



29 November 2011

Information Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001

Dear Information Commissioner,

APPLICATION TO DECLARE A PERSON A VEXATIOUS APPLICANT

APRA makes an application to the Information Commissioner (IC) to declare the following person to be a vexatious applicant under section 89K(1) of the *Freedom of Information Act 1982* ('FOI Act'):

Applicant	Phillip Sweeney
Applicant's contact details	12 Highland Way, Highton 3216 VIC

A. Background

1. APRA was established on 1 July 1998 under the *Australian Prudential Regulation Authority Act 1998* (Cth) as the national prudential regulator in Australia. APRA oversees banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, friendly societies and most members of the superannuation industry.
2. APRA is funded primarily from levies collected from supervised institutions, with a contribution from interest earnings, fees for services and miscellaneous cost offsets. APRA's total permanent staffing at end-June 2011 was 592.

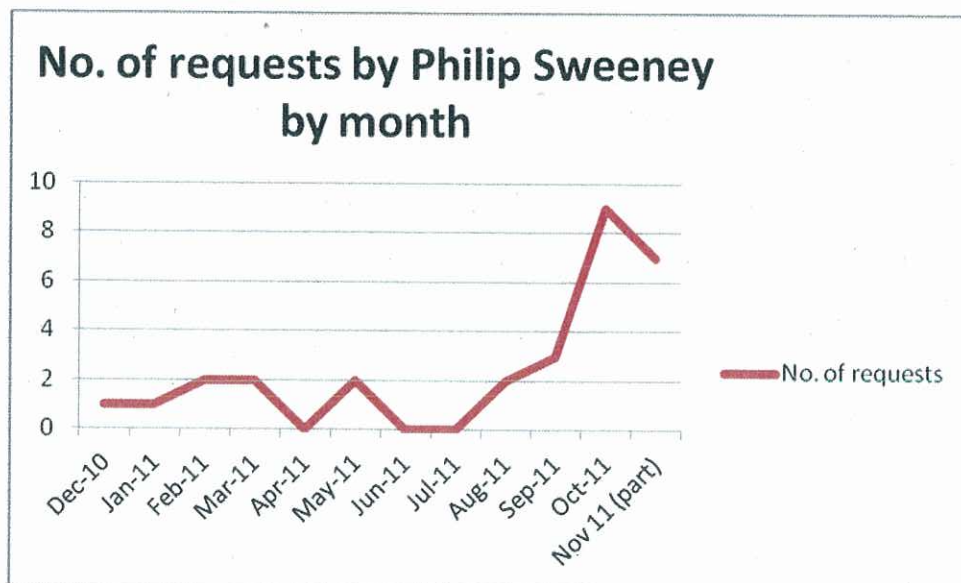
B. APRA's resource approach for access requests under the FOI Act

3. The number of requests received by APRA for access to documents it holds can generally be regarded as low when compared to other larger agencies. For each statutory reporting period since 2007/8, the highest number of requests for access to documents held by APRA has been 20 in 2008/09.
4. In relation to the other reporting years, APRA dealt with 13 applications for access to documents in 2007/08, 20 applications for access to documents and three applications for internal review in 2008/09, 12 applications for access to documents and one application for internal review in 2009/10 and 18 applications for access to documents under the FOI Act and one application for internal review in 2010/11.
5. The comparatively low number of access request can be attributed largely to the nature of documents and information held by APRA and the statutory protection afforded that information and those documents. APRA holds documents relating to the entities that it supervises. They are overwhelmingly of a commercially sensitive nature and this is recognised and reflected in the secrecy provision at section 56 of the *Australian Prudential Regulation Authority Act 1998* (APRA Act).
6. APRA has one dedicated FOI officer who is a lawyer in the Advice and Drafting Section of APRA's Legal Group. That person's duties encompass more than the handling of FOI requests and extend to the general provision of legal advice. Based on historical

experience and projections as to likely levels of access applications, the reliance upon a single officer with part-time responsibility for FOI has, and continues to be, appropriate for an agency of APRA's size and nature.

C. The applicant's access actions

7. From 1 November 2010 until 22 November 2011 APRA received 29 initial access requests from the applicant. APRA has already spent a total of 260 hours processing the applicant's initial access requests, and will be required to spend more time in finalising the requests in hand. By comparison, APRA received a total of 17 initial access requests from all other persons for the same time period, and spent 356 hours to date.
8. The below chart shows the number of requests made by the applicant each month since 1 November 2011. Notably, there has been a significant increase in the number of requests since September 2011.
9. Seventeen of the applicant's 29 initial access requests were for documents relating to one APRA-regulated entity (CCSL Limited). The applicant's other 12 access requests were in relation to a diverse range of documents. For the 17 access requests that are respect of the one entity, the applicant sought copies of documents that would ordinarily be protected under APRA's secrecy obligations (section 56 of the APRA Act) unless the entity consented for the information to be disclosed to the applicant:
 - a. 6 requests for documents relating to the entity's business (financial statements, auditor's report, trust deeds, reporting forms)
 - b. 6 requests for correspondence or communications between APRA and the entity
 - c. 2 requests for documents issued by APRA to the entity (RSE licence and conditions, variations)
 - d. 3 requests for correspondence between APRA and other parties where the subject matter was the entity



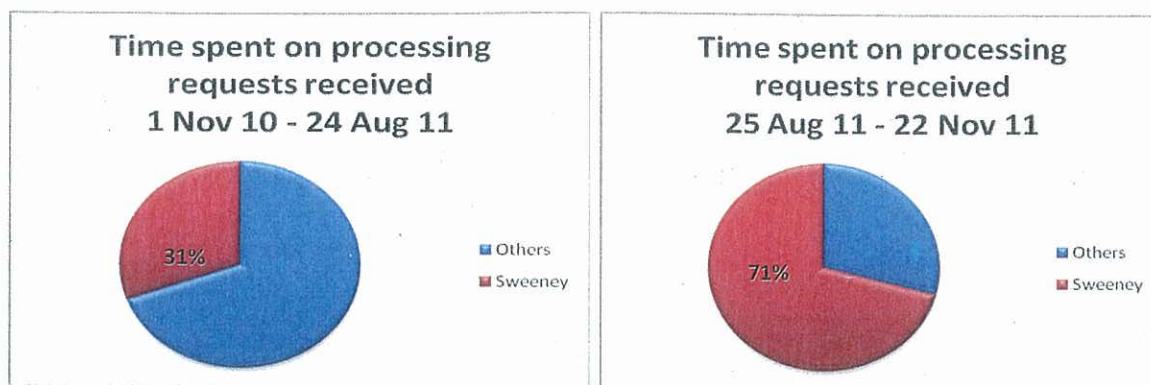
10. Please find at Tab 1 of this application a copy of the 29 initial access requests received from the applicant from 1 November 2010 until 22 November 2011.

D. Abuse of the process for an access action

11. Considering APRA's total permanent staffing at end-June 2011 was 592, APRA has aimed to balance the rights of the applicant to access documents held by APRA against its statutory purposes for which it was established. It is the contention of APRA that the applicant's repeated access actions meet the abuse of the process threshold under section 89K(1), as the access actions are unreasonably interfering with APRA's operations.
12. APRA's operations are being substantially and unreasonably interfered with as a result of it having to deal with the applicant's 29 initial access requests made directly to APRA, 2 initial access requests made to other agencies and transferred to APRA, and 2 internal review requests from the applicant. The limited resources available to APRA to prudentially supervise banks, insurance and reinsurance companies, superannuation funds, credit unions, building societies and friendly societies, have been obstructed from their regular functions and this has unreasonably interfered with its operations.
13. In assessing whether the receipt of access requests generally would have an unreasonable interference on its operations, APRA bases the allocation of its limited resources for FOI on its past number of access requests [i.e. no more than 20 per reporting year]. Given the size of APRA and the extent of the resources available for it to deal with FOI, APRA's allocation of resources to deal with FOI is more than reasonable in the circumstances.
14. In APRA's view, the applicant's frequent and repeated access actions are an unreasonable interference with the day-to-day operations of APRA's frontline supervisors for CCSL Limited. The frontline supervisors for CCSL Limited have been required to search for documents and provide other assistance in the processing of the applicant's 17 initial access requests relating to this one entity. The applicant's access actions are interfering with the critical role of frontline supervisors in ensuring the effective prudential regulation of this and other entities.
15. These 17 initial access requests of the applicant also imposed an administrative burden on the entity, due to the consultation carried out in relation to 5 access requests already decided by APRA. It is relevant that 8 of the 17 requests currently being processed by APRA will likely require consultation with the entity, if documents are located by APRA.
16. The unreasonable interference with the operations of APRA's frontline supervisory staff is in addition to interference with the operations of APRA's lawyers who are involved in processing FOI requests. As mentioned in paragraph 6, APRA has one dedicated FOI officer who is a lawyer in the Advice and Drafting Section of APRA's Legal Group. That person's duties encompass more than the handling of FOI requests and extend to the general provision of legal advice.
17. As a result of the repeated high number of access actions from the applicant, the FOI Officer has extremely limited capacity to carry out her ordinary duties as a lawyer. This is notwithstanding that APRA has had to assign FOI applications from the applicant to 6 other lawyers within the team to enable them to be processed, with the FOI officer taking on a co-ordinating role. This intervention with the day-to-day duties of the solicitors, together with the imposition placed on the operations of the APRA Enforcement Team and Secretary Group with respect to searching and making decisions on the access actions, has resulted in an unreasonable interference with APRA's operations.

▪ *Applicant's access actions received since 25 August 2011*

18. To further highlight how the applicant's access actions are at presently unreasonably interfering with APRA's operations the IC should be aware of the high number of access actions received from the applicant since 25 August 2011. Please find at **Tab 2** a representation showing the receipt of access actions for the calendar months August 2011 - November 2011.



19. As illustrated in the tables above, the proportion of time that APRA spends on processing the applicant's initial access requests (compared to requests from other persons) has increased dramatically since 25 August 2011. APRA received 22 initial access requests from the applicant since 25 August 2011 (i.e., a 13-week period), and APRA has already spent 125.25 hours on processing 12 of the requests. APRA received 6 requests from all other persons during the same period, which has taken 51.5 hours processing time to date.
20. In contrast, the applicant made 7 initial access requests during the much-longer period from 1 November 2010 to 24 August 2011 (i.e. a 47-week period), which took 134.75 hours processing time. APRA received 11 requests from other persons, which took 304.5 hours to process. This over-allocation of APRA's limited freedom of information resources to deal with the applicant's access actions clearly demonstrates an unreasonable interference with APRA's operations.
21. Where a person persistently makes access actions in such numbers and of such a nature as the applicant (particularly since 25 August 2011), the operations of APRA (an authority with a total permanent staffing at end-June 2011 of 592) will clearly be interfered with in an unreasonable way. APRA takes the view the IC should examine whether the applicant's repeated exercise of his legal right to access information under the FOI Act is consistent with the objects of the FOI Act and whether this amounts to an abuse of the process.

E. Considerations by APRA before making this application

22. In deciding to make this application APRA has taken into account the substantial increase in access actions since 25 August 2011. Quite simply, APRA is unable to continue to interfere with its day-to-day operations in order to process the applicant's repeated access actions.
23. In addition, there is an indication from the scope of the applicant's recent access actions there may be a pursuit of matters already dealt with under previously decided access actions and also the affairs of the Chair of APRA and APRA staff members. For the information of the IC, at the same time APRA is dealing with the applicant's repeated access actions that are unreasonably interfering with its operations, APRA is in receipt of voluminous correspondence from the applicant. Copies of this correspondence are at Tab 3.
24. APRA considers that it has no improper objectives in making this application, as APRA is not involved in any ongoing grievance with the applicant. APRA asks that the IC exercise his discretion under the FOI Act to relieve APRA of the ongoing interference with its operations as a result of the applicant's repeated access actions.

F. APRA's submissions in respect of the scope of the vexatious applicant declaration

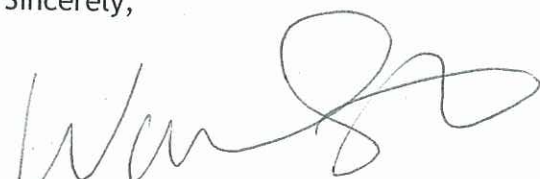
25. APRA aims, as far as possible, to facilitate and promote the applicant's access to its information promptly and at the lowest reasonable cost to the applicant. Unfortunately, the repeated receipt of the access actions from the applicant has resulted in considerable

strain being placed on APRA's resources and has interfered with its allocation of resources for its ongoing prudential supervisory processes.

26. APRA maintains that the applicant's unreasonable interference with its operations through the repeated access actions is an abuse of the process. Looking to the objects of the FOI Act, APRA takes the view that the action of barring a person from making an access request is not to be taken lightly. Subject to the information being exempt, APRA takes the view that all citizens have the right to information about the operations of APRA.
27. For the reasons outlined in this application, APRA seeks a declaration that the applicant is a vexatious applicant and that the declaration includes a condition that the applicant may not make an access request or internal review application to APRA unless the IC has granted the applicant permission to do so.

Please contact Benjamin Fogwell on 02 9210 3082 or by e-mail benjamin.fogwell@apra.gov.au to discuss any matter raised in this application further.

Sincerely,



Warren Scott
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Supervisory Support Division

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Tabs:

Tab 1 - Copies of the 29 initial access requests received from the applicant from 1 November 2010 until 22 November 2011.

Tab 2 - Representation showing the receipt of access actions for the calendar months August 2011 - November 2011.

Tab 3 - Copies of general correspondence from the applicant to APRA.