

**NOTICE OF DECISION MADE UNDER SECTION 23  
OF THE FREEDOM OF INFORMATION ACT 1982 (CTH) (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 section 23(1) of the FOI Act.

**Relevant documents:**

- correspondence between the Treasurer and the Chair of APRA (and any other APRA staff member) in relation to this capability review and the panel members (*Part One*); and
- any document that sets out the Terms of Reference for this capability review or otherwise might limit the scope of inquiry by the panel members (*Part Two*).

**My decision:** *Refuse access*, under section 47E(d) of the FOI Act, to the relevant document because disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of APRA.

*Grant access*, under section 11A(3) of the FOI Act to one document as specified in the attached Schedule.

**MATERIAL FACTS**

1. I refer to your email dated 18 March 2019, in which you sought access under the FOI Act to:

“The Treasurer, the Hon Josh Frydenberg MP has announced a capability review of APRA by a panel consisting of Graeme Samuel, Dianne Smith-Gander and Grant Spencer.

The documents I seek are copies of:

(i) correspondence between the Treasurer (i) and the Chair of APRA (and any other APRA staff member) in relation to this capability review and the panel members;

(ii) Any document that sets out the Terms of Reference for this capability review or otherwise might limit the scope of inquiry by the panel members”

(your **FOI request**).

2. By email dated 18 March 2019, APRA acknowledged receipt of your 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 by APRA on 18 March 2019;
  - b) acknowledgment email from FOI Officer to the Applicant dated 18 March 2019;
  - c) relevant sections of the *Australian Prudential Regulation Authority Act 1998* (Cth) (**APRA Act**);
  - d) relevant sections of the FOI Act; and
  - e) guidelines issued by the Office of the Australian Information Commissioner to date (**FOI Guidelines**).

## REASONS FOR DECISION

### **Part One**

4. APRA has conducted all reasonable searches of its records and identified a document relevant to your FOI request (**relevant part one document**).
5. I have decided to refuse access to the relevant part one document under section 47E(d) of the FOI Act because disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of APRA.

### **Section 47E - documents affecting certain operations of agencies**

6. Section 47E(d) provides that a document is conditionally exempt if its disclosure under the FOI 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.
7. For the exemption to apply, paragraph 6.96 of the FOI Guidelines requires that disclosure of the document would, or could reasonably be expected to 'have a substantial adverse effect on the proper and efficient conduct of the operations of an agency'.
8. Paragraph 5.20 of the FOI guidelines defines 'substantial and adverse effect' as 'an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person'.
9. The document contain correspondence between the Treasurer and APRA staff in relation to matters within APRA's mandate.
10. If this information were disclosed, information flow between Government Ministers and APRA on matters within APRA's mandate may be curtailed. This could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of APRA's operations.
11. In light of the above factors, I find the document to be conditionally exempt under section 47E(d) of the FOI Act.

### **Application of the public interest test**

12. Section 11B of the FOI Act applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest.
13. I have not taken the following factors into account in determining whether access to the document would, on balance, be contrary to the public interest:
  - a. access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
  - b. access to the document could result in any person misinterpreting or misunderstanding the document;
  - c. the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made; and
  - d. access to the document could result in confusion or unnecessary debate.
14. I have reviewed the FOI Guidelines and consider the following public interest factors favouring disclosure of the document would apply, as disclosure would or could reasonably be expected to:
  - a. promote the objects of the FOI Act; and
  - b. inform debate on a matter of public importance.
15. I have considered the following public interest factors against release would apply, as disclosure would or could reasonably be expected to:
  - a. prejudice APRA's ability to correspond with Government Ministers on matters within APRA's mandate; and
  - b. inhibit the ability of APRA to obtain information which informs its approach to prudential regulation and financial system stability in Australia.
16. In my view, on balance, the public interest factors against release outweigh the public interest factors in favour of release of the document.
17. For the reasons outlined above, I am satisfied that the relevant part one document is exempt under section 47E(d) of the FOI Act.

### ***Part Two***

18. APRA has conducted all reasonable searches of its records and identified one document relevant to your FOI request (**relevant part two document**).
19. I have decided to grant access to the relevant part two document specified in the attached Schedule under section 11A(3) of the FOI Act.

### **ADVICE TO APPLICANT AS TO RIGHTS OF REVIEW**

#### ***Application for Internal Review of Decision***

20. Pursuant to section 54 of the FOI Act, you have the right to apply for an internal review of the decision if you disagree with my decision. If you make an application for review,

another officer of APRA will be appointed to conduct a review and make a fresh decision on the merits of the case.

21. Pursuant to section 54B of the FOI Act, you must apply in writing for a review of the decision within 30 days after the day the decision has been notified to you.
22. You do not have to pay any other fees or processing charges for an internal review, except for providing access to further material in the document released as a result of the review (for example, photocopying, inspection, etc).
23. No particular form is required to apply for review although it is desirable (but not essential) to set out in the application the grounds on which you consider that the decision should be reviewed.
24. Application for an internal review of the decision should be addressed to:

*FOI Officer  
Australian Prudential Regulation Authority  
GPO Box 9836, Sydney NSW 2001  
Telephone: (02) 9210 3000  
Facsimile: (02) 9210 3411*

25. If you make an application for internal review and we do not make a decision within 30 days of receiving the application, the agency is deemed to have affirmed the original decision. However, under section 54D of the FOI Act, APRA may apply, in writing to the Information Commissioner for further time to consider the internal review.

#### ***Application for review by Information Commissioner***

26. 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.
27. 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.
28. An application for review by the Information Commissioner should be sent:

- Online: [www.oaic.gov.au](http://www.oaic.gov.au)
- Post: GPO Box 5218, Sydney NSW 2001
- Email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)
- In person:

*Office of the Australian Information Commissioner  
Level 3, 175 Pitt Street  
Sydney NSW 2000*

### ***Application for review by Administrative Appeals Tribunal***

29. 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.
30. The AAT is an independent review body with the power to make a fresh decision. An application to the AAT for a review of an FOI decision does not attract a fee. 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***

31. 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.
32. You may complain to the Commissioner either orally or in writing, by any of the methods outlined above, or by telephone, on 1300 363 992.



Ben Carruthers  
FOI Officer  
Australian Prudential Regulation Authority  
Date: 17 April 2019

## Schedule of documents to be released

Document number	Document title	Date	Link
Document 1	APRA Capability Review - Terms of Reference	13 March 2019	<a href="https://treasury.gov.au/review/apra-capability-review">https://treasury.gov.au/review/apra-capability-review</a>

## **FREEDOM OF INFORMATION ACT 1982 (CTH)**

### **47E Public interest conditional exemptions—certain operations of agencies**

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

- (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;
- (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;
- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

### **11B Public interest exemptions—factors**

#### *Scope*

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

#### *Factors favouring access*

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
  - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
  - (b) inform debate on a matter of public importance;
  - (c) promote effective oversight of public expenditure;
  - (d) allow a person to access his or her own personal information.

#### *Irrelevant factors*

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
  - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
  - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
  - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
  - (d) access to the document could result in confusion or unnecessary debate.

#### *Guidelines*

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

## 11A Access to documents on request

### *Scope*

- (1) This section applies if:
  - (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
    - (i) a document of the agency; or
    - (ii) an official document of the Minister; and
  - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.

- (2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

### *Mandatory access—general rule*

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

### *Exemptions and conditional exemptions*

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

- (5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
  - (a) a conditionally exempt document; and
  - (b) an exempt document:
    - (i) under Division 2 of Part IV (exemptions); or
    - (ii) within the meaning of paragraph (b) or (c) of the definition of *exempt document* in subsection 4(1).