fund members had been denied access to the Deeds of the fund by a purported trustee and so were unable to provide the Senate Committee with evidence in support of their submissions.

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

The following two paragraphs are extracts from the response from ASIC to the Senate Committee:

“In this regard, the Reporters have alleged that the trust deed has been illegitimately altered since the Fund's inception in 1913 to the detriment of members' benefits. As a result of this conduct, the Reporters consider that changes to the trust deed were not legally effective, meaning that the trust deed which was used to calculate their payouts is not effective.

As a result, a large number of the complaints received by ASIC concerning the Fund have been in relation to the Reporters' attempts to access trust deeds for the Fund dating back to its inception. The Reporters are of the view that the trustee is obliged to provide access to these documents under section 1017C of the Act.”

The fund members (Reporters) should have been protected by the provisions of the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012 was given Royal Assent on 3 December 2012 and was supposed to come into operation on 1 July 2013.

The “Transparency Measures” required trustees to make a copy of the original Trust Deed that constituted and established each Defined Benefit fund that they administer along with copies of all amending Deeds available for download on the trustee’s website.

If this Act had come into operation on 1 July 2013, then members would have had six months to lodge supporting submissions to the Senate Committee with copies of key Deeds or the fund.

However, under Class Order [CO 13/830] RSE licensees of registrable superannuation entities, ASIC delayed the commencement date of the requirements until 1 July 2014.

This was after the date that the Committee published its final report on 26 June 2014.

Trustees of Regulated Superannuation Funds should always have the original Trust Deed and amending Deeds held in a secure location, with copies of these Deeds ready to hand in electronic form (eg PDF files) for day-to-day administrative purposes.

It should have therefore been a relatively easy task to have these electric copies ready to be available for down load from the date of Royal Assent on 2 December 2012 until 1 July 2013 which was the nominated date for these important "Transparency Measures" to come into operation on 1 July 2013.

The document(s) I seek is a copy of any internal or external emails or correspondence or copy of working files that would provide a reason(s) or justification for delaying the commencing dated for a full year until 1 July 2014 of these important "Transparency Measures" that would have allow important evidence to be provided to the Senate Committee.

The search period is from 3 December 2012 to 30 June 2013.'

Document searches

Relevant ASIC staff undertook a search during the period 15 to 22 September 2023 in ASIC's databases such as relevant areas of LotusNotes, Microsoft Outlook, SharePoint, and local drives. The team searched by filtering documents in relevant folders by the date range in your request.

Scope of your request

I have understood your request to be for internal and external correspondences and internal file notes that contain ASIC's formal and official reasons for issuing ASIC Class Order [13/830] (**Class Order**) and that relate to the extension of the date required for disclosure obligation of trustees. You are seeking documents created from 3 December 2012 to 30 June 2013.

Decision and Reasons for the Decision

I am the authorised decision maker pursuant to section 23 of the FOI Act. This letter gives notice of my decision.

I have identified **3** documents that fall within the terms of your request. These documents are listed in the schedule of documents **attached** to this letter.

I advise that I have decided to provide access in full to document 1 and partial release of documents 2 and 3.

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 22, 47C, 47E(d), 47F of the FOI Act); and
- the guidelines issued by the Office of the Australian Information Commissioner (**OAIC**) under section 93A of the FOI Act (**FOI Guidelines**)

Documents subject to deliberative processes (Section 47C)

Document 2

I find the document contains material that is deliberative matter and therefore falls within the exemption set out in section 47C of the FOI Act.

Section 47C(1) sets out the following:

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

Paragraph 6.58 of the FOI Guidelines defines a deliberative process as involving the exercise of judgement in developing and making a selection from different options. It is the act of evaluating and weighing up considerations for a deliberative process involved in the functions of an agency.

Document 2 contains an ASIC officer's discussion and analysis of the Class Order. The document clearly contains opinions, recommendations, and exercises of judgment and considerations by an ASIC officer. These are deliberations that form part of the following deliberative process as to whether ASIC should issue the Class Order. The material is not purely factual in nature and is not operational information.

Accordingly, I find the document is conditionally exempt under section 47C(1) as it contains deliberative material. As this is a conditional exemption, a consideration of the public interest test in relation to this document is discussed further below.

Documents subject to operations of agencies (Section 47E(d))

Document 2

These documents contain information which is conditionally exempt under section 47E(d) of the FOI Act.

Section 47E(d) sets out the following:

'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'.

The release of the document would discourage individuals from discussing these matters in-depth if the discussion was released to the public. The release would cause detriment to ASIC's future ability to assess the directions it should take in relation to class orders and therefore undermine ASIC's ability to assess matters to determine the most appropriate course of action.

Accordingly, I find that the document is conditionally exempt under section 47E(d). As this is a conditional exemption, a consideration of the public interest test in relation to these documents is discussed below.

Documents subject to personal privacy (Section 47F)

Material in the document has been removed under section 47F of the FOI Act which relevantly 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).'

"Personal information" is defined in the FOI Act by reference to section 6 of the *Privacy Act 1988* as:

'information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) Whether the information or opinion is true or not; and*
- (b) Whether the information or opinion is recorded in material form or not.'*

Section 47F(2) sets out factors that must be considered when determining if disclosure would be unreasonable. These factors are as follows:

1. the extent to which the information is well known;
2. 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;
3. the availability of the information from publicly accessible sources; and
4. any other matters that ASIC considers relevant.

The material exempted under s 47F consists of the name of an employee from the Department of the Prime Minister and Cabinet (**PM&C**) who has been engaged in communications with ASIC with respect to the Class Order.

I am satisfied that it would be unreasonable to disclose this personal information for the following reasons:

- the information is not well known or available from publicly accessible sources;
- the individual concerned is not publicly known to be involved with the material that is the subject of the document;
- disclosure of the information could reasonably be expected to cause detriment to the persons to whom the information relates, particularly given they have objected to disclosure; and
- the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act

I find therefore that the identified material is conditionally exempt under s47F of the FOI Act.

Conditional exemptions are subject to the public interest test which is considered below.

Public Interest Test

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 material in the documents would, on balance, be contrary to the public interest. In particular, I have had regard to 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

Of the above factors I find factor 1 to be relevant to the identified documents. I have had regard to the fact that 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. The release of the documents would provide greater transparency in relation to the issuing of the Class Order and ASIC's reasoning behind it.

This must be balanced with the factors against disclosure. The FOI Act does not specify any factors against disclosure in the public interest, however, the FOI Guidelines at 6.22 include a non-exhaustive list of thirteen such factors. The factors relevant to this decision are that disclosure could reasonably be expected to impede the flow of information to ASIC and prejudice its ability to obtain similar, confidential information. In relation to document 3, disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy.¹

Determining whether disclosure would be contrary to the public interest requires that I weigh the relevant factors to determine where the public interest lies.

I have not taken into account the factors outlined in s11B(4) of the FOI Act as factors that are irrelevant in deciding whether access to the documents would be contrary to the public interest.

In my view, the factors against disclosure outweigh those that are in favour of disclosure. I give greater weight to ensuring that ASIC does not prejudice law enforcement and does not prejudice the protection of an individual's right to privacy.

Accordingly, I am satisfied that these documents are exempt under the FOI Act.

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 and irrelevant 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

¹ FOI Guidelines [6.22(a)]

- 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 2 and 3 with the exempt matter deleted. I also have also removed material from document 3 that does not fall within the scope of your request i.e., does not provide formal reasons for the issuing of the Class Order.

Review rights

If 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 foidr@oaic.gov.au or by telephone on 1300 363 992.

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, please contact me on jessica.zhang@asic.gov.au.

Yours sincerely

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

Attachments

1. Schedule of Documents

SCHEDULE OF DOCUMENTS

No.	Description of document	Date	Decision on access	Relevant section
1	Class Order 13/830 – Explanatory Statement	-	Release	-
2	Regulatory Policy Group submission - Proposed Class Order to defer the commencement of SIS regs 2.37 and 2.38 (executive remuneration and online disclosure requirements) from 1 July 2013 to 31 October 2013	-	Partial release	47C, 47E(d)
3	Email from ASIC to the Office of Best Practice Regulation and an internal email	26/2/2013	Partial release	22, 47F