



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

17 August 2020

Phillip Sweeney

By email: foi+request-6598-1f4e0175@righttoknow.org.au

Dear Mr Sweeney,

**Notice of Internal Review Decision under the Freedom of Information Act 1982
Ref No.161-2020**

I refer to your email received by the Australian Securities & Investments Commission (**ASIC**) on 17 August 2020, in which you request an internal review under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

I am authorised to conduct the internal review pursuant to s 23(1) of the FOI Act.

Initial Decision on your FOI Request

On 14 August 2020 you made the following request under the FOI Act:

Superannuation funds or schemes that are not established by statute are established as "trusts".

Since superannuation trusts are generally expected to operate for many decades an amending power {Power of Amendment} is generally reserved in the original Trust Deed to allow the provisions of the original Trust Deed to be amended from time to time.

Some superannuation Trust Deeds also include a schedule of "administrative rules" which may be subject to a different amending power which can sometimes cause confusion in a poorly drafted "Trust Deed and Rules" document as covered in the often-cited Authority "Thomas on Powers" by Geraint Thomas {Oxford Universit Press}.

Chapters in "Thomas on Powers" include:

- 8 "The Excessive Execution of a power"
- 9 "Fraud on a Power"
- 15 "Powers of Revocation"
- 16 "Powers of Amendment"

Understanding these powers is important when considering if allegations have been made that there may have been "changes to the Deeds that disadvantage the membership" - that is invalid purported amendments have been made to the original Trust Deed and/or "Rules".

For example, an amending Deed may look valid on its face, but might be impugned under the equitable doctrine of a "Fraud of a Power" if, for example, the amending Deed purports to abrogate a substantive benefit to a beneficiary of the trust (fund) provided in the original Trust Deed.

The document I seek is a copy of the title page of any edition of "Thomas on Powers" in the possession of ASIC as of 14 August 2020 that would confirm whether ASIC has possession of such a widely cited Authority as well as which edition or editions ASIC has in its possession.

IMPORTANT: I am not seeking a copy of the whole book which is a publically available document. I am only seeking a copy of the title page.

Title pages by themselves are not a publically available document.

On 17 August 2020 the authorised decision maker, Ms Zhang, gave notice of her decision on your request (**Original Decision**). Ms Zhang informed you that she had decided to refuse your request for access to the requested material on the basis that this material, being the title page of the book 'Thomas on Powers' published by Oxford University Press, was not a document of an agency as defined under s 4(1) of the FOI Act.

Internal Review Request

On 17 August 2020 you made an application for internal review of the original decision (**Internal Review Request**) and made the following submissions:

An agency subject to the FOI act does not maintain the title page of an established authority for reference purposes. A title page by itself would be completely useless for reference.

Likewise, a "title page" by itself is not publically available you have to buy the whole book.

When reference is made to "(d) material maintained for reference purposes that is otherwise publically available" this is clearly meant to apply to someone seeking a copy of the whole book or a chapter of the book under the FOI Act.

I am not seeking a copy of the whole book, or a chapter or a paragraph from the book - just a copy of the title page.

The default position must be that ASIC does not have possession of a copy of "Thomas on Powers" by Geraint Thomas.

If that is the case then just say so.

Information considered:

In reaching my decision, I have considered the following:

- the FOI Act, in particular ss 4(1), 11 and 15;
- the Australian Information Commissioner's FOI Guidelines issued under s 93A of the FOI Act (**FOI Guidelines**);
- your FOI request received on 14 August 2020;
- the original decision dated 17 August 2020; and
- your internal review application received on 17 August 2020.

In conducting this internal review I can decide all issues raised by your FOI request and exercise all the powers available to the original decision maker.¹

Internal Review Decision

I have decided to affirm the original decision. I have decided that the access provisions of the FOI Act do not apply to the material you are seeking, as the requested material is not a document of an agency as defined under s 4(1).

¹ FOI Guidelines [9.34]

Reasons for decision

Section 11 of the FOI Act provides that every person has a legally enforceable right to obtain access to a document of an agency, other than an exempt document. Section 15(1) of the FOI Act states that a person who wishes to obtain access to a document of an agency may request access to the document.

Section 4(1) of the FOI Act relevantly states that a document is 'a document of an agency' if:

- (a) the document is in the possession of the agency, whether created in the agency or received in the agency...

Section 4(1) further provides that:

document includes:

- (a) any of, or any part of any of, the following things:
 - (i) any paper or other material on which there is writing;
 - ...
 - (v) any article on which information has been stored or recorded, either mechanically or electronically;
 - (vi) any other record of information; or
- (b) any copy, reproduction or duplicate of such a thing; or
- (c) any part of such a copy, reproduction or duplicate;
 - but does not include:
- (d) material maintained for reference purposes that is otherwise publicly available; or
- (e) Cabinet notebooks.

The FOI Guidelines relevantly explain that '[m]aterial maintained for reference purposes that is otherwise publicly available (such as library reference material) and Cabinet notebooks are not 'documents' (s 4(1)).'²

I am satisfied that the book 'Thomas on Powers', including its title page, meets the definition of 'material maintained for reference purposes that is otherwise publicly available.' It is therefore excluded from the definition of a 'document'.

In your submissions you argue that title pages are not publicly available documents. As explained in the original decision, the title page of 'Thomas on Powers' is publicly available as part of that book. Further, a simple internet search reveals that the title page is publicly available to view online.³ It therefore constitutes material maintained for reference purposes that is otherwise publicly available.

For the above reasons, I am satisfied that your request is for material that falls outside the access provisions of the FOI Act, as the requested material is not a document of an agency as defined under s 4(1).

Your review rights

If you are dissatisfied with my decision, you may apply to the Australian Information Commissioner for review. An application for review by the Information Commissioner must

² FOI Guidelines [2.32]

³ See

https://books.google.com.au/books/about/Thomas_on_Powers.html?id=9ZSpEt_3dHgC&redir_esc=y and <https://www.amazon.com.au/Thomas-Powers-Geraint-ebook/dp/B008VDVF7U>.

be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

online:

https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10

email: foidr@oaic.gov.au

post: GPO Box 5218 Sydney NSW 2001

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

FOI Complaints

You may lodge a complaint with the Australian Information Commissioner in relation to the conduct of ASIC in the handling of this request. A complaint to the Information Commissioner must be made in writing. Complaints can be lodged in one of the following ways:

online: https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1

email: foidr@oaic.gov.au

post: GPO Box 5218 Sydney 2001

More information about complaints is available on the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>.

If you are not sure whether to lodge an Information Commissioner review or an Information Commissioner complaint, the Office of the Australian Information Commissioner has more information at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>

Questions about this decision

If you wish to discuss this decision, I can be contacted by phone or email as below.

Yours sincerely

Haydar Tuncer
Senior Freedom of Information Officer
Australian Securities and Investments Commission
Phone: 03 9280 4416
Email: haydar.tuncer@asic.gov.au