



FOI 20-17

2 January 2020

Phillip Sweeney  
Right to Know

By email: [foi+request-5835-33fe7ed8@righttoknow.org.au](mailto:foi+request-5835-33fe7ed8@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:** Nicky Tran, an authorised officer of the Australian Prudential Regulation Authority (**APRA**) for the purposes of subsection 23(1) of the FOI Act.

**FOI Request:** "The document I seek is a letter from APRA approving the purported merger of five funds, their assets and members (including beneficiaries) into the MLC Super Fund.

If there is no "Approval Letter" as such then I am seeking a copy of all letters and emails from APRA to NAB/NULIS concerning the "consultation with APRA" mentioned in evidence provided to the Hayne Royal Commission."

**My decision:** Refuse access to all documents specified in the attached Schedule based on the following reasons.

**MATERIAL FACTS**

1. On 3 November 2019, you made the FOI request by email under the FOI Act.
2. On 4 November 2019, APRA acknowledged receipt of the FOI request by email.

**DOCUMENTS RELATING TO THIRD PARTIES**

3. Your request is for documents that contain information relating to the business affairs of APRA entities. Therefore, APRA extended the statutory timeline until 2 January 2020.

## EVIDENCE AND MATERIAL

4. In making my decision, I have relied on the following evidence and material:
  - a. the Applicant's request received by APRA on 3 November 2019;
  - b. acknowledgment email from FOI Officer to the Applicant of 4 November 2019;
  - c. email correspondence between APRA staff between 12 November 2019 and 2 December 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

5. APRA has conducted all reasonable searches of its records and identified the documents detailed in the attached Schedule as relevant to your FOI request (**relevant documents**).
6. I refuse access to the relevant documents because of the following exemptions in the FOI Act:
  - a. section 38: as Documents 1-21 contain "protected information" under section 56 of the APRA Act; and
  - b. section 42: as Documents 15, 18 and 19 attract legal professional privilege; and
  - c. section 45: as disclosure of Documents 14, 15, 18 and 19 would found an action by a person other than an agency of the Commonwealth for breach of confidence.

### Secrecy provision

7. I have taken the following approach in applying section 38 of the FOI Act and section 56 of the APRA Act to Documents 1-21:
  - 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. Applying this to the relevant documents, the *Superannuation Industry (Supervision) Act 1993* (Cth) is a prudential regulation framework law as defined in section 3 of the APRA Act. Documents 1-21 relate to National Australia Bank Limited, NULIS Nominees (Australia) Limited and MLC Super which are financial sector entities. Therefore, Documents 1-21 are protected documents unless 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 financial sector entities. For the same reasons set out in paragraph 7(d) above, information contained in the document is protected, unless otherwise publicly available. The information in Documents 1-21 are protected information, unless they are publicly available; and
  - f. Documents 1-21 and the information contained in them are not otherwise publicly available.
8. I am satisfied that Documents 1-21 are protected documents, and contain protected information as defined in section 56(1) of the APRA Act and they are consequently exempt under section 38 of the FOI Act.

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

9. Section 42 of the FOI Act provides APRA may refuse a request for access to documents if the documents are of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
10. Paragraphs 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.
11. Documents 15, 18 and 19 were prepared in circumstances where relevant third parties retained the services of lawyers for the purposes of obtaining professional advice. The purpose of the advice in these documents relates to the full and frank disclosure between the lawyer and the entities.
12. I am satisfied the communications in Documents 15, 18 and 19 are privileged communications as:
- a. there was a legal-advisor client relationship;
  - b. the communication was for the purpose or giving or receiving legal advice;

- c. the advice given was from an independent lawyer; and
  - d. the advice given was confidential.
13. Disclosing the information in Documents 15, 18 and 19 would prejudice APRA's continuing ability to have confidential communications with regulated entities and legal advisers. Based on the information before me, I am satisfied that the relevant documents 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 Documents 15, 18 and 19.

#### **Material obtained in confidence**

14. I have taken the following approach in applying section 45 of the FOI Act:
- a. under subsection 45(1), a document is exempt if its disclosure under the FOI Act would found an action, by a person for breach of confidence; and
  - b. the relevant documents, Documents 14, 15, 18 and 19, contain confidential information which, if disclosed, would allow the affected parties to be able to bring an action under the general law for breach of confidence to prevent disclosure, or to seek compensation for loss or damage arising from disclosure.
15. I am satisfied that the relevant documents referred to above in paragraph 14 contain material that has been obtained in confidence and are consequently exempt under section 45 of the FOI Act.

#### **RIGHTS OF REVIEW**

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

16. 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.
17. 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.
18. You do not have to pay any other fees or processing charges for an internal review, except fees and charges applicable for providing access to further material in the document released as a result of the review (for example, photocopying, inspection, etc).
19. 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.
20. 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

21. 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 the Information Commissioner**

22. 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.
23. 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.
24. An application for review by the Information Commissioner may be lodged in the following ways:

<b>Online</b>	Complete and lodge the online review form at: <a href="https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/">https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/</a>
<b>Post</b>	Director of FOI Dispute Resolution GPO Box 5218, Sydney NSW 2001
<b>Email</b>	<a href="mailto:foidr@oaic.gov.au">foidr@oaic.gov.au</a>
<b>Facsimile</b>	(02) 9284 9666
<b>Delivered in person</b>	Office of the Australian Information Commissioner Level 3, 175 Pitt Street Sydney NSW 2000

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

25. 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 the Information Commissioner's decision by the Administrative Appeals Tribunal (**AAT**).
26. 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

27. You may complain to the Information Commissioner concerning action taken by APRA 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.
28. You may complain to the Information Commissioner either orally or in writing, by any of the methods outlined above, or by telephone, on 1300 363 992.

*Nicky Tran*

Nicky Tran  
FOI Officer  
Australian Prudential Regulation Authority  
Date: 2 January 2020

## Schedule of relevant documents

<b>Doc No.</b>	<b>Description</b>	<b>Exemption(s)</b>	<b>Access</b>
1	Exempt document	section 38	Refused
2	Exempt document	section 38	Refused
3	Exempt document	section 38	Refused
4	Exempt document	section 38	Refused
5	Exempt document	section 38	Refused
6	Exempt document	section 38	Refused
7	Exempt document	section 38	Refused
8	Exempt document	section 38	Refused
9	Exempt document	section 38	Refused
10	Exempt document	section 38	Refused
11	Exempt document	section 38	Refused
12	Exempt document	section 38	Refused
13	Exempt document	section 38	Refused
14	Exempt document	section 38 and 45	Refused
15	Exempt document	section 38, 42, 45	Refused
16	Exempt document	section 38	Refused
17	Exempt document	section 38	Refused
18	Exempt document	section 38, 42, 45	Refused
19	Exempt document	section 38, 42, 45	Refused
20	Exempt document	section 38	Refused
21	Exempt document	section 38	Refused