

Our ref: **FOI-2018-50105**

10 July 2018

Emailed to: foi+request-4658-db8bb4c2@righttoknow.org.au

Dear Mr Sweeney

Freedom of Information request – Documents do not exist or cannot be located

I refer to your email dated 22 June 2018 in which you requested access to documents under the *Freedom of Information Act 1982* (FOI Act). Your request was framed in the following way:

The document or documents I seek are any documents in the possession of the Ombudsman that would confirm that the Ombudsman has jurisdiction to investigate action by a natural person trustee or a corporate trustee of a regulated superannuation fund.

That is to investigate the conduct or misconduct of a natural person trustee or a corporate trustee of a regulated superannuation fund where the trustee is not a "Department or a Prescribed authority".

More specifically whether the Ombudsman has jurisdiction to investigate allegations of a breach of trust or a breach of fiduciary duty by such a trustee or purported trustee.

This letter constitutes notice of my decision on your request for access. I am authorised to make decisions on behalf of our Office under s 23 of the FOI Act.

Decision

I have searched our electronic records management systems, intranet and internet webpages to locate any documents this Office may hold, that would fall within the scope of your request. However, we have not identified any documents that meet the description of the documents you have requested.

Subsection 24A(1) of the FOI Act permits refusal of a request for access to a document where all reasonable steps have been taken to find the document and the agency or Minister is satisfied that the document does not exist or cannot be found. Having regard to the outcome of our searches for relevant documents, I have decided to refuse your request under subsection 24A(1) of the FOI Act.

In reaching my decision, I have taken the following things into account:

- your correspondence outlining the particulars of your FOI request
- the FOI Act, and
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act.

Review rights

Internal review

If you are dissatisfied with this decision, you are entitled to seek review of this decision.

Under s 54 of the FOI Act, you may apply for an internal review of the decision within 30 days of you receiving this notice. An internal review will be conducted by a different officer from the original decision-maker.

No particular form is required to apply for review although it will assist your case to set out in the application the grounds on which you believe that the original decision should be changed. An application for a review of the decision should be made:

- via email to information.access@ombudsman.gov.au
- by mail to Commonwealth Ombudsman GPO Box 442 Canberra ACT 2601

If you choose to seek an internal review, you will afterward have a right to apply to the Office of the Australian Information Commissioner (OAIC) for a review of the internal review decision.

Review by the Office of the Australian Information Commissioner

Under s 54L of the FOI Act, you may apply to the OAIC to review my decision. An application for review by the OAIC must be made in writing within 60 days of the decision date, either from the date of this letter or the date of our internal review decision letter. Your request can be lodged in one of the following ways:

- online at www.oaic.gov.au/about-us/contact-us
- via email to enquiries@oaic.gov.au
- by overland mail to GPO Box 5218 Sydney NSW 2001
- in person to Level 3, 175 Pitt Street Sydney NSW 2000

More information about the OAIC review process is available at its website:

www.oaic.gov.au/freedom-of-information/foi-review-process

Complaints to the Office of the Australian Information Commissioner

You may complain to the OAIC about action taken by the Ombudsman in relation to your FOI request.

While there is no particular form required to make a complaint to the OAIC, the complaint should be in writing and set out the reasons for why you are dissatisfied with the way your request was processed. It should also identify the Ombudsman's Office as the agency about which you are complaining.

You may lodge your complaint either:

- online at www.oaic.gov.au
- by mail to GPO Box 5218 Sydney NSW 2001
- by email to enquiries@oaic.gov.au.

Contacts

You may contact me via email at information.access@ombudsman.gov.au or via telephone on 1300 362 072.

Yours sincerely

Jessica Phillips
Legal Officer, Legal Team
Commonwealth Ombudsman

ATTACHMENT A – Relevant FOI Act provisions

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
 - (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.

54 Internal review—access refusal decision

- (1) This section applies if an access refusal decision is made in relation to a request to an agency for access to a document, other than a decision made personally by the principal officer of the agency or the responsible Minister.
- (2) The applicant in relation to the request may apply under this Part for the review (the **internal review**) of the access refusal decision.

54L IC reviewable decisions—access refusal decisions

- (1) An application may be made to the Information Commissioner for a review of a decision covered by subsection (2).
- (2) This subsection covers the following decisions:
 - (a) an access refusal decision;
 - (b) a decision made by an agency on internal review of an access refusal decision (see section 54C);
 - (c) a decision refusing to allow a further period for making an application for internal review of an access refusal decision (under section 54B).

Note 1: An application for the review of an access refusal decision made for the purposes of paragraph (a) may be made regardless of whether the decision was the subject of internal review.

Note 2: If no decision is made on internal review within 30 days, a decision to affirm the original access refusal decision is taken to have been made (see section 54D).

- (3) The IC review application may be made by, or on behalf of, the person who made the request to which the decision relates