



Our reference: MR16/00051

Mr John Telford
Secretary, Victims of Financial Fraud
10 Dixon Street
FAIRY MEADOW NSW 2519

Sent by email to: johnt@1earth.net

Dear Mr Telford

Application for IC review of decision by the Australian Prudential Regulation Authority

I refer to your request for Information Commissioner review (IC review) of the revised decision made by the Australian Prudential Regulation Authority (APRA) on 7 September 2016 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

Background

On 7, 8 and 15 November 2015, you applied to APRA for access to a number of documents under the FOI Act. On 27 November 2015, APRA advised you that these requests would be treated as a single request for documents, in accordance with s 24(2) of the FOI Act.

On 9 December 2015, APRA released documents within the scope of one of the combined requests but refused access to the other documents under s 24(1)(b) of the FOI Act on the basis that a practical refusal reason continued to exist following the request consultation process.

Your IC review

On 4 February 2016, you sought IC review of APRA's decision.

On 18 August 2016, you narrowed the scope of your FOI request as follows:

The revised scope of our FOI request 409 is APRA's acknowledgment of its own processing / assessing in handling complaints that it encountered from the period 2004 to 2007 of Astarra and entities. The document we seek would be in the form of:

a document created by APRA that assessed the supervision complaints about Astarra Strategic Fund Entities, whether the complaints originated within APRA's office or were provided by third party. The request for the above mentioned document is:

excluding complaints from the general public;

excluding complaints received via email or telephone calls and

excluding personal names and information about companies that is confidential.

The revised scope of our FOI request 412 is APRA's 'fit and proper person test' of Trio directors and Astarra board in 2005, 2006 and 2008. This would include APRA generated documents of when APRA carried out the 'fit and proper person test.'

The revised FOI 409 & 412 requests exclude emails and VOFF hope this is more acceptable for APRA.

On 7 September 2016, APRA revised its decision and decided to refuse you access to all the documents within scope on the basis that they are exempt under s 38 (secrecy provisions) of the FOI Act.

On 7 September 2016, you advised that you still sought IC review of APRA's decision. On 12 October 2016, you submitted:

The question is whether APRA's own document/summary is subject to protection under Section 56 of the APRA Act and s38 of the FOI Act, particularly after the request was revised not to include confidential or restricted information. Certainly Section 56 of the APRA Act and s 38 of the FOI Act is not meant to be used as a blanket exemption.

The second part of the request (APRA batched 409 & 412) is FOI number 412. This request sought APRA's 'fit and proper person test' of Trio directors and the Astarra board in 2005, 2006 and 2008. This would include APRA generated documents of when APRA carried out the 'fit and proper person test'.

As VOFF revised scope of our requests from the original requests, i.e. by excluding any confidential and/or restricted information. Again in this instance, FOI 412 is denied information under Section 56 of the APRA Act and s 38 of the FOI Act, illustrating another example of a blanket exemption.

Does disclosure of the documents constitute disclosure of protected information for the purposes of s 38 of the FOI Act?

Section 38 of the FOI Act provides that a document is exempt if its disclosure is prohibited under a provision of an enactment and s 38 is expressly applied to the document by that provision, or by another provision of that or any other enactment.

Section 56(11) of the *Australian Prudential Regulation Authority Act 1998* (the APRA Act) provides that a document that is a protected document, or contains protected information, is an exempt document for the purposes of s 38 of the FOI Act.

Section 56(1) of the APRA Act defines 'protected document' to include a document 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. 'Protected information' is defined to mean information disclosed or obtained under, or for the purposes of, a prudential regulation framework law and relating to the affairs of a financial sector entity.

Section 3 of the APRA Act states that the APRA Act and the *Superannuation Industry (Supervision) Act 1993* are prudential regulation framework laws.

I have reviewed an unredacted copy of the documents. It is clear the documents were given to APRA, or produced by them, for the purposes of performing functions under the APRA Act or the *Superannuation Industry (Supervision) Act 1993*. Trio Capital Limited (in liq) (formerly known as Astarra Capital Limited) is a financial sector entity. The documents are not otherwise publicly available.

As such, the documents are protected documents and s 38 of the FOI Act provides that they are exempt documents for the purposes of the FOI Act.

I have had regard to the grounds you raised including that:

- s 56 of the APRA Act is 'not meant to be used as a blanket exemption'
- s 56 has been used to exempt APRA's 'own' documents or 'APRA generated documents', and
- the FOI request was for documents excluding any confidential and/or restricted information.

It is clear that s 56 of the APRA Act is intended to protect documents given to or produced by APRA for the purpose of administering the APRA Act or the *Superannuation Industry (Supervision) Act 1993*, from being released except in the limited circumstances outlined in the section (none of which apply here). Production of protected documents outside this strict framework is punishable by two years' imprisonment.

Section 56 of the APRA Act does not exclude documents owned or created by APRA from the definitions of 'protected documents' or 'protected information'. The definition includes such documents.

Finally, an alternative interpretation of the scope of your request (which excludes confidential or restricted information) is that there are no documents falling within the scope of your request. This interpretation of your request would produce the same outcome.

You may like to consider a decision of the Freedom of Information Commissioner in *Sweeney and Australian Prudential Regulation Authority* [2013] AICmr 67 (27 August 2013) which affirmed a decision by APRA to refuse access to documents under the same provisions. A link to this decision can be found in our covering email.

Accordingly, on all the material before the OAIC, including your application for IC review and submissions, you have not raised a ground of review of substance with respect to APRA's revised decision.

Discretion not to conduct an IC review

Under s 54W(a)(i) of the FOI Act, the Information Commissioner may decide not to undertake a review if satisfied that the review application is lacking in substance.

On the basis of the following information before the OAIC, your application for IC review is lacking in substance:

- You have not raised a ground that discloses any error in APRA's finding that the documents you requested are protected documents or documents that contain protected information for the purposes of s 56 of the APRA Act.
- You have not raised a valid ground to review APRA's decision that the documents within the scope of your request are exempt under s 38 of the FOI Act because they are protected documents or documents that contain protected information (s 56(11) of the APRA Act).

Accordingly, the intention is to finalise your application for IC review under s 54W(a) of the FOI Act unless you provide reasons to reconsider our view of the matter.

I invite you to provide these reasons by **15 December 2016**. If I do not hear from you by this date your review request will be closed.

If you would like to discuss this matter, please contact Ms Rachel Ranjan, the case officer assigned to your application, on (02) 8231 4214 or email rachel.ranjan@oaic.gov.au. Please quote reference number **MR16/00051**.

Yours sincerely



Raewyn Harlock
Assistant Director
Freedom of Information, Dispute Resolution Branch
Office of the Australian Information Commissioner

1 December 2016