



# ‘AMS’ and Australian Prudential Regulation Authority (Freedom of information) [2024] AICmr 169 (14 August 2024)

**Decision and reasons for decision of  
Special Adviser, Freedom of Information Decisions, Toni Pirani  
Delegate of the Australian Information Commissioner for the purposes of s 55K of  
the Freedom of Information Act 1982**

Applicant	‘AMS’
Respondent	Australian Prudential Regulation Authority
Decision date	14 August 2024
Application number	MR21/00057
Catchwords	Freedom of Information — Whether information protected by secrecy provisions — (CTH) <i>Freedom of Information Act 1982</i> s 38

## Decision

1. Under s 55K of the *Freedom of Information Act 1982* (the FOI Act), I affirm the decision of the Australian Prudential Regulation Authority (APRA) of 13 January 2021.

## Key Points

2. This decision discusses the application of s 38 of the FOI Act in the context of the secrecy provisions that apply to APRA. It finds that the relevant document is a ‘protected document’ and contains ‘protected information’ and that the secrecy provisions therefore apply.

## Reasons for decision

### Scope of IC review

3. On 29 October 2020, the applicant applied to APRA for access under the FOI Act to:

...the 5-page letter written by an [Entity A] director who resigned in early 2005. The letter is addressed to the directors of [Entity B] or to [Entity B]. A copy of the 5-page letter was delivered to APRA.

Also include any other letter by the same letter writer to APRA during the time period from early 2005 to mid-2006.

Please also include any reply or response that APRA made concerning the issues the letter writer raised.

4. On 13 January 2021,<sup>1</sup> APRA advised the applicant it had identified one document falling within Part 1 of their request and had decided to refuse access to this document on the basis that it was a 'protected document' and/or contained 'protected information' each as defined in s 56(1) of the *Australian Prudential Regulation Authority Act 1998* (APRA Act) and was therefore exempt under s 38 of the FOI Act by virtue of s 56(11) of the APRA Act. Further, APRA refused Parts 2 and 3 of the request under s 24A of the FOI Act on the basis that the documents did not exist.
5. In submissions to this Information Commissioner review (IC review) the applicant advised they were not seeking a review of APRA's refusal to provide documents under Parts 2 and 3 of their FOI request. I am satisfied that these parts of the request are out of scope and that only Part 1 remains in scope. In respect of this, the applicant contends that s 38 of the FOI Act does not apply to the document at issue.
6. Therefore, the issue to be decided in this IC review is whether the document that APRA maintains is fully exempt under the secrecy provisions of enactments exemption (s 38), is exempt under that provision.
7. In an IC review of an access refusal decision, the agency bears the onus of establishing that its decision is justified, or that I should give a decision adverse to the applicant.<sup>2</sup>
8. In making my decision, I have had regard to the following:
  - APRA's decision and reasons for decision of 13 January 2021
  - the document at issue
  - the FOI Act<sup>3</sup>
  - the APRA Act<sup>4</sup>
  - the *Financial Sector (Collection of Data) Act 2001* (FSCOD Act)<sup>5</sup>
  - the *Superannuation Industry (Supervision) Act 1993* (SIS Act)<sup>6</sup>

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<sup>1</sup> In submissions to this IC review, APRA submitted that prior to making its decision it had engaged with the applicant on several occasions. On 25 November 2020, APRA provided a Notice of Practical Refusal under s 15AA of the FOI Act until 18 December 2020. On 18 December 2020, APRA issued a Notice of Practical Refusal under s 24AB of the FOI Act and provided the applicant with an opportunity to revise their request. On 21 December 2020, APRA received correspondence from the applicant in response to the Notice of Practical Refusal.

<sup>2</sup> Section 55D(1) of the FOI Act.

<sup>3</sup> See s 38 (set out at **Annexure A**).

<sup>4</sup> See ss 3 and 56 (set out at **Annexure A**).

<sup>5</sup> See s 5 (set out at **Annexure A**).

<sup>6</sup> See Division 4 (Part 25) (set out at **Annexure A**).

- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act<sup>7</sup> to which agencies must have regard in performing a function or exercising a power under the FOI Act,<sup>8</sup>
- the parties' submissions.

## Secrecy provisions - s 38

9. A document is exempt under s 38 of the FOI Act if its disclosure is prohibited under an enactment listed in Schedule 3 of the FOI Act<sup>9</sup> or if s 38 of the FOI Act is expressly applied to the document by an enactment.
10. Subsection 56(11) of the APRA Act applies s 38 of the FOI Act to 'protected information' and 'protected documents' within the scope of s 56(2) of the APRA Act (the secrecy provision). Section 56(2) makes it an offence to directly or indirectly disclose protected documents and/or protected information unless an exemption applies.
11. APRA decided that the document at issue was exempt in full pursuant to s 38 of the FOI Act because:
  - the document satisfies the definition of a 'protected document' under the APRA Act, which includes a document that has been given or produced under, or for the purposes of, a prudential regulation framework law, and contains information relating to the affairs of a financial sector entity<sup>10</sup>
  - the document also contains 'protected information' under the APRA Act, which includes 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<sup>11</sup>
  - the SIS Act is a prudential regulation framework law
  - the document was given or produced, and disclosed or obtained under, or for the purposes of the SIS Act
  - the entity in question is a 'financial sector entity'
  - no exceptions to the secrecy provision applied<sup>12</sup>
  - no exceptions to s 38 of the FOI Act applied,<sup>13</sup> and
  - the document and information is not publicly available.
12. In summary, the applicant submitted:<sup>14</sup>

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<sup>7</sup> See, Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (FOI Guidelines).

<sup>8</sup> Relevant Guidelines set out at **Annexure A**.

<sup>9</sup> For completeness I note that the APRA Act is not listed in Schedule 3.

<sup>10</sup> Section 56(1) of APRA Act.

<sup>11</sup> Section 56(1) of APRA Act.

<sup>12</sup> These exceptions are set out at ss 56(3)-(7L) of the APRA Act.

<sup>13</sup> These are set out at ss 38(1A) -(2) of the FOI Act.

<sup>14</sup> The applicant provided substantial submissions to this IC review. My review of these submissions revealed that, in broad terms, they primarily included the applicant's views regarding why there is a public interest in having the document at issue released. The FOI Act, however, does not provide for the public interest to be taken into account when making decisions regarding whether documents are exempt under s 38.

- the document at issue ‘...was not for the purposes of, a prudential regulation framework law’
- the document at issue does not relate to the affairs of a financial sector entity, and
- the entity in question was not required to report financial information to APRA.<sup>15</sup>

Whether disclosure of the material was prohibited

### **Was the document given or produced, or disclosed or obtained, under a prudential regulation framework law?**

13. I am satisfied that the SIS Act is a ‘prudential regulation framework law’ under s 3(1) of the APRA Act.
14. In summary, in support of its claim that the document at issue was given or produced, or disclosed or obtained, under the SIS Act, APRA submitted that:
  - the document at issue was provided to APRA in 2012 during an investigation it conducted into an entity of which the author of the document at issue was the founder and chief executive, and
  - the investigation was conducted under Division 4 of part 25 of the SIS Act.<sup>16</sup>
15. In summary, the applicant submitted:
  - they understand that the document at issue was handed to the board of [Entity A] in 2005 and the author of the document resigned from [Entity A] after delivering the document to his former work colleagues
  - APRA should have had access to the document at issue in 2005 through the regular prudential review process
  - APRA should have seen the document at issue during its diligence investigations pursuant to the grant of [Entity A’s] RSE licence, and
  - the document at issue would have been in the board’s correspondence files.
16. The applicant’s claim that APRA should have had access to the document at issue in 2005 is immaterial to this IC review. I accept APRA’s submissions and I am satisfied that the document at issue was given or produced, or disclosed or obtained, under the SIS Act.

### **Does the document at issue relate to the affairs of a financial sector entity?**

17. In summary, APRA submitted:
  - pursuant to s 5(2)(b) of the FSCOD Act), the term ‘financial sector entity’ includes ‘regulated entity’, the latter which is defined under s 5(4) of FSCOD Act as including a body regulated by APRA within the meaning of s 3(2) of the APRA Act
  - pursuant to paragraph 3(2)(f) of the APRA Act, a trustee of a superannuation entity within the meaning of the SIS Act,<sup>17</sup> is a body regulated by APRA, and

<sup>15</sup> The applicant’s position was set out in submissions provided to the OAIC dated 31 March 2022.

<sup>16</sup> APRA submitted that it gave a Notice requiring production of books pursuant to s 269 of the SIS Act to the liquidator of the entity it was investigating. The liquidator provided the document at issue (along with other documents) in response to APRA’s notice.

<sup>17</sup> Section 10 of the SIS Act sets out the definitions of ‘superannuation entity’ and ‘trustee’ (see **Annexure A**).

- [Entity A] held a registrable superannuation entity (RSE) licence, was a trustee of a superannuation entity and was regulated by APRA. Therefore, [Entity A] was a financial sector entity as defined in s 5(2)(b) of FSCOD Act.
18. APRA further submitted that it has wide powers under the SIS Act to supervise and licence RSEs.<sup>18</sup>
  19. The applicant did not provide specific submissions to substantiate their claim that [Entity A] was not a financial sector entity.
  20. The OAIC's review of publicly available information revealed that [Entity B] (formerly Entity A) was the trustee of a superannuation entity and was regulated by APRA. Further, the OAIC's review of publicly available information did not reveal that the document at issue was publicly available.
  21. I accept APRA's submissions and I am satisfied that [Entity A] was, and continues to be, a financial sector entity for the purposes of the APRA Act because it was a body regulated by APRA within the meaning of s 3(2)(f) of the APRA Act and, s 56 of the APRA Act provides that, a 'body regulated by APRA' includes a body that has at any time been a body regulated by APRA.
  22. Given the above, and following my review of an unedited copy of the document at issue, I am satisfied that it is a 'protected document' and contains 'protected information' and is therefore prohibited from disclosure because:
    - the SIS Act is a 'prudential regulation framework law'
    - the document was given or produced, or disclosed or obtained, under the SIS Act
    - [Entity A] satisfies the definition of a 'financial sector entity' for the purposes of the definitions of a 'protected document' and 'protected information',<sup>19</sup> and
    - the information in the document is not publicly available.<sup>20</sup>
  23. Therefore, I am satisfied that it would be an offence under s 56(2) of the APRA Act for the staff or members of APRA to disclose the document, unless an exception in s 56 of the APRA Act applies.

### Does an exception to the secrecy provision apply?

24. Disclosure of a 'protected document' or 'protected information' is permissible under the secrecy provision if it is enabled by an exception in the APRA Act.

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<sup>18</sup> APRA submitted that it has wide powers under the SIS Act to supervise and licence RSEs, conduct investigations, require the production of documents, ban individuals from working in an APRA-regulated industry, commence civil proceedings or refer matters for criminal prosecution. In extreme circumstances, APRA can take control of a RSE or apply to the court for an order that a RSE be placed under judicial management. Under the SIS Act, APRA may also determine, vary or revoke prudential standards that must be complied with by all RSE licensees of registrable superannuation entities and APRA may suspend or remove a trustee of a superannuation entity for any number of reasons, including, if the trustee is a RSE licensee, the RSE licensee has breached any of the conditions of its RSE licence.

<sup>19</sup> FSCOD Act ss 5(2) (definition of 'financial sector entity') and 5(4) (definition of 'regulated entity'); APRA Act ss 3(2) and 56(1) (definition of 'protected document'); and, SIS Act s 10 (definitions of 'superannuation entity' and 'trustee').

<sup>20</sup> Pursuant to s 56(1) of the APRA Act, a document is not a 'protected document' and information is not 'protected information' if the document or information respectively have already been lawfully made available to the public from other sources.

25. APRA's submissions in relation to the exceptions to the secrecy provision<sup>21</sup> are set out at **Annexure B**.
26. Having reviewed the document at issue, the exceptions to the secrecy provision, and APRA's submissions, I am satisfied that none of the exceptions apply to the document at issue.

### Does an exception to s 38 of the FOI Act apply?

27. There are also two exceptions to s 38 of the FOI Act. The first is where the secrecy provision does not prohibit disclosure of the document to the applicant.<sup>22</sup> The second is where the material is the applicant's personal information.<sup>23</sup>
28. As set out above, the first exception does not apply because disclosure of the document to the applicant would not be permitted under the APRA Act.
29. Following my review of an unedited copy of the document at issue, I am also satisfied that the second exception does not apply because the document does not contain the applicant's personal information.

### Finding

30. I am satisfied that the document at issue is exempt in full under s 38 of the FOI Act.

### Toni Pirani

Special Adviser, Freedom of Information Decisions, Delegate of the Australian Information Commissioner for the purposes of s 55K of the *Freedom of Information Act 1982*

14 August 2024

## Annexure A

### Relevant provisions of the FOI Act, FOI Guidelines, and decisions

Section 11A(4) of the FOI Act states the agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

### Documents to which secrecy provisions of enactments apply (s 38)

Section 38 of the FOI Act states:

- (1) Subject to subsection (1A), a document is an exempt document if:
  - (a) disclosure of the document, or information contained in the document, is prohibited under a provision of an enactment or a Norfolk Island law; and
  - (b) either:

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<sup>21</sup> The exceptions are set out at ss 56(3)-(7L) of the APRA Act.

<sup>22</sup> Section 38(1A) of the FOI Act.

<sup>23</sup> Section 38(2) of the FOI Act.

- (i) that provision is specified in Schedule 3; or
- (ii) this section is expressly applied to the document, or information, by that provision, or by another provision of that enactment or law or any other enactment or Norfolk Island law.

(1A) A person's right of access to a document under section 11 or 22 is not affected merely because the document is an exempt document under subsection (1) of this section if disclosure of the document, or information contained in the document, to that person is not prohibited by the enactment or law concerned or any other enactment or Norfolk Island law.

(2) Subject to subsections (3) and (3A), if a person requests access to a document, this section does not apply in relation to the document so far as it contains personal information about the person.

#### The FOI Guidelines state:

Section 38 is intended to preserve the operation of specific secrecy provisions in other legislation, including in cases where no other exemption or conditional exemption is available under the FOI Act. The primary purpose of secrecy provisions in legislation is to prohibit unauthorised disclosure of client information. Most secrecy provisions allow disclosure in certain circumstances, such as with the applicant's consent where the information relates to them, or where it is in the course of an officer's duty or performance of duties, or exercise of powers or functions, to disclose the information.<sup>24</sup>

## Relevant provisions of the APRA Act

Section 3 of the APRA Act includes the following definitions:

**"prudential regulation framework law"** means any of the following:

...

(l) the *Superannuation Industry (Supervision) Act 1993*<sup>25</sup>

...

(2) Each of the following is a **body regulated by APRA**:

...

(f) the trustee of a superannuation entity, within the meaning of the *Superannuation Industry (Supervision) Act 1993*

...

Subsection 56(11) of the APRA Act states:

(11) A document that:

(a) is a protected document; or

(b) contains protected information;

is an exempt document for the purposes of section 38 of the *Freedom of Information Act 1982*.

Note: For additional rules about personal information, see the *Privacy Act 1988*.

Subsection 56(2) of the APRA Act creates an offence, being that:

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<sup>24</sup> FOI Guidelines at [5.135] [footnotes omitted].

<sup>25</sup> See s 3(1) of the APRA Act.

(2) A person who is or has been an officer commits an offence if:

(a) the person directly or indirectly:

(i) discloses information acquired in the course of his or her duties as an officer to any person or to a court; or

(ii) produces a document to any person or to a court; and

(b) the information is protected information, or the document is a protected document; and

(c) the disclosure or production is not in accordance with subsection (3), (4), (5), (5AA), (5A), (5AB), (5AC), (5B), (5C), (5D), (6), (6AA), (6AB), (6A), (7), (7A), (7B), (7C), (7D), (7E), (7F), (7G), (7H), (7J), (7K) or (7L).

Penalty: Imprisonment for 2 years.

A ‘protected document’ is defined as:

**protected document** means a document given or produced (whether before or after the commencement of this section) under, or for the purposes of, a prudential regulation framework law and containing information relating to the affairs of:

(a) a financial sector entity; or

(b) a body corporate (including a body corporate that has ceased to exist) that has at any time been, or is, related (within the meaning of the *Corporations Act 2001*) to a body regulated by APRA or to a registered entity; or

(c) a person who has been, is, or proposes to be, a customer of a body regulated by APRA or of a registered entity; or

(ca) a person in relation to whom information is, or was, required to be given under a reporting standard made in accordance with subsection 13(4A) or (4D) of the *Financial Sector (Collection of Data) Act 2001*; or

(cb) a person in relation to whom information is, or was, required to be given under Part IIAA of the *Banking Act 1959*; or

(cc) a person in relation to whom information is, or was, required to be given under the *Financial Accountability Regime Act 2023*;

other than:

(d) a document containing information that has already been lawfully made available to the public from other sources; or

(da) a document given or produced to ASIC under, or for the purposes of, a provision of the *Financial Accountability Regime Act 2023*, other than a document given or produced to ASIC by APRA; or

(e) a document given or produced under, or for the purposes of, a provision of the *Superannuation Industry (Supervision) Act 1993*:

(i) administered by the Commissioner of Taxation; or

(ii) being applied for the purposes of the administration of a provision administered by the Commissioner of Taxation.

It also includes a document that is given to APRA under Part 7.5A of the *Corporations Act 2001*, other than a document containing information that has already been lawfully made available to the public from other sources.<sup>26</sup>

‘Protected information’ is defined as:

<sup>26</sup> APRA Act s 56(1) (emphasis in original).



**protected information** means information disclosed or obtained (whether before or after the commencement of this section) under, or for the purposes of, a prudential regulation framework law and relating to the affairs of:

- (a) a financial sector entity; or
- (b) a body corporate (including a body corporate that has ceased to exist) that has at any time been, or is, related (within the meaning of the *Corporations Act 2001*) to a body regulated by APRA or to a registered entity; or
- (c) a person who has been, is, or proposes to be, a customer of a body regulated by APRA or of a registered entity; or
- (ca) a person in relation to whom information is, or was, required to be given under a reporting standard made in accordance with subsection 13(4A) or (4D) of the *Financial Sector (Collection of Data) Act 2001*; or
- (cb) a person in relation to whom information is, or was, required to be given under Part IIAA of the *Banking Act 1959*; or
- (cc) a person in relation to whom information is, or was, required to be given under the *Financial Accountability Regime Act 2023*;

other than:

- (d) information that has already been lawfully made available to the public from other sources; or
- (da) information given or produced to ASIC under, or for the purposes of, a provision of the *Financial Accountability Regime Act 2023*, other than information given or produced to ASIC by APRA; or
- (e) information given or produced under, or for the purposes of, a provision of the *Superannuation Industry (Supervision) Act 1993*:
  - (i) administered by the Commissioner of Taxation; or
  - (ii) being applied for the purposes of the administration of a provision administered by the Commissioner of Taxation.

It also includes information that is given to APRA under Part 7.5A of the *Corporations Act 2001*, other than information that has already been lawfully made available to the public from other sources.<sup>27</sup>

The exceptions to the offence<sup>28</sup> are contained in ss 56(3) – (7L) of the APRA Act.

## Relevant provisions of the SIS Act

Section 10 of the SIS Act sets out the following definitions:

**"superannuation entity"** means:

- (a) a regulated superannuation fund; or
- (b) an approved deposit fund; or
- (c) a pooled superannuation trust.

**"trustee"**, in relation to a fund, scheme or trust, means:

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<sup>27</sup> APRA Act s 56(1) (emphasis in original).

<sup>28</sup> APRA Act s 56(2).

(a) if there is a trustee (within the ordinary meaning of that expression) of the fund, scheme or trust--the trustee; or

(b) in any other case--the person who manages the fund, scheme or trust.

## Relevant provisions of the FSCOD Act

Section 5 of the FSCOD Act includes:

### Entities covered by the Act

(1) This Act deals with financial sector entities.

(2) A **financial sector entity** is:

(a) a registered entity; or

(b) a regulated entity; or

(c) a corporation to which section 5A applies; or

(d) a discretionary mutual fund; or

(e) a person who:

(i) provides a financial service (within the meaning of the *Corporations Act 2001*); and

(ii) is not an entity, corporation or fund referred to in paragraphs (a) to (d) of this subsection; or

(f) a person who:

(i) is a participant in a payment system (within the meaning of section 7 of the *Payment Systems (Regulation) Act 1998*); and

(ii) is not an entity, corporation or fund referred to in paragraphs (a) to (d) of this subsection.

A regulated entity is defined in s 5(4) as including:

(a) a body regulated by APRA (within the meaning of subsection 3(2) of the *Australian Prudential Regulation Authority Act 1998*);

## Annexure B

### APRA's submissions – Ss 56(4)-(7L) of the APRA Act

Subsection 56(4) permits disclosure by an employee of, or with the consent of, the person to whose affairs the information or document relates. APRA is neither an employee of [Entity A] (nor [entity] or [entity]) nor has the consent of any of these entities to disclose the information or document, so this exemption does not apply.

Subsections 56(5) and 56(5A) - (5B) permits disclosure to a financial sector supervisory agency or certain other government agencies, or to another person, if that disclosure is approved by APRA by instrument in writing. The Applicant is

not a financial sector supervisory agency nor another government agency and the disclosure to the Applicant hasn't been approved by APRA by instrument, so these exemptions do not apply.

Subsection 56(5AA) permits disclosure by a financial sector supervisory agency or another government agency. This exemption does not permit disclosure by APRA so does not apply.

Subsections 56(5C) permits the disclosure of information collected under FSCODA if that information has been determined to be non-confidential. The Document (as defined below) was not collected under FSCODA, so this exemption does not apply.

Subsection 56(6) permits disclosure to an APRA member or APRA staff member (not by an APRA member or APRA staff member), so this exemption does not apply.

Subsections 56(6AA) and (6AB) permits disclosure to the Financial Regulator Assessment Authority so these exemptions do not apply.

Subsection 56(6A) permits disclosure to auditors and actuaries, so this exemption does not apply.

Subsection 56(7) permits disclosure of information if that information is aggregated or summarised so that information relating to a particular entity cannot be found out from it. This exemption does not apply as the Document contains specific information relating to [Entity A], [entity] and [entity].

Subsection 56(7A) permits the disclosure of names and addresses of regulated entities. This exemption does not apply.

Subsection 56(7B) permits the disclosure of a statement regarding a breach or suspected breach of a provision of a prudential regulation framework law. This exemption does not apply.

Subsection 56(7C) permits the disclosure to the Registrar of the Australian Business Register. This exemption does not apply.

Subsections 56(7G) – (7L) permit disclosure in connection with the *Financial Accountability Regime Act 2023*. These exemptions do not apply.

## **Review rights**

### **Review by the Administrative Appeals Tribunal**

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 (AAT). 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. Further

information is available on the AAT's website ([www.aat.gov.au](http://www.aat.gov.au)) or by telephoning 1300 366 700.

### **Making a complaint to the Commonwealth Ombudsman**

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.

### **Accessing your information**

If you would like access to the information that we hold about you, please contact [FOIDR@oaic.gov.au](mailto:FOIDR@oaic.gov.au). More information is available on the [Access our information](#) page on our website.