

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

- Applicant:** Phillip Sweeney
- Decision-maker:** Christopher Colwell, Information and Governance Manager, 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 remain \$150.00

MATERIAL FACTS

1. The Applicant under section 15 of the Freedom of Information Act 1982 (the Act) in a request dated 23 January 2015 (FOI Request) sought access to:

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.

(the documents).

2. On the 4 February 2015 Mr Fussell issued a Notice under section 29 of the FOI Act for this request.
3. On the same day the Applicant contested the Notice.
4. On the 13 February 2015, the matter was reviewed and a fresh Notice under section 29 of the FOI Act was sent to the Applicant. This notice reduced the charge to \$150.00.
5. On 14 February the Applicant requested an Internal Review of the charges.

EVIDENCE AND MATERIAL RELIED ON

6. In making my decision, I have relied on the following evidence and material:
 - a) the Applicant's request dated 23 January 2015;
 - b) a letter from Mr Fussell dated 4 February 2015;
 - c) an email from the Applicant dated 4 February 2015;
 - d) a Notice of Decision by Mr Wilson dated 13 February 2015;
 - e) email from the Applicant dated 14 February 2015;
 - f) *Sweeney and Australian Information Commissioner and Australian Prudential Regulation Authority (Joined Party)* [2014] AATA 539 (6 August 2014)

- g) relevant sections of the *Australian Prudential Regulation Authority Act 1998*;
- h) relevant sections of the *Freedom of Information Act 1982*; and
- i) Guidelines issued by the Office of the Australian Information Commissioner to date.

REASONS FOR DECISION

7. Section 29 of the FOI Act deals with charges. The section is attached at 'A'. Under Part VI of the FOI Act the Applicant is entitled to have the decision internally reviewed.
8. 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 the 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.
9. As set out in the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines) at 4.22 the preliminary assessment maybe based on two elements:
 - a. a charge (based on the Charges Regulations) for the 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.
10. 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

11. In his request for an Internal Review the Applicant states:

I am writing to request an internal review of Australian Prudential Regulation Authority's handling of my FOI request 'Australia's Worst White-Collar Crime'.

I refer to the decision letter of Mr Andrew Wilson.

At paragraph 12 Mr Wilson has made the representation that I have not provide (sic) APRA with any evidence of my financial circumstances, however that is incorrect.

I have provided APRA with a copy of a consolidation Deed of Variation dated 6 May 1958 where the Fund was then known as The Provident Fund, but then later known as the Elders IXL Superannuation Fund.

This Deed confirms that a male officer who has completed at least 15 years of service is entitled to be paid a pension for life, provided he does not voluntarily leave the service before the age of 60.

I have completed 21.5 years of service, however this pension is not being paid.

How can I provide evidence of pension payments are (sic) requested by Mr Wilson, when the pension is not being paid in the first instance? I am receiving nothing.

I will provide APRA with a Statutory Declaration, if APRA insists, that I am not currently employed and that I am not in receipt of a pension that I am legally entitled to have.

If I was receiving the pension that I am entitled to receive, there would be not (sic) reason to be lodging FOI requests with APRA.

At (sic) to the matter of Public Interest, superannuation is compulsory in Australia as a matter of government policy and the regulation of superannuation is a current topic of public interest with proposals to amend the governance provisions of regulated superannuation funds.

The documents I seek are part of my campaign to influence Government policy, since the fund in question was administered in contravention to the "equal representation rule" from 2010.

What is APRA's explanation as why APRA failed to enforce the "equal representation rule" after APRA was advised of the non-compliance?

Why would APRA enforce compliance with a new "Trustee Representation Rule" involving "independent directors", if APRA fails to enforce existing governance regulations?

How can APRA claim this is not a matter of "Public Interest", when \$1 Trillion is subject to the governance of corporate Trustees most of which must comply with the "equal representation rule" pursuant to the provisions of the SIS Act?

The documents I seek are the PwC Fund Auditor's Compliance Reports provided to APRA which I believe will state that the purported corporate Trustee, CCSL Limited, complied with the "equal representation rule" and the associated "voting rule" when there have been no member elected directors since 2010.

This is important evidence that must be provided to our elected representatives in Canberra who will be making a decision as to whether to amend the governance provisions in the SIS Act.

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

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)

13. 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 pensions or income support payment; or provide evidence of income, debts or assets.

14. In his request for an internal review the Applicant states that he does not receive a pension to which he asserts he is entitled. However, this does not show hardship. It is a matter of public record, as stated in the Applicant's evidence before the

Administrative Appeals Tribunal, that he received a lump sum payment from his superannuation fund instead of the pension that he asserts he is entitled to. Therefore to demonstrate hardship the Applicant needed to provide evidence of any income, including receipt of any Commonwealth pensions or support payments, as well as debts and assets, to show how this expense would cause him financial hardship.

15. The Applicant has not provided any evidence to show how this expense would cause him financial hardship. In the absence of any such evidence I am unable to decide whether paying the charge would cause the Applicant to suffer financial hardship.

Public Interest - 29 (5)(b)

16. In relation to public interest the Guidelines relevantly state:

4.55 An applicant relying on s 29(5)(b) should identify or specify the 'general public interest' or the 'substantial section of the public' that would benefit from disclosure. This may require consideration both of the content of the documents requested and the context in which their public release would occur. Matters to be considered include whether the information in the documents is already publicly available, the nature and currency of the topic of public interest to which the documents relate, and the way in which a public benefit may flow from the release of the documents.

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 section 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.

17. The Guidelines at paragraph also 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
- the information in the documents has already been published by an agency and the documents do not add to the public record,
- the applicant has requested access to a substantial volume of documents and significant work would be required to process the request.

4.50 The applicant has requested access to a substantial volume of documents and significant work would be required to process the request. 4.50 It is open to an agency or minister to impose a charge even though it would cause financial hardship to the applicant, or a public interest purpose for disclosure has been established. However, there is no onus on an applicant to justify his or her case. It is for an agency or minister to reach a decision on the merits of the request.

18. The type of document requested by the Applicant and after reviewing the information provided in support of this internal review 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

19. The Applicant has not provided any evidence that payment of this charge would cause him financial hardship; he has only provided a statement of what he believes he is entitled to receive. Further I do not believe that the information provided in relation to the matter demonstrates that the release of these documents will be in the broader public interest or of interest to a substantial section of the public.

20. As set out above I believe \$150.00 is a correct estimate of the charge.

21. As the estimated charge exceeds \$100, in line with the original and reviewed notices 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 FOI Act, such as exemptions for documents containing information relating to business affairs; 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, ARPA 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

ADVICE TO APPLICANT AS TO RIGHTS OF REVIEW

28. Pursuant to section 54L of the FOI Act, you have the right to apply to the Information Commissioner for a review of the original decision or a review of a decision made on review.
29. Any application must be in writing and must give details of an address where notices may be sent and include a copy of the original decision or the decision made on internal review.
30. An application for review by the Information Commissioner should be sent:
- Online: www.oaic.gov.au;
 - Post: GPO Box 2999, Canberra ACT 2601
 - Fax: +61 2 9284 9666
 - Email: enquiries@oaic.gov.au
 - In person: Level 3, 25 National Circuit Forrest, ACT, or at Level 8, Piccadilly Tower, 133 Castlereagh Street, Sydney, NSW

Application for review by Administrative Appeals Tribunal

31. If the decision on review by the Information Commissioner is not to grant access to all of the documents within your request, you would be entitled to seek review of that decision by the AAT.
32. The AAT is a completely independent review body with the power to make a fresh decision. Your application to the AAT should be accompanied by a filing fee of \$861, unless you are granted legal aid or you come within an exempt category of persons. The AAT Registrar or Deputy Registrar may waive the fee on the ground that its

payment would impose financial hardship on you. The fee may be refunded where you are successful. The AAT cannot award costs either in your favour or against you, although it may in some circumstances recommend payment by the Attorney-General of some or all of your costs. Further information is available from the AAT on 1300 366 700.

Complaints to the Information Commissioner

33. You may complain to the Commissioner concerning action taken by this agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. The Commissioner will conduct a completely independent investigation of your complaint.

34. You may complain to the Commissioner either orally or in writing, by any of the methods below.

- Telephone: 1300 363 992
- email: enquiries@oaic.gov.au
- GPO Box 2999, Canberra ACT 2601
- website at www.oaic.gov.au



Christopher Colwell
Information and Governance Manager
Australian Prudential Regulation Authority

Date: 11/3/2015

Freedom of Information Act 1982

29 Charges

(1) Where, under the regulations, an agency or Minister decides that an applicant is liable to pay a charge in respect of a request for access to a document, or the provision of access to a document, the agency or Minister must give to the applicant a written notice stating:

(a) that the applicant is liable to pay a charge; and

(b) the agency's or Minister's preliminary assessment of the amount of the charge, and the basis on which the assessment is made; and

(c) that the applicant may contend that the charge has been wrongly assessed, or should be reduced or not imposed; and

(d) the matters that the agency or Minister must take into account under subsection (5) in deciding whether or not to reduce, or not impose, the charge; and

(e) the amount of any deposit that the agency or Minister has determined, under the regulations, that the applicant will be required to pay if the charge is imposed; and

(f) that the applicant must, within the period of 30 days, or such further period as the agency or Minister allows, after the notice was given, notify the agency or Minister in writing:

(i) of the applicant's agreement to pay the charge; or

(ii) if the applicant contends that the charge has been wrongly assessed, or should be reduced or not imposed, or both—that the applicant so contends, giving the applicant's reasons for so contending; or

(iii) that the applicant withdraws the request for access to the document concerned; and

(g) that if the applicant fails to give the agency or Minister such a notice within that period or further period, the request for access to the document will be taken to have been withdrawn.

(2) If the applicant fails to notify the agency or Minister in a manner mentioned in paragraph (1)(f) within the period or further period mentioned in that paragraph, the applicant is to be taken to have withdrawn the request for access to the document concerned.

(3) An agency or Minister must not impose a charge in respect of a request for access to a document, or the provision of access to a document, until:

(a) the applicant has notified the agency or Minister in a manner mentioned in paragraph (1)(f); or

(b) the end of the period or further period mentioned in that paragraph.

(4) Where the applicant has notified the agency or Minister, in a manner mentioned in subparagraph (1)(f)(ii), that the applicant contends that the charge should be reduced or not imposed, the agency or Minister may decide that the charge is to be reduced or not to be imposed.

(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.

(6) If the applicant has notified the agency or Minister in the manner mentioned in subparagraph (1)(f)(ii), the agency or Minister must take all reasonable steps to enable the applicant to be notified of the decision on the amount of charge payable as soon as practicable but in any case no later than 30 days after the day on which the applicant so notified the agency or Minister.

(7) If:

(a) that period of 30 days has elapsed since the day on which the agency or Minister was so notified; and

(b) the applicant has not received notice of a decision on the amount of charge payable;

the principal officer of the agency, or the Minister, as the case requires, is, for all purposes of this Act, taken to have made, on the last day of the period, a decision to the effect that the amount of charge payable is the amount equal to the agency's or Minister's preliminary assessment of the amount of the charge mentioned in paragraph (1)(b).

(8) If:

(a) the applicant makes a contention about a charge as mentioned in subsection (4); and

(b) the agency or Minister makes a decision to reject the contention, in whole or in part;

the agency or Minister, as the case requires, must give the applicant written notice of the decision and of the reasons for the decision.

Note: Section 25D of the *Acts Interpretation Act 1901* sets out rules about the contents of a statement of reasons.

(9) A notice under subsection (8) must also state the name and designation of the person making the decision and give the applicant appropriate information about:

(a) his or her rights with respect to review of the decision; and

(b) his or her rights to make a complaint to the Information Commissioner in relation to the decision; and

(c) the procedure for the exercise of those rights;

including (where applicable) particulars of the manner in which an application for internal review (Part VI) and IC review (Part VII) may be made.

(10) Section 13 of the *Administrative Decisions (Judicial Review) Act 1977* does not apply to a decision referred to in subsection (8).

(11) A notice under subsection (8) is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.

