

Australian Prudential Regulation Authority

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Sydney NSW 2001



Ref no. 15/002716

30 September 2015

Phillip Sweeney

By email: foi+request-1201-a54143d3@righttoknow.org.au

Dear Phillip Sweeney

FOI Application dated 31 August 2015

I refer to your request dated 31 August 2015 (FOI request), which was acknowledged by APRA on 14 September.

In your request you sought access under the *Freedom of Information Act 1982* (Cth) to the following documents:

“The first document the applicant seeks is a copy of the most recent notice in writing provided by any licensed Trustee to APRA pursuant to SIS Regulation 11.08 confirming the transfer of members to any fund.

The transfer may or may not culminate in the winding up of the fund, depending whether all or only some of members and their benefits are transferred.

The second document the applicant seeks is a copy of the most recent notice in writing provided by any licensed Trustee pursuant to SIS Regulation 11.08 confirming the purported wind-up of the fund after the transfer of members to another fund.

This notice in writing must be provided before the winding up is commenced”.

Explanation

All reasonable steps have been taken to find documents sought in your FOI request. Attached is the notice of decision with statement of reasons. The statement of reasons also sets out your rights of review.

Please contact me on 02 9210 3100 or foi@apra.gov.au if you have any queries.

Yours sincerely

Ben Carruthers
FOI Officer
Tel: 02 9210 3000
Fax: 02 9210 3430
foi@apra.gov.au

**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:** Phillip Sweeney
- Decision-maker:** Ben Carruthers, an authorised officer of the Australian Prudential Regulation Authority (APRA) for the purposes of subsection 23(1) of the FOI Act
- Relevant documents:** The most recent notices in writing provided by any licensed Trustee to APRA pursuant to SIS Regulation 11.08: (1) confirming the transfer of members to any fund; and (2) Confirming the purported wind-up of the fund after the transfer of members to another fund.
- My decision:** *Refuse access*, under section 38 of the FOI Act and section 56 of the APRA Act, to the documents specified in the Applicant's request.

MATERIAL FACTS

1. By email dated 31 August 2015 and received by APRA on 31 August 2015, the Applicant sought copies of the most recent notices in writing provided by any licensed Trustee to APRA pursuant to SIS Regulation 11.08:

"The first document the applicant seeks is a copy of the most recent notice in writing provided by by any licensed Trustee to APRA pursuant to SIS Regulation 11.08 confirming the transfer of members to any fund.

The transfer may or may not culminate in the winding up of the fund, depending whether all or only some of members and their benefits are transferred.

The second document the applicant seeks is a copy of the most recent notice in writing provided by any licensed Trustee pursuant to SIS Regulation 11.08 confirming the purported wind-up of the fund after the transfer of members to another fund.

This notice in writing must be provided before the winding up is commenced".

2. On 14 September 2015 APRA acknowledged the request.

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 on 31 August 2015;
 - b) acknowledgment email with attached letter from FOI Officer to the Applicant dated 14 September 2015;
 - c) consultation with Senior Manager, Coordination on 28 and 29 September 2015;
 - d) consultation with Senior Business Analyst on 29 September 2015;

- e) consultation with Manager, Supervision on 29 September 2015;
- f) relevant sections of the *Superannuation Industry (Supervision) Act 1993 (SIS Act)*;
- g) relevant Regulations contained in the *Superannuation Industry (Supervision) Regulations 1994 (SIS Regs)*;
- h) relevant sections of the *Australian Prudential Regulation Authority Act 1998 (APRA Act)*;
- i) relevant sections of the *Freedom of Information Act 1982 (FOI Act)*; and
- j) Guidelines issued by the Office of the Australian Information Commissioner to date.

REASONS FOR DECISION

4. Your request seeks the most recent notices in writing provided by any licensed Trustee to APRA pursuant to SIS Regulation 11.08:
 - a) confirming the transfer of members to any fund; and
 - b) Confirming the purported wind-up of the fund after the transfer of members to another fund.
5. Based on internal document searches and the advice of the relevant APRA staff, I am satisfied that the documents that you have requested are protected documents and/or contain protected information, as those terms are defined in section 56 of the APRA Act. Accordingly, the documents are exempt from release under section 38 of the FOI Act.

EXPLANATION OF LEGISLATION

6. 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) under section 38 of the FOI Act, a document is exempt if disclosure is prohibited under a provision of an enactment and section 38 expressly applies to that provision;
 - b) 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;
 - c) under section 56(2) of the APRA Act it is an offence to directly or indirectly disclose protected documents and/or protected information unless a specified exemption applies. This offence provision is binding on me as an APRA staff member. The offence is punishable by up to two years imprisonment;
 - d) a 'protected document' is defined in section 56(1) of the APRA Act to include documents given or produced under or for the purposes of a prudential regulation framework law, and containing information relating to the affairs of a financial sector entity. Regulation 11.08 has been enacted in accordance with section 31 of the SIS Act, which is a prudential regulation framework

law. The trustee who has provided APRA the 'most recent notice' is a financial sector entity and is regulated by APRA. Documents provided to APRA by a regulated entity in accordance with Regulation 11.08 is protected, unless the documents are otherwise publicly available;

- e) 'protected information' is defined in section 56(1) of the APRA Act to include information disclosed or obtained under or for the purposes of a prudential regulation framework law, and relating to the affairs of a financial sector entity. Information provided to APRA by a regulated entity in accordance with Regulation 11.08 is protected, unless the information is otherwise publicly available; and
 - f) Documents relevant to the request are not otherwise publicly available.
7. On the basis of paragraph 6 above I am satisfied that the documents relevant to the request are protected documents and/or contain protected information 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.
8. Extracts of section 56 of the APRA Act and section 38 of the FOI Act are attached.

ADVICE TO APPLICANT AS TO RIGHTS OF REVIEW

Application for review by Information Commissioner

9. 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.
10. 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.
11. 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

12. 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.

13. The AAT is an independent review body with the power to make a fresh decision. Your application to the AAT should be accompanied by a filing fee of \$777, 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

14. 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 an independent investigation of your complaint.
15. 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



Ben Carruthers
Senior Manager - Legal
Australian Prudential Regulation Authority

Date: 30.9.15

FREEDOM OF INFORMATION ACT 1982 - SECT 38

Documents to which secrecy provisions of enactments apply

(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.

Secrecy--general obligations

(1) In this section:

"body regulated by APRA " includes a body that has at any time been a body regulated by APRA.

"court " includes a tribunal, authority or person having the power to require the production of documents or the answering of questions.

"financial sector entity " has the same meaning as in the [Financial Sector \(Collection of Data\) Act 2001](#) .

"officer " means:

- (a) an APRA member; or
- (b) an APRA staff member; or
- (c) any other person who, because of his or her employment, or in the course of that employment:

(i) has acquired protected information; or

(ii) has had access to protected documents;

other than an employee of the body to which the information or document relates.

"personal information " has the same meaning as in the [Privacy Act 1988](#) .

"produce " includes permit access to.

"protected document " means a document given or produced (whether before or after the commencement of this section) under, or for the purposes of, a prudential regulation framework law and containing information relating to the affairs of:

- (a) a financial sector entity; or
- (b) a body corporate (including a body corporate that has ceased to exist) that has at any time been, or is, related (within the meaning of the [Corporations Act 2001](#)) to a body regulated by APRA or to a registered entity; or
- (c) a person who has been, is, or proposes to be, a customer of a body regulated by APRA or of a registered entity;; or
- (ca) a person in relation to whom information is, or was, required to be given under a reporting standard made in accordance with [subsection 13\(4A\)](#) of the [Financial Sector \(Collection of Data\) Act 2001](#) ;
other than:
 - (d) a document containing information that has already been lawfully made available to the public from other sources; or
 - (e) a document given or produced under, or for the purposes of, a provision of the [Superannuation Industry \(Supervision\) Act 1993](#) :

(i) administered by the Commissioner of Taxation; or

(ii) being applied for the purposes of the administration of a provision administered by the Commissioner of Taxation.

It also includes a document that is given to APRA under Part 7.5A of the [Corporations Act 2001](#) , other than a document containing information that has already been lawfully made available to the public from other sources.

"protected information " means information disclosed or obtained (whether before or after the commencement of this section) under, or for the purposes of, a prudential regulation framework law and relating to the affairs of:

- (a) a financial sector entity; or
- (b) a body corporate (including a body corporate that has ceased to exist) that has at any time been, or is, related (within the meaning of the [Corporations Act 2001](#)) to a body regulated by APRA or to a registered entity; or
- (c) a person who has been, is, or proposes to be, a customer of a body regulated by APRA or of a registered entity;; or
- (ca) a person in relation to whom information is, or was, required to be given under a reporting standard made in accordance with [subsection 13\(4A\)](#) of the [Financial Sector \(Collection of Data\) Act 2001](#) ;
other than:
 - (d) information that has already been lawfully made available to the public from other sources; or
 - (e) information given or produced under, or for the purposes of, a provision of the [Superannuation Industry \(Supervision\) Act 1993](#) :

(i) administered by the Commissioner of Taxation; or

(ii) being applied for the purposes of the administration of a provision administered by the Commissioner of Taxation.

It also includes information that is given to APRA under Part 7.5A of the [Corporations Act 2001](#) , other than information that has already been lawfully made available to the public from other sources.

"registered entity " means a corporation that is, or has at any time been, a registered entity within the meaning of the [Financial Sector \(Collection of Data\) Act 2001](#) .

(2) A person who is or has been an officer is guilty of an offence if:

(a) the person directly or indirectly:

(i) discloses information acquired in the course of his or her duties as an officer to any person or to a court; or

(ii) produces a document to any person or to a court; and

(b) the information is protected information, or the document is a protected document; and

(c) the disclosure or production is not in accordance with subsection (3), (4), (5), (5AA), (5A), (5B), (5C), (6), (7), (7A), (7B) or (7C).

Penalty: Imprisonment for 2 years.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(3) It is not an offence if the disclosure of protected information or the production of a protected document by a person is for the purposes of a prudential regulation framework law.

Note: A defendant bears an evidential burden in relation to the matters in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

(4) It is not an offence if the disclosure of protected information or the production of a protected document by a person:

- (a) is by an employee of the person to whose affairs the information or document relates; or
- (b) occurs after the person to whose affairs the information or document relates has agreed in writing to the disclosure or production.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

(5) It is not an offence if the disclosure of protected information or the production of a protected document by a person:

- (a) occurs when the person is satisfied that the disclosure of the information, or the production of the document, will assist a financial sector supervisory agency, or any other agency (including foreign agencies) specified in the regulations, to perform its functions or exercise its powers and the disclosure or production is to that agency; or
- (b) is to another person and is approved by APRA by instrument in writing.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5) (see subsection 13.3(3) of the *Criminal Code*).

(5AA) It is not an offence if the disclosure of protected information or the production of a protected document is made:

- (a) by an officer of an agency to which the information or document has been disclosed or produced under paragraph (5)(a); and
- (b) for the same purpose as the information or document was so disclosed or produced to that agency.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5AA) (see subsection 13.3(3) of the *Criminal Code*).

(5A) It is not an offence if the production by a person of a document that was given to APRA under [section 9](#) or [13](#) of the *Financial Sector (Collection of Data) Act 2001* is to the Australian Statistician for the purposes of the *Census and Statistics Act 1905* .

Note: A defendant bears an evidential burden in relation to matters in subsection (5A) (see subsection 13.3(3) of the *Criminal Code*).

(5B) It is not an offence if the production by a person of a document that was given to APRA under [section 9](#) or [13](#) of the *Financial Sector (Collection of Data) Act 2001* is to:

- (a) the Reserve Bank of Australia; or
- (b) another prescribed authority.

Note: A defendant bears an evidential burden in relation to matters in subsection (5B) (see subsection 13.3(3) of the *Criminal Code*).

(5C) If:

(a) a document is a reporting document given to APRA under [section 13](#) of the *Financial Sector (Collection of Data) Act 2001*; and

(b) either:

(i) a determination has been made under [section 57](#) that the document does not, or documents of that kind do not, contain confidential information; or

(ii) a determination has been made under [section 57](#) that a specified part of the document, or of documents of that kind, does not contain confidential information;

it is not an offence to disclose the document or that part of the document, or any information contained in the document or that part of the document, to any person (including by making the document, the part of the document or the information available on APRA's website).

(6) It is not an offence if the disclosure of protected information or the production of a protected document is to:

- (a) an APRA member; or
- (b) an APRA staff member;

for the purposes of the performance of APRA's functions, or the exercise of APRA's powers, under a law of the Commonwealth or of a State or a Territory.

Note: A defendant bears an evidential burden in relation to the matters in subsection (6) (see subsection 13.3(3) of the *Criminal Code*).

(6A) It is not an offence if the disclosure of protected information or the production of a protected document is to:

- (a) an auditor who has provided, or is providing, professional services to a general insurer, authorised NOHC or a subsidiary of a general insurer or authorised NOHC; or
- (b) an actuary who has provided, or is providing, professional services to a general insurer, authorised NOHC or a subsidiary of a general insurer or authorised NOHC;

and the disclosure is for the purposes of the performance of APRA's functions, or the exercise of APRA's powers, under a law of the Commonwealth or of a State or Territory.

(7) It is not an offence if the information, or the information contained in the document, as the case may be, is in the form of a summary or collection of information that is prepared so that information relating to any particular person cannot be found out from it.

Note: A defendant bears an evidential burden in relation to the matters in subsection (7) (see subsection 13.3(3) of the *Criminal Code*).

(7A) It is not an offence if the information, or the information contained in the document, as the case may be, is all or any of the following:

- (a) the names of bodies that are regulated by APRA;
- (b) the addresses at which bodies referred to in paragraph (a) conduct business;

- (c) any other information that is reasonably necessary to enable members of the public to contact persons who perform functions in relation to bodies referred to in paragraph (a).

Note: A defendant bears an evidential burden in relation to the matters in subsection (7A) (see subsection 13.3(3) of the *Criminal Code*).

(7B) It is not an offence if the information, or the information contained in the document, as the case may be, is:

- (a) a statement of APRA's opinion as to whether or not a body regulated by APRA is complying, or was complying at a particular time, with a particular provision of a prudential regulation framework law; or

(b) a description of:

(i) court proceedings in relation to a breach or suspected breach by a person of a provision of a prudential regulation framework law; or

(ii) activity engaged in, or proposed to be engaged in, by APRA in relation to such a breach or suspected breach; or

(c) a description of action under a prudential regulation framework law that APRA has taken or is proposing to take in relation to:

(i) a body regulated by APRA; or

(ii) an individual who holds or has held a position with or in relation to such a body.

Note: A defendant bears an evidential burden in relation to the matters in subsection (7B) (see subsection 13.3(3) of the *Criminal Code*).

(7C) If information referred to in subsection (7A) or paragraph (7B)(a) that relates to a body that is, or has at any time been, regulated by APRA under the [Superannuation Industry \(Supervision\) Act 1993](#) is disclosed to the Registrar of the Australian Business Register established under [section 24](#) of the [A New Tax System \(Australian Business Number\) Act 1999](#), the Registrar may enter the information in that Register.

Note: A defendant bears an evidential burden in relation to the matters in subsection (7C) (see subsection 13.3(3) of the *Criminal Code*).

(8) A person who is, or has been, an officer cannot be required to disclose to a court any protected information, or to produce in a court a protected document, except when it is necessary to do so for the purposes of a prudential regulation framework law.

(9) If a person discloses information or produces a document under this section to another person, the first person may, at the time of the disclosure, impose conditions to be complied with in relation to the information disclosed or the document produced.

(10) A person is guilty of an offence if the person fails to comply with a condition imposed under subsection (9).

Penalty: Imprisonment for 2 years.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(11) A document that:

(a) is a protected document; or

(b) contains protected information;

is an exempt document for the purposes of [section 38](#) of the *Freedom of Information Act 1982* .

Note: For additional rules about personal information, see the *Privacy Act 1988* .

(12) A disclosure of personal information is taken to be authorised by this Act for the purposes of paragraph 6.2(b) of Australian Privacy Principle 6 if:

(a) the information is protected information and the disclosure is made in accordance with any of subsections (4), (5), (5AA), (6), (7A), (7B) and (7C); or

(b) the information is contained in a protected document and the disclosure is made by the production of the document in accordance with any of those subsections.

