



FOI 20-10

6 September 2019

Phillip Sweeney

By email: [foi+request-5563-8ff33d98@righttoknow.org.au](mailto:foi+request-5563-8ff33d98@righttoknow.org.au)

Dear Mr Sweeney,

**NOTICE OF DECISION MADE UNDER SECTION 23 OF THE FREEDOM OF INFORMATION ACT 1982 (CTH) (FOI ACT) WITH REASONS UNDER SECTION 26**

**Applicant:** Phillip Sweeney

**Decision-maker:** Benjamin Fogwell<sup>1</sup>

**FOI Request:** The documents I seek are copies of file notes or reports prepared by these APRA observers of the proceedings that they attended involving Mr Quinn.

List of Proceedings involving Charles Anthony Quinn

(1) Anthony Charles Quinn v Carlton and United Breweries Limited {796 of 1996}

(2) Quinn v FBG Superannuation Ltd [1998] VSC 173

(3) Quin (sic) v FBG Superannuation Ltd [2000] VSCA 29

(4) Legal Ombudsman v D'Abaco [1999] VLPT

**Decision:** Give access to Document 1 in part based on the following reasons.

Refuse access to Documents 2 and 3 based on the following reasons.

**MATERIAL FACTS**

1. On 7 August 2019 you made the FOI request by email under the FOI Act.
2. On 7 August 2019 APRA acknowledged receipt of the FOI request by email.

**EVIDENCE AND MATERIAL**

3. I relied on the following evidence and material in making my decision:
  - a. the Applicant's request received by APRA on 7 August 2019;

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<sup>1</sup> An authorised officer of the Australian Prudential Regulation Authority (APRA) for the purposes of section 23(1) of the FOI Act.

- b. acknowledgment email from APRA FOI to the Applicant dated 7 August 2019;
- c. correspondence between APRA staff between 26 August 2019 and 28 August 2019;
- d. relevant sections of the *Australian Prudential Regulation Authority Act 1998* (Cth) (APRA Act);
- e. relevant sections of the FOI Act; and
- f. guidelines issued by the Office of the Australian Information Commissioner to date (FOI Guidelines).

## REASONS

4. After conducting all reasonable searches of its records and its predecessor agency records, APRA identified the documents detailed in the Schedule as relevant to the FOI request (the relevant documents).
  5. I give access to Document 1 in part as Document 1 contains information that would be privileged from production in legal proceedings on the ground of legal professional privilege.
  6. I refuse access to Document 2 because Document 2 is an exempt document under section 38 of the FOI Act and would be privileged from production in legal proceedings on the ground of legal professional privilege under section 42 of the FOI Act.
  7. I refuse access to Document 3 because Document 3 would be privileged from production in legal proceedings on the ground of legal professional privilege under section 42 of the FOI Act.
- ***document subject to legal professional privilege***
8. Section 42 of the FOI Act provides APRA may refuse a request for access to a document if the document is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
  9. Paragraph 5.127 and 5.129 of the FOI guidelines requires APRA to consider whether:
    - a. there is a legal-advisor client relationship;
    - b. the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation;
    - c. the advice given is independent; and
    - d. the advice given is confidential.
  10. Document 1 (in parts), Document 2 and Document 3 were prepared in circumstances, where the predecessor agency to APRA retained services of lawyers for the purposes of obtaining professional advice. The purpose of the advice in the relevant documents relates to the full and frank disclosure between the lawyer and the predecessor agency.

11. I am satisfied the communication in Document 1 (in parts), Document 2 and Document 3 is a privileged communication as:
- a. there was a legal-advisor client relationship;
  - b. the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation;
  - c. the advice given was from an independent in house-lawyer; and
  - d. the advice given was confidential.
12. Disclosing the information in Document 1 (in parts), Document 2 and Document 3 would prejudice APRA's continuing ability to have confidential communications with its legal advisers. Based on the information before me, I am satisfied Document 1 (in parts), Document 2 and Document 3 would be privileged from production in legal proceedings on the ground of legal professional privilege. I have decided to refuse access under section 42 of the FOI Act to Document 1 (in parts), Document 2 and Document 3.

• ***document to which secrecy provisions of enactments apply***

13. I have taken the following approach in applying section 38 of the FOI Act to Document 2:
- a. under section 56(2) of the APRA Act it is an offence to directly or indirectly disclose "protected information" or to produce a "protected document". The offence is punishable by up to two years imprisonment;
  - b. "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 body regulated by APRA;
  - c. "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 body regulated by APRA;
  - d. Document 2 was produced for the purposes of its prudential supervision under the *Superannuation Industry (Supervision) Act 1993* (Cth), being a prudential regulation framework law;
  - e. information in Document 2 relates to the affairs of an entity regulated by APRA under the *Superannuation Industry (Supervision) Act 1993*;
  - f. the information in Document 2 has not been lawfully made available to the public from other sources;
  - g. the relevant document is therefore a "protected document" for the purposes of section 56(1) of the APRA Act;
  - h. a document is an exempt document under the FOI Act if disclosure of information contained in the document is prohibited under a provision of an enactment and that secrecy provision expressly applies section 38 to that provision;

- i. subsection 56(11) of the APRA Act expressly applies section 38 of the FOI Act so that a document that is a “protected document” is an exempt document under section 38 of the FOI Act.
14. Under section 56(2) of the APRA Act it is an offence to directly or indirectly disclose “protected information” or to produce a “protected document”. Document 2 is a “protected document” for the purposes of subsection 56(1) of the APRA Act. I am satisfied Document 2 is an exempt document as subsection 56(11) of the APRA Act expressly applies section 38 of the FOI Act.

## **RIGHTS OF REVIEW**

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

15. Under 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 the review and make a fresh decision on the merits of the case.
16. Under 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.
17. 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).
18. 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.
19. 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
20. 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***

21. Under 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.
22. 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.
23. 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***

24. 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.
25. 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***

26. 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.
27. 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.

Benjamin Fogwell  
FOI Officer  
Australian Prudential Regulation Authority  
Date: 6 September 2019

### Schedule of relevant documents

<b>Document number</b>	<b>Description</b>	<b>FOI Act exemptions</b>
Document 1	ISC Minute Paper	s42
Document 2	ISC internal communication	s38, s42
Document 3	ISC internal communication	s42

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

### **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).

## **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.

## **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.

#### **42 Documents subject to legal professional privilege**

- (1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
- (2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.
- (3) A document is not an exempt document under subsection (1) by reason only that:
- (a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and
  - (b) the information is operational information of an agency.

Note: For **operational information**, see section 8A.

## AUSTRALIAN PRUDENTIAL REGULATION AUTHORITY ACT 1998

### 56 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.