

Notice of charge decision following applicant contention that charge be reduced (s 29(8)) of the Freedom of Information Act 1982 (the FOI Act)

- Applicant:** Phillip Sweeney
- Decision-maker:** Andrew Wilson an authorised officer of the Australian Prudential Regulation Authority (APRA) for the purposes of section 23(1) of the FOI Act.
- Relevant documents:** Copies of the Section 35C(B) Compliance Report for the years ending 30 June 2007, 2008, 2009, 2010, 2011, 2012, 2013, and for the year ending 20 January 2014 for the fund recently known as the AusBev Superannuation Fund
- My decision:** The estimate of the charge is to be reduced to \$150.00.

1. On 4 February 2015, a Notice under section 29 FOI Act (the Notice) was sent to the Applicant. The Notice said:

Notice under section 29 of the Freedom of Information Act 1982

I refer to your request under section 15 of the Freedom of Information Act 1982 (the Act) dated 23 January 2015 (FOI Request) seeking:

Copies of the Section 35C(B) Compliance Report for the years ending 30 June 2007, 2008, 2009, 2010, 2011, 2012, 2013, and for the year ending 20 January 2014 for the fund recently known as the AusBev Superannuation Fund

Notice of charge in respect of processing the FOI Request

I have decided, under regulation 3 of the Freedom of Information (Charges) Regulations 1982 (the Regulations), that you are liable to pay a charge in respect of processing the FOI Request. My preliminary assessment of that charge is as follows:

Charges in respect of processing the FOI Request

Search and retrieval time @ \$15.00 per hour – 11 hours	\$165.00
---	----------

TOTAL	\$165.00
-------	----------

Please note APRA has already spent one hour conducting initial searches for documents relevant to the request. This time has been included in the estimate provided for search and retrieval time above.

2. In a response dated 4 February 2015, the Applicant stated:

I wish to contest the charges imposed in order to gain access to documents that Trustees are required to provide to APRA pursuant the Section 35C of SIS Act.

The proposed charge of \$165 will cause me economic hardship since I am a pensioner without a pension.

I should now be receiving a pension of approximately \$80,000 per annum, but am currently receiving nothing.

The documents I am requesting are also a matter of public interest since they relate to several thousand fund members and not just to myself.

Under my current financial circumstances I can afford to pay \$16.50.

I believe this this (sic) to be a reasonable payment since the documents should be able to be easily retrieved since they a part of a formalised compliance program implemented by APRA.

If it takes so long to find documents that MUST be submitted as part of a formal compliance program, this is just a reflection of poor document management on the part of APRA.

Applicants should not be required to pay for poor document management by an agency.

Review of estimated hours

3. I have reviewed the information on which the estimation of the time required was based. From this review I believe 10 hours is an accurate estimate of time to:
 - a. recall the physical folders that have been identified as relevant to the request;
 - b. search through the physical folders to identify any relevant documents;
 - c. search electronic folders and locate versions of the documents relevant to the request; and
 - d. review the relevant documents to identify any information protected under section 56 of the APRA Act 1998.
4. As set out in the Guidelines¹ at 4.22 the preliminary assessment maybe based on two elements:
 - a. a charge (based on the Charges Regulations) for work already done by the agency or minister, for example, in search and retrieval of documents; and
 - b. an estimated charge for work still to be done.
5. Therefore it is appropriate to include the work already conducted in identifying the relevant folders as well as the estimate for the work still to be done.
6. I estimate the costs of this request to be as follows:

Search and retrieval time @ \$15.00 per hour - 10 hours	\$150.00
Decision making time (it is estimated to be less than five hours)	nil
Total	\$150.00

¹ Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982 – Charges for providing access, Version 1.5, October 2014.

7. This is a reduction of \$15.00 from the original notice.

Review of the estimated charges

8. Section 29(5) of the FOI Act states:

- (5) *Without limiting the matters the agency or Minister may take into account in determining whether or not to reduce or not to impose the charge, the agency or Minister must take into account:*
- (a) *whether the payment of the charge, or part of it, would cause financial hardship to the applicant, or to a person on whose behalf the application was made; and*
 - (b) *whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public.*

Financial hardship - 29(5)(a)

9. In the Notice the Applicant was informed:

If you contend that the charge has been wrongfully assessed, or should be reduced or not imposed, you should give full reasons for so contending. In deciding whether to reduce or not impose a charge, APRA must, among other things, take into account whether payment of the charge, or part of it, would **cause financial hardship and whether the giving of access to the documents is in the general public interest** [my emphasis].

10. The Applicant in his reply stated:

The proposed charge of \$165 will cause me economic hardship since I am a pensioner without a pension.

11. However the Applicant did not provide any evidence to support this statement.

12. The Guidelines at paragraph 4.53 state:

An applicant relying on this ground [financial hardship] could ordinarily be expected to provide some evidence of financial hardship. For example, the applicant may rely upon (and provide evidence of) receipt of a pension or income support payment; or provide evidence of income, debts or assets.

13. In the absence of any such evidence, I cannot decide that paying the charge would cause the Applicant to suffer financial hardship.

Public Interest - 29(5)(b)

14. In relation to public interest, the Applicant states:

The documents I am requesting are also a matter of public interest since they relate to several thousand fund members and not just to myself.

15. I have referred to the Guidelines which state:

- 4.58 The 'public interest' is a concept of wide import that cannot be exhaustively defined. The following examples nevertheless illustrate circumstances in which it may be

thought appropriate by an agency or minister to reduce or waive a charge under s 29(5)(b) for granting access to a document under the Act:

- The document relates to a matter of public debate, or a policy issue under discussion within an agency, and disclosure of the document would assist public comment on or participation in the debate or discussion.
- The document relates to an agency decision that has been a topic of public interest or discussion, and disclosure of the document would better inform the public as to why or how the decision was made, including highlighting any problems or flaws that occurred in the decision making process.
- The document would add to the public record on an important and recurring aspect of agency decision making.
- The document is to be used by a researcher in research that is to be published widely or that complements research being undertaken in an agency or elsewhere in the research community.
- The document is to be used by a community or non-profit organisation in preparing a submission to a parliamentary or government inquiry, for example, on a law reform, social justice, civil liberties, financial regulation or environmental or heritage protection issue.
- The document is to be used by a member of Parliament in parliamentary or public debate on an issue of public interest or general interest in the member's electorate.
- The document is to be used by a journalist in preparing a story for publication that is likely to be of general public interest.

16. The seven dot points are only examples and indicative of the types of matters which are considered. The document subject to the request does not fit into nor similar in any way to those examples. The Guidelines at 4.49 state:

4.49 An agency or minister is also entitled to consider matters that weigh against those relied upon by an applicant. The policy of the Act is that charges can be imposed for search and retrieval, decision making, inspection, electronic production, copying and delivery. By way of example, an agency may decide that it is appropriate to impose an FOI charge where:

- the applicant can be expected to derive a commercial or personal benefit or advantage from being given access and it is reasonable to expect the applicant to meet all or part of the FOI charge;
- **the documents are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public** (my emphasis);
- the information in the documents has already been published by an agency and the documents do not add to the public record; or
- the applicant has requested access to a substantial volume of documents and significant work would be required to process the request.

17. On considering the type of documents requested and the information provided by the Applicant in support of his application I am not satisfied that the documents requested or any documents like them are of interest to the general public or of interest to a substantial section of the public.

DECISION

18. The Applicant has not provided any evidence that the charge will cause him any financial hardship. As a result of this I cannot find that the charge will cause any

financial hardship. Further there is nothing to show the release of the document will be in the general public interest or a substantial section of the public.

19. After reviewing the estimated hours processing this request I believe the appropriate number of hours is 10 not the 11 hours recorded in the original decision. Therefore the charge is \$150.
20. It should also be noted that if the final charge is less than the amount already paid by the Applicant as a deposit a refund will be made as required by regulation 10(4)(a) *Freedom of Information (Charges) Regulations 1982*.
21. As the estimated charge exceeds \$100, in line with the original Notice I have determined that a deposit of \$37.50 (being 25 per cent of the total estimated charge) is payable.

Payment

22. Following payment of the deposit of \$37.50, APRA will further process your request.
23. As previously advised the preliminary assessment of the charge is made based on the amount of time spent to search and retrieve the documents that may be relevant to the Applicant's FOI request.
24. The decision will only be made by APRA after consultation with any affected parties and on the basis of any applicable exemptions under the Act, such as exemptions for documents containing information relating to business affairs; documents affecting the enforcement of a law; documents obtained in confidence; documents subject to legal professional privilege; and documents to which statutory secrecy provisions apply.
25. Accordingly, it is possible that notwithstanding your payment of the charge, APRA may decide to release none or a small number of the documents retrieved and examined.

Further charge in respect of the provision of access to documents

26. If APRA decides to grant access to any documents in relation to the FOI Request, a further charge may be payable in respect of the provision of access to those documents. The amount of the charge would be calculated in accordance with the Regulations and notified to you once a decision is made on the FOI Request.
27. Payment of the amount should be made by crossed cheque made out to 'Australian Prudential Regulation Authority'.

Please send the cheque directly to:

The FOI Coordinator
Australian Prudential Regulation Authority
GPO Box 9836
SYDNEY NSW 2001

YOUR REVIEW RIGHTS

If you are dissatisfied with my decision, you may apply for an internal review or Information Commissioner review of the decision.

Internal review

Under section 54 of the FOI Act, you may apply in writing to APRA for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter.

Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.

Information Commissioner review

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must 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/aba/oaic/foi-review-/>

email: enquiries@oaic.gov.au

post: GPO Box 2999, Canberra ACT 2601

in person: Level 3, 175 Pitt Street, Sydney NSW

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to www.oaic.gov.au/freedom-of-information/foi-reviews.

Yours sincerely



Andrew Wilson
Manager, Compliance Management
Australian Prudential Regulation Authority
13 February 2015.