



INTERNAL REVIEW DECISION

Applicant:	Phillip Sweeney
Decision-maker:	Evelyn Ong, an authorised officer of the Australian Prudential Regulation Authority (APRA) for the purposes of subsection 23(1) of the <i>Freedom of Information Act 1982</i> (FOI Act).
FOI reference:	FOI 22-4
Decision:	Affirm the original decision to refuse access to the relevant documents.

SUMMARY

- On 17 July 2021, you made the following FOI request:

‘The documents I seek are copies of any correspondence between APRA and NULIS Nominees (Aust) Ltd the trustee of the MLC Super Fund.

The search period is from 1 April 2021 to the date that APRA responds to this FOI request.’

(the original FOI request)
- On 23 July 2021, you revised the original FOI request with the following:

‘The correspondence would be in relation to the Defined Benefit sub-funds administered by NULIS and Trust Deeds and/or amending Deeds associated with these Defined Benefit sub-funds.’

(the revised FOI request)
- On 13 August 2021, APRA made the decision to refuse access to 11 documents on the basis of section 38 of the FOI Act (**the original FOI decision**).
- On 19 August 2021, 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 dated 17 July 2021;
 - acknowledgment of FOI request from FOI Officer to the Applicant dated 20 July 2021;
 - the revised FOI request dated 23 July 2021;

- d) email correspondence between APRA staff between 22 July 2021 and 9 August 2021;
- e) the original FOI decision;
- f) the internal review application;
- g) memorandum from FOI Officer dated 24 August 2021;
- h) relevant sections of the *Australian Prudential Regulation Authority Act 1998* (Cth) (**APRA Act**);
- i) relevant sections of the FOI Act; and
- j) guidelines issued by the Office of the Australian Information Commissioner to date (FOI Guidelines).

DECISION

6. I have decided to affirm the original FOI decision to refuse access to the relevant documents under section 38 of the FOI Act and section 56 of the APRA Act. My reasons for the refusal are as follows:

REASONS

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

‘APRA has conducted all reasonable searches of its records and identified 11 documents relevant to your FOI request (**relevant documents**).

REASONS

I have decided to refuse access to the relevant documents under section 38 of the FOI Act and section 56 of the APRA Act. My reasons for refusal are as follows:

Secrecy Provisions

I have taken the following approach in applying section 38 of the FOI Act and section 56 of the APRA Act:

i. 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;

ii. 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;

iii. under subsection 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;

iv. a “protected document” is defined in subsection 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. The *Superannuation Industry (Supervision) Act 1993* (Cth) is a prudential regulation framework law. The relevant documents were given or produced and disclosed or obtained under, or for the purposes of, this prudential regulation framework law. Therefore, the documents are protected documents unless otherwise publicly available;

v. “protected information” is defined in subsection 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 financial sector entities. For the same reasons set out in paragraph (iv) above, information contained in the documents is protected, unless otherwise publicly available; and

vi. the information and the documents are not otherwise publicly available.

I am satisfied that the relevant documents are protected documents, and/or contain protected information as defined in subsection 56(1) of the APRA Act and that the documents are consequently exempt under section 38 of the FOI Act.’

8. The following statements were made in support of the internal review application:

- a) ‘The correspondence that has been identified relates to Australia's Largest Superannuation Fraud as well as a Fraud Against the Commonwealth of Australia where fraudulent documents were lodged with APRA in 2006 in order to obtain Fund Registration for an occupational pension scheme established by a Trust Deed made on the 23 December 1913 in the State of South Australia.

This is a very simple fraud - the original Trust Deed was concealed from APRA and a doctored document printed on 30 March 2006 which had not been executed was represented to APRA as the ‘Trust Deed’ of the fund. APRA has recently obtained an executed version of this purported ‘Trust Deed’ printed on 29 March 2006 which makes reference to the 1913 Trust Deed which had not been lodged with APRA in 2006.

The genuine Trust Deed provide a life pension for male fund members as well as a survivorship pension for their widows. The doctored document purported to provide a token lump sum benefit typically only worth 20-25% of the life pension entitlement.

There were multiple contraventions of the Criminal Code Act 1995 {Cth} related to both fund registration and granting a RSE licence to a purported Trustee who had not been lawfully appointed to the office of Trustee.

This occupational pension scheme has been known by many names and NULIS Nominees (Aust) Ltd has administered this Defined Benefit scheme since 1 July 2016 (under the name Carlton and United Breweries Superannuation Plan).

It is a matter of public interest that APRA is now aware of these contraventions under Chapter 7 -- The proper administration of Government.

Failure to release copies of documents related to contraventions related to the proper administration of Government will be confirmation that APRA is attempting to cover-up these contraventions of the Criminal Code Act 1995 so as to ‘do a friend a favour’ (ie friends at NULIS).’

9. I have considered your statements and reviewed all relevant documentation.
10. Subsection 56(11) of the APRA Act provides that a protected document is an exempt document for the purposes of section 38 of the FOI Act.
11. The relevant documents have not been lawfully made available to the public from other sources. The relevant documents were given or produced for the purposes of a prudential regulation framework law, namely the *Superannuation Industry (Supervision) Act 1993* (Cth). It is clear that the relevant documents are protected documents. I affirm the original FOI decision to refuse access to the relevant documents.

RIGHTS OF REVIEW

12. 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 Sydney NSW 2000

13. 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/>

Evelyn Ong
FOI Officer
Australian Prudential Regulation Authority

7 September 2021

Document Schedule

Document No.	Description	Exemption(s)	Access
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

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.