



FEDERAL COURT OF AUSTRALIA

HARRY GIBBS COMMONWEALTH LAW COURTS BUILDING
119 NORTH QUAY
BRISBANE QLD 4000

11 August 2023

Mr Bob Neil
Right to Know

By email: foi+request-10463-79f2e2c4@righttoknow.org.au

Dear Mr Neil,

Request under the Freedom of Information Act

I refer to your email to the Federal Court of Australia (Court) of 12 July 2023 requesting access to documents under the *Freedom of Information Act 1982* (Cth) (FOI Act). Specifically, you have requested the following:

I seek access to documents under the Freedom of Information Act 1982 (Cth).

Please provide access to documents which constitute the records of the Federal Court Committee relating to Self-Represented Litigants (howsoever named or described), including (without limitation) the committee agenda, minutes, and any reports, dating from inception of the Committee to the present date.

Authorised decision-maker

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

Decision

I have decided that pursuant to section 5(1) of the FOI Act to refuse your FOI request for the reason that the FOI Act does not apply to your request due to the operation of that section.

Under section 5(1) of the FOI Act, it is only open to you to make a request for documents that relate to “*matters of an administrative nature*”. The documents you have requested are not documents that relate to “*matters of an administrative nature*”. Rather, the documents you have requested directly relate to the Self Represented Litigants Committee (Committee). This Committee was comprised of mainly judicial officers whose functions and responsibilities were to advise the Chief Justice and Judges on issues arising in relation to litigation conducted by persons who were self-represented.

Pursuant to section 5(1)(b) of the FOI Act, judicial officers are specifically excluded from the operation of the FOI Act. Therefore, the right to access documents under the FOI Act does not extend to documents held by judicial officers. To the extent that judicial officers are in possession of any of the documents you have requested, access must be refused to those documents.

I have determined that a valid request under the FOI Act has not been made as:

- it is only open for you to make a request for documents under the FOI Act that relate to “*matters of an administrative nature*”; and
- the FOI Act does not apply to judicial officers.

Alternatively, if a valid request has been made, I consider that it does not fall within the limited application of the FOI Act to the Court.

I have taken the following into account in making my decision:

- the terms of your request;
- the relevant provisions of the FOI Act and case law considering those provisions;
- the *Freedom of Information (Charges) Regulations 2019*; and
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (FOI Guidelines).

Reasons for Decision

Section 5(1) of the FOI Act – Act to apply to courts in respect of administrative matters

The FOI Act has a very limited application to the Court.¹ Although the Court is a “*prescribed authority*” in accordance with subsection 5(1)(a) of the FOI Act, subsection 5(1) makes clear that the only request that can validly be made to the Court under the FOI Act is to access a document that relates to “*matters of an administrative nature*”.

Subsection 5(1) of the FOI Act provides as follows:

For the purposes of this Act:

- (a) *a court (other than a court of Norfolk Island) shall be deemed to be a prescribed authority;*
- (b) *the holder of a judicial office (other than a judicial office in a court of Norfolk Island) or other office pertaining to a court (other than a court of Norfolk Island) in his or her capacity as the holder of that office, being an office established by the legislation establishing the court, shall be deemed not to be a prescribed authority and shall not be included in a Department; and*
- (c) *a registry or other office of a court (other than a court of Norfolk Island), and the staff of such a registry or other office when acting in a capacity as members of that staff, shall be taken as a part of the court;*

¹ Paragraphs 2.8 – 2.10 of the FOI Guidelines.

but this Act does not apply to any request for access to a document of the court unless the document relates to matters of an administrative nature.

The High Court of Australia (High Court) considered the operation of section 5 of the FOI Act and the meaning of the phrase “*matters of an administrative nature*” in *Kline v Official Secretary to the Governor General of Australia & Anor* (2013) 249 CLR 645; [2013] HCA 52. In the joint judgment dismissing the appeal the Chief Justice and Justices Crennan, Kiefel and Bell acknowledged that:

The FOI Act does not apply to any request for access to a document of either a court or a specified tribunal, authority or body “unless the document relates to matters of an administrative nature”.²

Further, the High Court held:

...the exception of a class of document which relates to “matters of an administrative nature” connotes documents which concern the management and administration of office resources, examples of which were given above. This is a common enough connotation of the epithet “administrative”.³

The examples referred to by the High Court were a second category of assistance and support provided to the Governor-General by the Office of the Official Secretary. That category of support was the management and administration of office resources, such as financial and human resources and information technology.⁴ The first category, which was thereby excluded from the management and administration of office resources, included assisting and supporting the Governor-General’s discharge of substantive powers and functions.

As relevant, the High Court then held that:

Accordingly, the only documents which courts and specified tribunals, authorities and bodies are obliged to open to increased public scrutiny are those documents relating to the management and administration of registry and office resources.⁵

The High Court, in considering the decision of *Bienstein v Family Court of Australia*,⁶ held that decision to be erroneous in suggesting that even documents held by a court which related to individual cases might be characterised as documents relating to matters of an administrative nature, or that since some powers and functions of a judicial officer were administrative in nature, those administrative powers and functions which were not closely related to judicial independence would not need protection from the operation of the FOI Act.⁷

The High Court held that the reasoning in *Bienstein* accorded no weight to the circumstance that a judicial officer is not subject to the operation of the FOI Act, only a registry or office of a court or specified tribunal is subject to the operation of the FOI Act, and then only in respect of documents relating to administrative matters.⁸

² at [19].

³ at [41].

⁴ at 13].

⁵ at [47].

⁶ (2008) 170 FCR 382.

⁷ at [51].

⁸ at [51].

In a separate judgment, Justice Gageler also dismissed the appeal. His Honour held that:

The distinction sought to be drawn by the appellant between documents which “relate to administrative tasks ... to support or assist the exercise of ... powers or the [performance] of ... functions”, on the one hand, and documents which answer that description but which would “disclose the decision-making process involved in the exercise of those powers or performance of those functions in a particular matter or context”, on the other, is too fine to be sustained. The true distinction is more robust and more practical.

Matters which do not relate to the provision of logistical support do not become “administrative” merely because they are in some way preparatory to an exercise of a substantive power or to the performance of a substantive function.⁹

The documents you have sought are not documents that relate to “*matters of an administrative nature*” as that compound of words has been interpreted by the High Court. They are not documents concerning the management and administration of registry and office resources. Rather, they are documents concerning correspondence relating to a Committee comprised mainly of judicial officers of the Federal Court of Australia. The Committee’s objective was to advise the Chief Justice and the Judges on issues arising in relation to litigation conducted by persons who are self-represented. The function of that Committee did not include the management and administration of office resources, such as financial and human resources and information technology.

The right to access documents under the FOI Act does not extend to documents held by judicial officers in their capacity as the holder of that office. Section 4 of the FOI Act defines “agency”, to which the right to access documents extends as “*a Department, a prescribed authority or a Norfolk Island authority.*” Pursuant to subsection 5(1)(b) of the FOI Act, judicial officers are specifically excluded from being “*a prescribed authority*” and therefore, they are “*not ... included in a Department.*”

To the extent that judicial officers are in possession of any of the documents you have requested, access must be refused to those documents also for this reason.

Since requests for access can only be made for documents relating to “*matters of an administrative nature*”, I have determined that your FOI request has not been validly made under the FOI Act.

Alternatively, if a valid request has been made, I conclude the documents you have requested do not relate to “*matters of an administrative nature*” and, as such, cannot be accessed under the FOI Act.

Charges

You have not been charged for the processing of your request.

⁹ at [75] and [76].

Your Review Rights

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

Under section 54 of the FOI Act, you may apply in writing to the Court for an internal review of my decision. The internal review application must be made within thirty (30) days of the date of this letter.

Where possible please attach reasons as to why you believe review of the decision is necessary. The internal review will be carried out by another officer within thirty (30) days.

Information Commissioner review

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within sixty (60) days of the date of this letter and be lodged in one of the following ways:

online: [Information Commissioner Review Application form \(business.gov.au\)](https://www.business.gov.au/foi-review-application-form)
email: foi@oaic.gov.au
post: Director of FOI Dispute Resolution, GPO Box 5218, Sydney NSW 2001

More information about the Information Commissioner review is available on the Office of the Australian Information Commissioner (OAIC) website at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

Complaints

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely



B Henderson
FOI Officer