

**NOTICE OF DECISION MADE UNDER SECTION 23  
OF THE FREEDOM OF INFORMATION ACT 1982 (the FOI Act)  
WITH REASONS FOR DECISION PROVIDED UNDER SECTION 26**

**Applicant:** Phillip Sweeney

**Decision-maker:** Andrew Wilson, an authorised officer of the Australian Prudential Regulation Authority (APRA) for the purposes of subsection 23(1) of the FOI Act

**Relevant documents:** Documents in relation to successor fund transfers for several superannuation funds.

**My decision:** *Refuse access* under subparagraph 24(1)(b) of the FOI Act to all documents specified in the Applicant's request on the basis that the work involved in processing the request would substantially and unreasonably divert APRA's resources from its other operations.

**MATERIAL FACTS**

1. APRA received 18 requests in separate emails from the Applicant between 27 January 2015 and 16 February 2015, for '...the first two pages of the "Approved Form" lodged by...' trustees of various superannuation funds. The Applicant stated that these Trustees 'would have needed to lodge an Approved Form with APRA pursuant to the provisions of section 145(2) of the SIS Act.' Details of each request are set out in Schedule A.
2. Under section 24(2) of the FOI Act Mr Fussell treated the 18 requests as a single request, as he was satisfied that the requests relate to documents, the subject matter of which is substantially the same. The Applicant was notified of this by Mr Fussell in an email dated 20 February 2015.
3. In the same email, Mr Fussell undertook a request consultation process in accordance with section 24 of the FOI Act and notified the Applicant under subsection 24AB(2) of the FOI Act of his intention as a delegate to refuse access to the documents which are the subject of the request, on the basis that the work involved in processing the request would substantially and unreasonably divert the resources of APRA from its other operations.
4. By email dated 28 March 2015, the Applicant confirmed that he wished to proceed with the Request. The Applicant did not make any amendment to the Request.
5. On 4 March 2015 Mr Fussell refused access under subparagraph 24(1)(b) of the FOI Act to all documents specified in the Applicant's request on the basis that the work involved in processing the request would substantially and unreasonably divert APRA's resources from its other operations.
6. On 5 March 2015 the Applicant applied for Mr Fussell's decision to be internally reviewed.

**EVIDENCE AND MATERIAL RELIED ON**

7. In making my decision, the following evidence and material has been relied upon:

- a) the Applicant's requests set out in Schedule A;
- b) file note written by Ms Cole, FOI Officer, dated 18 February 2014;
- c) file note written by Ms Cole dated 20 August 2014;
- d) letter from Ms Cole to the Applicant dated 1 September 2014;
- e) file note written by Ms Cole dated 9 September 2014;
- f) file note written by Mr Fussell dated 20 February 2015;
- g) email from Mr Fussell to the Applicant dated 20 February 2015 advising the Applicant of the matters outlined in subsection 24AB(2) of the FOI Act;
- h) email from the Applicant to APRA dated 28 February 2015;
- i) file note written by Mr Fussell dated 2 March 2015;
- j) Notice of Decision by Mr Fussell dated 4 March 2015;
- k) request for internal review by the Applicant dated 5 March 2015;
- l) relevant sections of the FOI Act; and
- m) Guidelines issued by the Office of the Australian Information Commissioner to date.

## REASONS FOR DECISION

8. Section 24(2) of the FOI Act states:

- (2) For the purposes of this section, the agency or Minister may treat 2 or more requests as a single request if the agency or Minister is satisfied that:
  - (a) the requests relate to the same document or documents; or
  - (b) the requests relate to documents, the subject matter of which is substantially the same.

9. I have reviewed the 18 requests made by the Applicant. Each request asks for the  
 'the first two pages of the "Approved Form"...'

10. I am satisfied that the requests relate to documents, the subject matter of which is substantially the same and treating the 18 requests as one under section 24(2) is appropriate.

11. Mr Fussell estimated, after a search of a significant number of APRA's physical and electronic files relating to its supervision of various superannuation entities, that APRA staff responsible for the search and retrieval of these documents would need to spend approximately 90 staff hours to conclusively determine whether the documents sought by the Applicant existed.

12. It was also estimated that further time would be required to consider the relevant documents, identify any applicable exemptions under the FOI Act, consult with third parties, prepare a draft decision and have a decision-maker examine the documents and the draft decision.

13. I have reviewed the file and this information and agree with the estimates of Mr Fussell.

14. Section 24 of the FOI Act provides that:

- (1) If an agency or Minister is satisfied, when dealing with a request for a document, that a practical refusal reason exists in relation to the request (see section 24AA), the agency or Minister:
  - (a) must undertake a request consultation process (see section 24AB); and
  - (b) if, after the request consultation process, the agency or Minister is satisfied that the practical refusal reason still exists—the agency or Minister may refuse to give access to the document in accordance with the request.

15. I am satisfied that a request consultation process was carried out in accordance with section 24AB. After the consultation process the Applicant did not revise the scope of the request.

16. Subparagraph 24AA(1)(a)(i) of the FOI Act provides that, for the purposes of section 24, a practical refusal reason exists in relation to a request if the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations.

17. It has been estimated that 90 hours will be required to deal with this request. I am satisfied that carrying out this request both:

- a) the APRA teams responsible for the supervision of the superannuation entities who are responsible for searching and retrieving documents relevant to the request; and
- b) APRA's Governance, Communication and Information Group and Legal Group who are responsible for processing the revised request,

would have their time substantially diverted from their ordinary functions given the significant amount of search, retrieval and decision making time that would be involved.

18. The Applicant has been informed on previous occasions that the documents sought do not exist. In spite of this the Applicant has applied for access to a further 18 documents. It should also be noted that the Applicant in his request for an Internal Reviews states that APRA has previously represented that such documents do not exist.

19. Even though the Applicant has been informed the documents do not exist he continues to apply for access to the documents. I find it unreasonable to spend any time, let alone an estimated 90 hours, searching for documents which APRA does not require to be submitted and which previous searches have failed to locate.

#### Applicant's request for an internal review

20. The Applicant in his request for an internal review relevantly stated:

*Mr Fussell is claiming that it would require an excessive amount of time for APRA staff to search for the documents requested.*

*However by APRA's own admission the documents requested to not exist.*



*I refer to a letter dated 1 May 2014 {APRA ref:14/000311} that was sent to Ms Carly Oliver of the Office of the Australian Information Commission who was investigating a complaint against APRA.*

*This letter has been signed by Mr Fussell.*

*In Paragraph 5 representation are included that have been made by Mr Bradley Johnstone to the effect that SIS regulation 6.29(1)(c) does not require the lodgement of an "approved form" pursuant to subsection 145(2) of the SIS Act*

*Subsection 145(2) states:*

*"(2) The application must be in the approved form."*

*The Resolution I Seek (sic)*

*Mr Fussell has claimed in his decision letter that APRA will have to spend an excessive amount of time searching for the documents that I have requested {ie "approved forms" pursuant to ss 145(2)}.*

*However in the letter dated 1 May 2014, Mr Fussell had made a representation to the Office of the Australian Information Commissioner (OAIC) that documents of the nature to that I have requested do not exist.*

*Therefore why would Mr Fussell bother to search for documents that he has already advised the Office of the Australian Information Commissioner do not exist?*

*Therefore the reason to be provided by the Internal Review Officer must be that APRA is unable to provide the documents requested related to this FOI Request because they do not exist.*

21. The Applicant in his request for the Internal Review asks why would Mr Fussell bother to search for documents that he has already advised the Office of the Australian Information Commissioner do not exist.

22. The Commissioner's Guidelines state:

***Refusing a request for a document that does not exist, cannot be found or is not received from a contractor***

3.80 An agency or minister may refuse a request if it has taken 'all reasonable steps' to find the document requested, and is satisfied that the document cannot be found or does not exist (s 24A(1)).

23. As a result of this APRA has to take 'all reasonable steps' to find the document requested and be satisfied that the document cannot be found or does not exist.

24. In *H and the Australian Broadcasting Corporation* [2012] AICmr10 (30 March 2012) when discussing what are reasonable steps the decision states:

8. The applicant contends that the ABC failed to provide him with documents that it held, and which are within the scope of his request, because the ABC conducted an inadequate search of its records.

9. Section 24A(1) of the FOI Act provides:

**24A Requests may be refused if documents cannot be found, do not exist or have not been received**

*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.

10. The Australian Information Commissioner has issued Guidelines under s 93A to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. The Guidelines explain that:

The FOI Act is silent about what an agency or minister must do in terms of searching for documents that may be relevant to a request. Agencies should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's environment. At a minimum, an agency or minister should take comprehensive steps to locate a document, having regard to:

- the subject matter of the documents
- the current and past file management systems and the practice of destruction or removal of documents
- the record management systems in place
- the individuals within an agency who may be able to assist with the location of documents, and
- the age of the documents.

The Information Commissioner considers that, as a minimum, an agency should conduct a search by using existing technology and infrastructure to conduct an electronic search of documents, as well as making enquiries of those who may be able to help locate the documents [my emphasis].

25. As set out above, APRA to establish that the documents do not exist, should conduct a search by using existing technology and infrastructure to conduct an electronic search of documents, as well as making enquiries of those who may be able to help locate the documents.

26. To undertake this search for each of the 18 documents, as set out above, it is estimated will take APRA 90 hours.

27. I do not propose to deal with the remainder of the assertions in Applicant's request as what they are irrelevant to locating and gaining access to the documents and built on a mistaken belief.

### Decision

28. The consultation process required by section 24 of the FOI Act has been conducted. The Applicant did not change his request after the consultation. I am satisfied that the work involved in processing the 18 documents in the Applicant's request would substantially and unreasonably divert APRA's resources from its other operations. As a result of this the Applicant's request for access to the 18 documents sought is refused.

## **ADVICE TO APPLICANT AS TO RIGHTS OF REVIEW**

### ***Application for review by Information Commissioner***

29. 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.
30. 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.
31. An application for review by the Information Commissioner should be sent:
  - Online: [www.oaic.gov.au](http://www.oaic.gov.au);
  - Post: GPO Box 2999, Canberra ACT 2601;
  - Fax: +61 2 9284 9666
  - Email: [enquiries@oaic.gov.au](mailto: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***

32. 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.
33. 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***

34. 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.
35. 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](mailto:enquiries@oaic.gov.au)



- GPO Box 2999, Canberra ACT 2601
- website at [www.oaic.gov.au](http://www.oaic.gov.au)



Andrew Wilson  
Manager, Compliance Management  
Australian Prudential Regulation Authority

Date: 11 March 2015

### Schedule A

APRA reference number	Date received	Request
15/000835	29/01/2015	Approved Form - Local Super and Statewide Superannuation Trust
15/000836	29/01/2015	Approved Form - Australian Christian Superannuation and Christian Super
15/000837	30/01/2015	Approved Form - Private Hospitals Superannuation and Prime Super
15/000838	30/01/2015	Approved Form - Australian Government Employees Superannuation Trust (AGEST) and AustralianSuper
15/000840	27/01/2015	Approved Form - Vision Super and Local Authorities Super
15/000844	2/02/2015	Approved Form - Age Staff Pension Fund and Mercer Superannuation
15/000845	2/02/2015	Approved Form - John Fairfax Retirement Fund and Mercer Superannuation
15/000851	2/02/2015	Approved Form - Coal Industry Superannuation Fund and AUSCOAL Superannuation Fund
15/000852	2/02/2015	Approved Form - Cue Super and NGS Super
15/000853	2/02/2015	Approved Form - City Super and Local Government Superannuation Scheme
15/000854	2/02/2015	Approved Form - Health Super and First State Superannuation Scheme
15/000865	3/02/2015	Approved Form - ConnectSuper and CBUS
15/000952	16/02/2015	Approved Form - BP Superannuation Fund and Plum Superannuation Fund
15/000953	16/02/2015	Approved Form - Amcor Superannuation Fund and Plum Superannuation Fund



15/000954	16/02/2015	Approved Form - Pepsi Superannuation Fund and Plum Superannuation Fund
15/000955	16/02/2015	Approved Form - Philip Morris Superannuation Fund and Plum Superannuation Fund
15/000956	16/02/2015	Approved Form - BHP Billton No. 2 Superannuation Fund and Plum Superannuation Fund
15/000957	16/02/2015	Approved Form - Campbell Arnott's Superannuation Fund and Plum Superannuation Fund

*Freedom of Information Act 1982*

## Sections 24, 24AA, 24AB

**24 Power to refuse request—diversion of resources etc.**

- (1) If an agency or Minister is satisfied, when dealing with a request for a document, that a practical refusal reason exists in relation to the request (see section 24AA), the agency or Minister:
  - (a) must undertake a request consultation process (see section 24AB); and
  - (b) if, after the request consultation process, the agency or Minister is satisfied that the practical refusal reason still exists—the agency or Minister may refuse to give access to the document in accordance with the request.
- (2) For the purposes of this section, the agency or Minister may treat 2 or more requests as a single request if the agency or Minister is satisfied that:
  - (a) the requests relate to the same document or documents; or
  - (b) the requests relate to documents, the subject matter of which is substantially the same.

**24AA When does a *practical refusal reason* exist?**

- (1) For the purposes of section 24, a ***practical refusal reason*** exists in relation to a request for a document if either (or both) of the following applies:
  - (a) the work involved in processing the request:
    - (i) in the case of an agency—would substantially and unreasonably divert the resources of the agency from its other operations; or
    - (ii) in the case of a Minister—would substantially and unreasonably interfere with the performance of the Minister's functions;
  - (b) the request does not satisfy the requirement in paragraph 15(2)(b) (identification of documents).
- (2) Subject to subsection (3), but without limiting the matters to which the agency or Minister may have regard, in deciding whether a practical refusal reason exists, the agency or Minister must have regard to the resources that would have to be used for the following:
  - (a) identifying, locating or collating the documents within the filing system of the agency, or the office of the Minister;
  - (b) deciding whether to grant, refuse or defer access to a document to which the request relates, or to grant access to an edited copy of such a document, including resources that would have to be used for:
    - (i) examining the document; or
    - (ii) consulting with any person or body in relation to the request;
  - (c) making a copy, or an edited copy, of the document;
  - (d) notifying any interim or final decision on the request.
- (3) In deciding whether a practical refusal reason exists, an agency or Minister must not have regard to:
  - (a) any reasons that the applicant gives for requesting access; or
  - (b) the agency's or Minister's belief as to what the applicant's reasons are for requesting access; or
  - (c) any maximum amount, specified in the regulations, payable as a charge for processing a request of that kind.

## 24AB What is a *request consultation process*?

### *Scope*

- (1) This section sets out what is a *request consultation process* for the purposes of section 24.

### *Requirement to notify*

- (2) The agency or Minister must give the applicant a written notice stating the following:
  - (a) an intention to refuse access to a document in accordance with a request;
  - (b) the practical refusal reason;
  - (c) the name of an officer of the agency or member of staff of the Minister (the *contact person*) with whom the applicant may consult during a period;
  - (d) details of how the applicant may contact the contact person;
  - (e) that the period (the *consultation period*) during which the applicant may consult with the contact person is 14 days after the day the applicant is given the notice.

### *Assistance to revise request*

- (3) If the applicant contacts the contact person during the consultation period in accordance with the notice, the agency or Minister must take reasonable steps to assist the applicant to revise the request so that the practical refusal reason no longer exists.
- (4) For the purposes of subsection (3), *reasonable steps* includes the following:
  - (a) giving the applicant a reasonable opportunity to consult with the contact person;
  - (b) providing the applicant with any information that would assist the applicant to revise the request.

### *Extension of consultation period*

- (5) The contact person may, with the applicant's agreement, extend the consultation period by written notice to the applicant.

### *Outcome of request consultation process*

- (6) The applicant must, before the end of the consultation period, do one of the following, by written notice to the agency or Minister:
  - (a) withdraw the request;
  - (b) make a revised request;
  - (c) indicate that the applicant does not wish to revise the request.
- (7) The request is taken to have been withdrawn under subsection (6) at the end of the consultation period if:
  - (a) the applicant does not consult the contact person during the consultation period in accordance with the notice; or
  - (b) the applicant does not do one of the things mentioned in subsection (6) before the end of the consultation period.

### *Consultation period to be disregarded in calculating processing period*

- (8) The period starting on the day an applicant is given a notice under subsection (2) and ending on the day the applicant does one of the things mentioned in paragraph (6)(b) or (c) is to be disregarded in working out the 30 day period mentioned in paragraph 15(5)(b).



Note: Paragraph 15(5)(b) requires that an agency or Minister take all reasonable steps to notify an applicant of a decision on the applicant's request within 30 days after the request is made.

*No more than one request consultation process required*

- (9) To avoid doubt, this section only obliges the agency or Minister to undertake a request consultation process once for any particular request.