



Internal review decision

- Applicant:** Phillip Sweeney
- Decision-maker:** Ben (person number 2355), an authorised officer of the Australian Prudential Regulation Authority (APRA) for the purposes of section 23(1) of the *Freedom of Information Act 1982* ('FOI Act').
- FOI reference:** FOI 21 – 1
- Decision:** Affirm the original decision to refuse access to the relevant documents.

Summary

- On 7 July 2020 you made the following FOI request:

“The documents I seek are any correspondence between either trustee and APRA related to the change in trustee from National Australia Bank Superannuation Fund Pty Ltd to PFS Nominees Pty Ltd and the change in fund status from ‘not-for-profit’ to ‘for-profit’.”

(‘the original FOI request’)
- On 10 August 2020 APRA made the decision to refuse access to all relevant documents on the basis of sections 38, 47C and 47E(d) of the FOI Act (‘the original FOI decision’).
- On 14 August 2020 APRA received your email request for an internal review of the original FOI decision (‘the internal review application’).

Material taken into account

- I relied on the following evidence and material in making my decision:
 - the original FOI request;
 - acknowledgment of FOI request from FOI Officer to the Applicant dated 8 July 2020;
 - email correspondence between APRA staff between 24 July – 3 August 2020;
 - the original FOI decision;
 - the internal review application;
 - memorandum from FOI Officer dated 11 September 2020;
 - relevant sections of the *Australian Prudential Regulation Authority Act 1998* (Cth) (APRA Act);

- h) relevant sections of the FOI Act; and
- i) guidelines issued by the Office of the Australian Information Commissioner to date (FOI Guidelines).

Reasons

5. I reproduce relevant paragraphs of the original FOI decision:

“APRA conducted all reasonable searches and identified 14 documents relevant to the FOI request.

I refused access to Documents 1-14 following application of the following exemptions in the FOI Act:

- a. *section 38: Documents 1-14 contain “protected information” under section 56 of the APRA Act;*

Secrecy Provisions

I have taken the following approach in applying section 38 of the FOI Act:

- a. *a document is exempt under section 38 of the FOI Act 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 applies section 38 of the FOI Act so a document that is a ‘protected document’ or contains ‘protected information’ within the meaning of subsection 56(1) of the APRA Act is an exempt document under section 38 of the FOI Act;*
- c. *it is an offence under section 56(2) of the APRA Act to directly or indirectly disclose protected information or produce a protected document, unless a specified exemption applies. This offence provision is binding on APRA staff members. 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.*
- e. *The Superannuation Industry (Supervision) Act 1993 and the APRA Act are prudential regulation framework laws.*
- f. *Documents 1-14 were given and disclosed for the purposes of APRA regulating bodies in the financial sector in accordance with the laws that provide for prudential regulation, namely the APRA Act and the Superannuation Industry (Supervision) Act 1993. t*
- g. *As the protected information in Documents 1-14 has not already been lawfully made available to the public from other sources, Documents 1-14 are protected documents.*

6. You made the following statements in support of your internal review application:
- a) *“It is a matter of public interest as to why APRA would have approved the change of status of the NAB staff superannuation fund from ‘not-for-profit’ to ‘for-profit’ – a change that would not be in the best interests of the members of the NAB staff superannuation fund.”*
 - b) *“It is a matter of public interest that in a COMPULSORY superannuation system such a change in fund status would have been approved by APRA.”*
 - c) *“It is a matter of public interest as to why staff of the Commonwealth Bank and ANZ Bank have the benefit of being members of top-performing superannuation funds which provide a high degree of transparency as to their administration, whereas APRA approved the change in status of the NAB staff superannuation fund so that there would be a complete lack of transparency as to the administration of the staff fund and underperformance due to profit-taking from members’ accounts.”*
 - d) *“It is also a matter of public interest in that the trustee of the NAB Staff Superannuation Fund (since 1 July 2016) is NULIS Nominees (Australia) Ltd that featured at the Hayne Royal Commission and where the conduct of the previous Chairman of NULIS was extensively covered in the media.”*
 - e) *“In a ‘for-profit’ fund there is a conflict of interest between the interests of shareholders in the parent company and fund members that leads to such misconduct as ‘Fees for No Service’ which is absent in ‘not-for-profit’ superannuation funds.”*
7. I considered your statements, reviewed all relevant documentation and the process that was undertaken by the FOI Officer.
8. I affirm the original FOI decision to refuse access to the relevant documents. The relevant documents are exempt documents under section 38 of the FOI Act.

Rights of review

9. Under section 54L of the FOI Act, you have the right to apply to the OAIC for a review of my decision. The application for review by the OAIC must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

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

10. More information about your review rights under the FOI Act is available here: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-10-review-by-the-information-commissioner/>

Ben (person number 2355)
FOI Officer

14 September 2020

FREEDOM OF INFORMATION ACT 1982

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.

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.