Australian Government
Office of the Australian Information Commissioner

Washington and Australian Prudential Regulation Authority [2011] AICmr 11 (22 December 2011)

Decision and reasons for decision of Freedom of Information Commissioner, Dr James Popple

Applicant:	**Stuart Washington**
Respondent:	**Australian Prudential Regulation Authority**
Decision date:	**22 December 2011**
Application number:	**MR10/00009**
Catchwords:	**Freedom of Information — Request for access to risk registers maintained by regulator — Whether documents conditionally exempt from release — (CTH) Freedom of Information Act 1982 s 47J** **Freedom of Information — Request for access to risk registers maintained by regulator — Whether contrary to public interest to release conditionally exempt documents — (CTH) Freedom of Information Act 1982 s 11A(5)** **Freedom of Information — Procedure in IC Review — Access by IC Review applicant to submissions containing exempt material — (CTH) Freedom of Information Act 1982 s 55**

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Summary

1. I affirm the decision of the Australian Prudential Regulation Authority (**APRA**) of 7 December 2010 to refuse access to the documents requested under the *Freedom of Information Act 1982* (the **FOI Act**). Those documents are exempt under s 47J of the FOI Act.

Background

2. APRA was established[1] by the *Australian Prudential Regulation Authority Act 1998* (the **APRA Act**) to regulate bodies in the financial sector in accordance with other laws of the Commonwealth that provide for prudential regulation or for retirement income standards.[2]

3. On 8 November 2010, Mr Stuart Washington, a journalist with the *Sydney Morning Herald*, applied to APRA for access to:

    1) Industry risk 'registers' for each of the APRA-regulated industries.

       The description of these documents appears in the following description on page 44 of APRA's 2010 annual report:

       > 'These registers identify the main emerging risks and supervisory issues for each industry, the implications for regulated institutions and the key areas or triggers where specific supervisory action may be required.'

    2) The same registers as above, but the archived copy dated August 30, 2008 (or before that date but as close as possible to that date).

    3) The same registers as above, but the archived copy dated January 1, 2009 (or before that date as close as possible to that date).

4. The content of APRA's risk registers is described in its 2009–10 Annual Report:

    > APRA has risk registers for each of the regulated industries, in which risks are graded by their potential severity, and it assigns risk owners whose task it is to scope the appropriate mitigating actions, determine resources and timeframes and see the actions through to conclusion.[3]

5. APRA identified 12 risk registers relevant to Mr Washington's request. These registers relate to four financial sectors: superannuation, life insurance and friendly societies, general insurance, and authorised deposit-taking institutions. They are variously dated November 2008, January 2009 and July, August and September 2010.

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1 APRA Act, s 7.

2 APRA Act, s 8(1)(a). APRA's other purposes, set out in s 8(1)(b) and (c), are administering the financial claims schemes provided for in the *Banking Act 1959* and the *Insurance Act 1973*; and developing the administrative practices and procedures to be applied in performing that regulatory role and administration.

3 APRA, *Annual Report 2010*, 7.

6. On 7 December 2010, APRA refused Mr Washington access to these risk registers on the basis that they were exempt documents under the FOI Act because of s 47C (deliberative processes) and s 47J (the economy).

7. By email dated 20 December 2010, Mr Washington sought IC review of this decision under s 54L of the FOI Act.

8. In the course of this IC review, APRA also submitted that the risk registers were exempt because of s 38 of the FOI Act (documents to which secrecy provisions of enactments apply) and s 56 of the APRA Act (secrecy—general obligations).

Decision under review

9. The decision under review is the decision of APRA on 7 December 2010 to refuse Mr Washington's request.

The economy exemption (s 47J)

10. Section 47J of the FOI Act relevantly provides:

> **47J Public interest conditional exemptions—the economy**
>
> (1) A document is conditionally exempt if its disclosure under this Act would, or could be reasonably expected to, have a substantial adverse effect on Australia's economy by:
>
> (a) influencing a decision or action of a person or entity; or
>
> (b) giving a person (or class of persons) an undue benefit or detriment, in relation to business carried on by the person (or class), by providing premature knowledge of proposed or possible action or inaction of a person or entity.
>
> …
>
> (2) For the purposes of subsection (1), a substantial adverse effect on Australia's economy includes a substantial adverse effect on:
>
> (a) a particular sector of the economy; or
>
> (b) the economy of a particular region of Australia.
>
> …
>
> (3) The documents to which subsection (1) applies include, but are not limited to, documents containing matter relating to any of the following:
>
> …
>
> (d) the regulation or supervision of banking, insurance and other financial institutions;
>
> …

11. I have examined the risk registers in question. Each relates to the regulation or supervision of banking, insurance and other financial institutions; the risk registers are documents to which s 47J(1) applies (s 47J(3)(d)). And banking, insurance and other financial institutions make up particular sectors of the

economy (s 47J(2)(a)). So, the risk registers will be conditionally exempt under s 47J(1) if their disclosure would, or could reasonably be expected to, have a substantial adverse effect on the banking, insurance and other financial institution sectors of Australia's economy.

Would have a substantial adverse effect

12. There is a high threshold for a decision maker to decide that disclosure of documents sought under the FOI Act would have a substantial adverse effect on Australia's economy. 'Would', in this context, requires that an adverse effect is certain. That is not the case in this IC review, and APRA has not asserted that it is.

Could be reasonably expected to have a substantial adverse effect

13. 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 use of 'could' in the expression 'could be reasonably expected to' means that the test 'requires no more than a degree of reasonableness being applied to deciding whether disclosure would cause the consequences'.[4] Importantly, 'the mere risk or mere possibility of prejudice does not qualify as a reasonable expectation':[5]

> There must be more than an assumption, allegation or possibility that the adverse effect would occur if the document were released … A decision maker must focus on the expected effect on Australia's economy if a document is disclosed.[6]

14. The Guidelines[7] also explain that:

> The term 'substantial adverse effect' broadly means 'an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person'.[8] The word 'substantial', taken in the context of substantial loss or damage, has been interpreted as 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal'.[9]

15. In its reasons for decision on 7 December 2010, APRA claimed that 'the information in the risk registers may affect the public's perception about certain entities or an industry' and 'the confidence in the economy may be undermined if the potential emerging risks and APRA's discussions and thoughts were disclosed'. Mr Washington, in his request for IC review, argued that APRA's claims were not adequately supported.

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4 Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (2010) [5.14]

5 *Guidelines* [5.15].

6 *Guidelines* [6.194]–[6.195].

7 *Guidelines* [5.17].

8 See *Re Thies and Department of Aviation* [1986] AATA 141.

9 See *Tillmanns Butcheries Pty Ltd v Australasian Meat Employees Union* (1979) 27 ALR 367.

16. APRA has provided me with examples,[10] based on information in the risk registers, which seek to demonstrate that entities in the banking, insurance and other financial institution sectors could reasonably be expected to suffer a substantial adverse effect if the registers were disclosed.

17. I am persuaded by these examples that the disclosure of the 12 risk registers could reasonably be expected to have a substantial adverse effect on those sectors by:

    - influencing the decisions and actions of two groups of persons or entities (see s 47J(1)(a)), and
    - giving persons in those groups an undue benefit in relation to business carried on in those sectors by providing premature knowledge of proposed or possible action by APRA (see s 47J(1)(b)).

    The two groups of persons or entities are:

    - the individual entities within the banking, insurance and other financial institution sectors, that are regulated by APRA and may take action to evade possible regulatory action by APRA should the risk registers be disclosed, and
    - members of the public whose investment decisions may be influenced by information contained in the risk registers.

18. I place greater weight on the possible effect on the first of these two groups than on the second. Whether it is in the public interest to keep information from the second group is discussed at [28]–[29] below.

19. APRA also claimed that disclosure of the risk registers 'may have a systemic effect in the industry which may affect the stability of Australia's economy'. As explained at [11] above, there is no requirement that there be a substantial adverse effect on the whole economy. It is enough that there be a substantial adverse effect on a particular sector of the economy, like the banking, insurance and other financial institutions sectors. Because of the view that I have taken about the adverse effect that disclosure would have on these sectors, there is no need for me to consider any possible effect on the entire national economy.

Findings

20. The 12 risk registers are conditionally exempt under s 47J.

21. If these documents are exempt, it will not be reasonably practical for APRA to provide Mr Washington with edited copies under s 22, having regard to the extent of the modifications that would be required.[11] This is partly due to the

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[10] At APRA's request, these examples have not been provided to Mr Washington. See [35]–[37] below.

[11] See s 22(1)(c)(i).

relatively small number of entities in some of these sectors, whose identities could be guessed from edited copies.

Other exemptions

22. As explained at [6]–[8] above, in refusing to disclose the risk registers to Mr Washington, APRA applied the deliberative processes exemption (s 47C) as well as the economy exemption (s 47J). In the course of this IC review, APRA also submitted that the risk registers were exempt because of s 38 of the FOI Act and s 56 of the APRA Act.

23. Because of the view I have come to on the application of s 47J, it is not necessary for me to consider the possible application of these other exemptions.

The public interest test (s 11A(5))

24. I have found that the 12 risk registers that are the subject of this IC review are conditionally exempt under s 47J of the FOI Act. Section 11A(5) provides that, if a document is conditionally exempt, it must be disclosed 'unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest'.

25. Section 11B(3) of the FOI Act lists factors that favour access when applying the public interest test. One of these (allowing a person to access his or her own personal information) is not relevant to this IC review. The other three factors are relevant, because access would:

    - promote the objects of the FOI Act
    - inform debate on a matter of public importance, namely the regulation of the banking, insurance and other financial institution sectors of Australia's economy, and
    - promote effective oversight of public expenditure, to the extent that it would provide insight into APRA's regulation of those sectors.

    I place some weight on these three factors in this IC review.

26. The Guidelines include a non-exhaustive list of further factors that favour disclosure.[12] Having regard to that list, I consider that the further factors that favour disclosure in this IC review are that access would, to some extent:

    - inform the community about APRA's operations
    - reveal the reason for APRA's regulatory decisions and contextual information that informed those decisions
    - reveal APRA's risk assessment practices, which would allow scrutiny of the basis for those practices, and

[12] *Guidelines* [6.25].

- allow or assist inquiry into possible deficiencies in APRA's conduct or administration.

I place some weight on these four factors in this IC review.

27. The Guidelines also include a non-exhaustive list of factors against disclosure.[13] Having regard to that list, I consider that the factors against disclosure in this IC review are that access could be reasonably expected to:

- prejudice APRA's ability to obtain confidential or sensitive information in the future
- allow individual entities to take action to evade possible regulatory action by APRA, and
- harm the interests of individuals with financial interests in those regulated entities.

Of all of these factors—for and against disclosure—I give the greatest weight in this IC review to the factors against disclosure, especially the last two.

28. A corollary of the last factor (disclosure could harm individuals' financial interests in regulated entities) is that information is kept from members of the public whose investment decisions might have been influenced by that information. Generally speaking, this is undesirable. However, APRA's role of regulating financial sector bodies (as set out in s 8(1)(a) of the APRA Act) must sometimes—and properly—involve not disclosing to the market all relevant information that it holds.

29. I think that that is the case in this IC review: it would be contrary to the public interest for the information in the risk registers to be disclosed to the market at this time. But that does not mean that disclosure of those registers will always be contrary to the public interest, as discussed at [31]–[33] below.

Findings

30. Giving Mr Washington access to the 12 risk registers that I have found to be conditionally exempt under s 47J would, on balance, be contrary to the public interest for the purposes of s 11A(5).

Timing

31. When applying the public interest test, as the Guidelines explain:

> The timing is important: it is possible that certain factors may be relevant when the decision is made, but would not be relevant if the request was reconsidered some time later. In such circumstances a new and different decision could be made.[14]

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13 *Guidelines* [6.29].
14 *Guidelines* [6.32].

32. The risk registers subject to this IC review are variously dated November 2008, January 2009 and July, August and September 2010. In applying the public interest test above, I gave the greatest weight to the possible effect of disclosure on regulatory action by APRA and on the financial interests of individuals. With the passing of time, these factors will have less effect. But the factors in favour of disclosure, discussed above, will generally have no lesser effect. So, at a later time, disclosing these risk registers will no longer be contrary to the public interest.

33. APRA should consider routinely publishing its risk registers after a certain period of time, for all of the reasons identified above as factors favouring access:[15] for example, because publication would promote effective oversight of public expenditure by providing insight into APRA's regulation of the banking, insurance and other financial institution sectors.

34. Any such publication would, of course, need to be consistent with applicable secrecy provisions. For example, s 56(2) of the APRA Act makes it an offence to disclose 'protected information', or produce a 'protected document'. Those terms are defined in s 56(1). But there are a number of circumstances in which disclosure is not an offence, including where the disclosure is approved in writing by APRA (s 56(5)(b)).

Material not made available to the IC review applicant

35. As discussed at [16]–[17] above, APRA provided me with examples, based on information in the risk registers, in support of its contention about the substantial adverse effect that disclosure of the risk registers could be reasonably expected to have. I found those examples persuasive.

36. At APRA's request, those examples have not been made available to Mr Washington. APRA contends—and I agree—that to do so would reveal exempt material. Although the FOI Act gives the Information Commissioner broad powers to conduct an IC review in whatever way he or she considers appropriate (s 55(2)(a)), there is an obligation to ensure that each review party is given a reasonable opportunity to present his or her case (s 55(4)(b)). Generally, those provisions, and the requirements of natural justice, would mean that each review party would have access to all of the material that the Information Commissioner takes into account when conducting an IC review. However, where (as here) material is provided by an agency that is relevant to the IC review but would be exempt if it were the subject of an FOI application, it is appropriate not to provide it to the applicant. As the Guidelines explain:

> A decision maker should clearly describe the expected effect and its impact on the usual operations or activity of the agency in the statement of reasons in order to show their deliberations in determining the extent of the expected effect. Of

[15] See [25]–[26] above.

course, it may sometimes be necessary to use general terms to avoid making the Statement of Reasons itself an 'exempt document' (s 26(2)).[16]

37. This approach is consistent with s 55(5)(c) of the FOI Act, which provides that, if a hearing is held as part of an IC review, part of that hearing may be held in the absence of a review party if necessary to prevent disclosure of confidential material to that review party.

Decision

38. Under s 55K of the FOI Act, I affirm APRA's decision of 7 December 2010.

Dr James Popple
Freedom of Information Commissioner

22 December 2011

Review rights

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. The current application fee is $777, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.

[16] *Guidelines* [5.18].