



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

Office address (inc courier deliveries):
Level 7, 120 Collins Street,
Melbourne VIC 3000

Mail address for Melbourne office:
GPO Box 9827,
Brisbane QLD 4001

Tel: +61 1300 935 075
Fax: +61 1300 729 000

www.asic.gov.au

3 September 2020

Phillip Sweeney

By email only: foi+request-6582-9a83c627@righttoknow.org.au

Dear Mr Sweeney

Freedom of Information Request No. FOI 155-2020

I refer to your request for access to documents made under the *Freedom of Information Act 1982 (FOI Act)* dated 7 August 2020 in which you requested access to documents in the possession of the Australian Securities and Investments Commission (**ASIC**).

Your request received by ASIC was as follows:

The Parliament of Australia has given ASIC the power {or standing} to enforce the provisions of the Corporations Act 2001 and associated Regulations.

The contravention of some provisions of the Corporations Act 2001 is an offence which has a criminal penalty listed in Schedule 3, while the contravention of other provisions does not have an associated penalty.

For, example subsection 912(A) requires a financial services licensee to:

“(a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly”.

This might be termed a “shades of grey” provisions since it is not easy to prove in many cases that there has been a contravention of this provisions and so no penalty is provided in Schedule 3 for a contravention of subsection 912(A).

However, a maximum penalty of two years imprisonment is prescribed in Schedule 3 for the contravention of what might be termed a “black and white” provision - the failure to provide a statement to ASIC following a direction from ASIC – subsection 912(C).

Similarly, another “black and white” provision is the failure of a trustee of a regulated superannuation fund to provide a copy (or access to) a fund document to a member or beneficiary that is prescribed in subsection 1017C(5) of the Act and associated Regulation 7.9.45.

For example, a trustee officer who failed to provide a copy of the “audited accounts of the fund” { Regulation 7.9.45 (2)(b)} to a “concerned person” upon a written request is subject to a maximum penalty of two years imprisonment as listed in Schedule 3.

The prescribed document has either:

- (i) Been provided within the prescribed time period {or allowed to be photocopied} after the written request has been received; or*
- (ii) No copy or access has been provided.*

This is a "black and white" provision.

In a letter dated 5 September 2019 {ASIC Ref: CCU-18\0397} to a former chair of the Standing Committee of Economics, Warren Day {Now an Executive Director of ASIC} made the following representation:

"We encourage Mr Sweeney to seek legal advice about pursuing any private rights that may be available to him"

The actual complaint to Mr Day in 2009 was that the purported trustee of the regulated superannuation fund in which my wife and I have a beneficial interest had contravened subsection 1017C(5) by failing to allow access to fund documents prescribed by Regulation 7.9.45.

The document or documents I seek are documents in the possession of ASIC that would confirm that a member of the public has standing {a "private right"} to commence criminal proceedings against a trustee of a regulated superannuation fund if the statement of claim alleges one or more contraventions of the provisions of the Corporations Act 2001 to which criminal sanctions apply as contained in Schedule 3 of the Act. (my emphasis added)

Decision

I am the authorised decision-maker for the purposes of section 23 of the Act and this letter gives notice of my decision.

A search of ASIC's records was conducted. My decision is to refuse your request for access to the documents, as no documents exist. The reasons for my decision are set out below.

Information considered

In reaching my decision, I have considered the following:

- the FOI Act, in particular, s 24A;
- the Australian Information Commissioner's FOI Guidelines issued under s 93A of the FOI Act (**FOI Guidelines**); and
- the terms of your request.

Section 24A of the FOI Act

Section 24A of the FOI Act relevantly provides:

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.

Whilst you have worded your request as seeking a document in ASIC's possession, identifying the document would amount to giving legal advice. You have referred to a statement made in ASIC's letter to the Hon Sarah Henderson MP dated 5 September 2018, 'We encouraged Mr Sweeney to seek legal advice about pursuing any private rights that may be available to him' (**ASIC's recommendation**). You have identified what you are seeking in such a way that you are requesting a document that confirms that you have standing to pursue ASIC's recommendation.

ASIC does not provide legal advice in relation to the individual rights of members of the public. In this case, it appears that you are seeking to access legal advice through the FOI process in relation to your standing to pursue ASIC's recommendation.

I further note that in your request dated 7 August 2020, you provided a series of assertions of opinion and general commentary relating to your previous dealings with ASIC. I do not consider any of these statements as relevant to the determination of your FOI request. This type of information is not required under the FOI Act and impedes ASIC's efficient processing of your request. Please see the Office of the Information Commissioner's [how to make an FOI request](#) webpage for further information.

Review rights

In the event that you are dissatisfied with the decision:

1. You may, within 30 days after the day on which you have been notified of this decision, apply in writing to ASIC for an internal review of my decision under section 54B of the FOI Act. This review is an independent process conducted by a Senior Freedom of Information Officer at ASIC. This request should be addressed to me or to the Senior Manager, Freedom of Information, GPO Box 9827, Brisbane QLD 4001 or by email to foirequest@asic.gov.au.
2. You may within 60 days after the day on which you have been notified of this decision, apply in writing to the Office of the Australian Information Commissioner (OAIC) for a review of my decision under section 54N of the FOI Act. You may contact the OAIC by post at GPO Box 5218 Sydney NSW 2001, by email at foidr@oaic.gov.au or by telephone on 1300 363 992.

Right to complain

You may lodge a complaint with the OAIC in relation to the conduct of ASIC in the handling of this request. You may contact the OAIC as set out above.

If you have any questions or wish to discuss, please contact me on (03) 9280 4156 or on Jessica.Zhang@asic.gov.au.

Yours sincerely

Jessica Zhang

Freedom of Information Officer
(Authorised decision-maker pursuant to subsection 23(1) of the FOI Act)