



**FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY**

LEVEL 17
LAW COURTS BUILDING
QUEENS SQUARE
SYDNEY NSW 2000

14 September 2023

Mr Bob Neil
Right to Know

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

Dear Mr Neil,

Request for an internal review under the *Freedom of Information Act 1982*

I refer to your email dated 15 August 2023 and sent to the External.FOI@fedcourt.gov.au mailbox of the Federal Court of Australia (**Court**). In that email, you requested an internal review of the decision made by the Court on 11 August 2023 refusing you access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

Authorised decision-maker

I am authorised under s 23 of the FOI Act to make decisions on behalf of the Court in relation to your internal review request.

In conducting the internal review, I am required to review the original freedom of information decision and make a fresh decision on behalf of the Court.¹ I acknowledge that an internal review is a merit review process and that I am required ‘to bring a fresh, independent and impartial mind to the review’.²

Background

On 12 July 2023, you requested access to documents under the FOI Act. Specifically, you 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.

¹ Section 54C of the FOI Act.

² Paragraphs 1.28 and 9.34 of the FOI Guidelines.

The request assumes that all records of this committee are related to the management and administration of the resources of the Court Registry, on the basis that it would not be appropriate for any matters of a substantive nature relating to the discharge of the Court's jurisdiction in court proceedings to be the subject of deliberations by this Committee, rather than being discussed in open court.

In a decision dated 11 August 2023, the original decision-maker refused access to the documents requested on the basis that the documents do not relate to ‘*matters of an administrative nature*’ as required by s 5(1) of the FOI Act. In addition, the original decision-maker determined that if any of the documents requested were only in the possession of judicial officers, those documents are also precluded from access by virtue of s 5(1)(b) of the FOI Act.

On 15 August 2023, you sent correspondence to the Court seeking an internal review under the FOI Act of the Court’s decision dated 11 August 2023.

Decision on internal review

I have decided to refuse your request for access to documents on the basis that the documents requested do not fall within the limited application of the FOI Act to the Court as provided in s 5(1) of the FOI Act.

There may be some documents you have requested that are only in the possession of judicial officers. I do not know what those documents are, but if there are any documents only in the possession of judicial officers, I refuse access to those documents under s 5(1)(b) of the FOI Act as Judges of the Court are not subject to the operation of the FOI Act.

Material taken into account

I have considered the following material in making my decision on internal review:

- your FOI request dated 12 July 2023;
- the decision issued to you on 11 August 2023;
- your internal review request email dated 15 August 2023;
- the records of searches conducted by Court staff;
- the documents identified by the original decision-maker as falling within the scope of your request;
- the FOI Act and relevant case law; and
- the guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (**FOI Guidelines**).

Reasons for internal review decision

As the decision-maker on internal review, I ‘*must consider all issues*’ raised in your request for internal review.³ Your request for internal review dated 15 August 2023 raises issues that can be summarised as follows:

- First, the searches conducted for the documents you requested were not adequate.

³ Paragraph 9.34 of the FOI Guidelines.

- Second, the documents you requested are accessible under the FOI Act. You make this contention on the basis that your FOI request dated 12 July 2023 specifically limited your request to only those documents which relate to ‘*matters of an administrative nature*’, and that the original decision-making process ‘*miscarried*’ by failing to expressly refer to this limitation of your request. You also contend that the records of the Self-Represented Litigants Committee, being the documents to which you seek access, ‘*ought to consist solely of documents containing “matters of an administrative nature”*’.
- Third, you do not consider the documents you have requested are all exclusively in the possession of judicial officers, and therefore s 5(1)(b) would not apply to preclude access to those documents.

I address each of these issues in turn.

Adequacy of searches undertaken

In your request for internal review dated 15 August 2023, you contend that ‘*the search undertaken for records meeting the description in the request was not adequate*’. You make this contention on the basis that the original decision-maker did not expressly reference the paragraph of your request that ‘*had the effect of clarifying and refining the scope of the request to apply specifically, and only, to those documents which relate to “matters of an administrative nature”*.’

Before the original decision was made on your request, extensive searches were undertaken by staff of the Court to search for documents within the scope of your request. The searches involved consultations with staff of the Court, searches of the Court’s intranet, searches of hardcopy files, as well as searches of the Court’s records management and information systems. The searches utilised key words having regard to the terms of your request. In particular, the search terms used were “*Self [and] Represented [and] Litigants*”, “*Litigant [and] Committee*”, and “*SRL*”. The time spent searching and retrieving the documents requested took a total of thirty (30) hours.

The searches that were conducted to identify any documents falling within the scope of your request were searches for any records of the Self Represented Litigants Committee generally. Although this was a broader search than a search only for documents of the Self-Represented Litigants Committee that relate to ‘*matters of an administrative nature*’, the broader search would have captured any documents that fell within the more limited scope of your request. The original decision-maker could not have determined whether or not any documents of the Self-Represented Litigants Committee relates to ‘*matters of an administrative nature*’ without having first been provided all of the documents that relate to that Committee.

Despite your contention that the searches were not adequate, I am satisfied that the searches that were conducted were thorough, comprehensive, and identified all of the documents that could possibly fall within the scope of your FOI request. I do not believe any further reasonable search or enquiry would find additional documents within the scope of your request. I am satisfied that, other than the documents already found, no other documents exist or they cannot be found.

‘Matters of an administrative nature’

As explained by the original decision-maker, the right to obtain access to documents from the Court under the FOI Act is a very limited right.⁴ Subsection 5(1) of the FOI Act provides that the only documents that can be requested from the Court under the FOI Act are documents that relate to ‘*matters of an administrative nature*’. The phrase ‘*matters of an administrative nature*’ is not defined in the FOI Act,⁵ but that phrase has been considered at length by the High Court of Australia in *Kline v Official Secretary to the Governor General of Australia & Anor* (2013) 249 CLR 645; [2013] HCA 52 (**Kline**).

In *Kline*, the majority held that the phrase ‘*matters of an administrative nature*’ refers to documents that concern ‘*the management and administration of office resources*’,⁶ such as ‘*financial and human resources and information technology*’.⁷ The High Court held that the phrase does not apply to documents that relate to the discharge of the Court’s ‘*substantive powers and functions*’.⁸

In a separate judgment also dismissing the appeal, Justice Gageler held that 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*’.

Having regard to the nature of the exemption in s 5(1) of the FOI Act and how the High Court has interpreted the phrase ‘*matters of an administrative nature*’, the question is whether the documents requested relate to financial and human resources and information technology or to the provision of logistical support. In my view, the documents you have requested do not relate to such matters.

The documents you have requested are records of the Self Represented Litigants Committee from its inception to date, including the Committee agenda, minutes, and any reports. As explained by the original decision-maker, 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.

On the face of your request, it is difficult to see how the records of the Self Represented Litigants Committee relates to the management and administration of office resources, such as financial and human resources and information technology. The Committee was a judicial committee. Although the Committee may have had non-judicial members provide input, for example, as Secretariat to the Committee, decisions were made by the Judges on that Committee as to the functions and processes of the Court.

I have reviewed the content of each of the documents found from the Self Represented Litigants Committee and the purpose for which those documents were created. It is clear from that exercise that the documents requested do not relate to the management and administration of office resources. The documents found are minutes, agendas, correspondence and other records of the Self Represented Litigants Committee. The documents concern reviews of the Court’s rules, forms, policies and procedures for managing self-represented litigants, and

⁴ FOI Guidelines [2.8]-[2.10].

⁵ FOI Guidelines [2.9].

⁶ *Kline* at [41] (French CJ, Crengnan, Kiefel and Bell JJ).

⁷ *Kline* at [13] (French CJ, Crengnan, Kiefel and Bell JJ).

⁸ *Kline* at [41] (French CJ, Crengnan, Kiefel and Bell JJ).

include recommendations for improving those practice materials and assisting self-represented litigants. The Committee's records include materials that either formed part of the Committee's deliberations on the Court's management of litigation involving self-represented litigants, or are the records of those deliberations. The documents are clearly preparatory or referable to the substantive function of the Court and do not relate to '*matters of an administrative nature*'. The documents therefore do not fall within the limited class of documents that can be requested from the Court under the FOI Act.

You made your original FOI request on 12 July 2023 for access to documents of the Self Represented Litigants Committee on the following basis:

The request assumes that all records of this committee are related to the management and administration of the resources of the Court Registry, on the basis that it would not be appropriate for any matters of a substantive nature relating to the discharge of the Court's jurisdiction in court proceedings to be the subject of deliberations by this Committee, rather than being discussed in open court.

In your request for internal review dated 15 August 2023, you contend that the original decision-making process '*miscarried*' because the original decision-maker failed to take into account the terms of your request because they failed to make explicit reference in their decision to the paragraph of your original request that has been extracted above. You also contend that all documents of the Self-Represented Litigants Committee should be documents that relate to '*matters of an administrative nature*'. Specifically, you contend:

The records of the Self Represented Litigants Committee ought to consist solely of documents containing "matters of an administrative nature", which are related to the "management and administration of the resources of the Court Registry" for the simple reason that it would be improper for the substance of any proceeding before the Court to be discussed in private by Judges of the Court. The substance of extant court proceedings should only be dealt with exclusively in open court. The only legitimate purpose for a standing committee on Self Represented Litigants is to discuss matters of an administrative nature, arising in relation to the subject matter.

There should be nothing in the records of the Self Represented Litigants Committee that would "disclose the decision-making process involved in the exercise of those powers or performance of those functions in a particular matter or context". If the records in question do include content of that nature, and that is the basis upon which access is refused, I respectfully request that this be stated with sufficient clarity.

In other words, you contend that, if the Self-Represented Litigants Committee did not discuss the substance of legal proceedings, then the agenda, meeting minutes and other documents associated with that Committee are accessible under the FOI Act. This approach however is inconsistent with the narrow interpretation of the compound of words '*matters of an administrative nature*' following the High Court decision in *Kline*. As held in *Kline*, documents can only be requested from the Court if the documents relate to financial and human resources and information technology, or relate to the provision of logistical support.

In response to your contention that the original decision-making process '*miscarried*', I am not satisfied that the original decision-maker erred by failing to explicitly reference a particular paragraph of your original FOI request. The paragraph you contend that the original decision-maker failed to reference is a paragraph that limited your FOI request to seek access to only those documents of the Self Represented Litigants Committee that relate to '*matters of an administrative nature*'. The original decision provided extensive reasons as to why the

decision-maker considered that the documents requested do not relate to ‘*matters of an administrative nature*’ and therefore clearly considered the application of that phrase to the documents requested.

In response to your contention that ‘*There should be nothing in the records of the Self Represented Litigants Committee that would "disclose the decision-making process involved in the exercise of those powers or performance of those functions in a particular matter or context"*’, I note that you have cited part of Justice Gageler’s decision in *Kline*. However, the part of the judgment you have cited held that, for documents to relate to ‘*matters of an administrative nature*’, the question is not whether the documents disclose the decision-making process in the exercise of substantive powers or functions. Justice Gageler held:⁹

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.

The effect of Justice Gageler’s decision is that even documents which may not disclose decision-making processes can be exempt from disclosure under s 5(1) of the FOI Act. Documents will only relate to ‘*matters of an administrative nature*’ if they relate to the provision of logistical support. Justice Gageler held:¹⁰

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.

Having regard to the content of the documents requested and the purpose for which those documents were created, it is clear that the documents do not relate to the management and administration of registry resources, and are more substantive in nature than the mere provision of logistical support. The documents concern the management of self-represented litigants in legal proceedings which is a crucial component of access to justice and referable to the Court’s discharge of its substantive powers and functions. The documents you have requested do not relate to ‘*matters of an administrative nature*’ under s 5(1) of the FOI Act as that compound of words has been interpreted by the High Court, and your request for access to documents must therefore be refused.

Judicial officers

The original decision-maker set out s 5(1)(b) of the FOI Act and explained its operation to preclude access to documents only in the possession of Judges of the Court. It is not necessary for me to repeat that material in my decision.

The basis for your contention against the application of s 5(1)(b) to the documents requested is set out in your request for internal review dated 15 August 2023. In particular, you contend:

⁹ *Kline* at [75] (Gageler J).

¹⁰ *Kline* at [76] (Gageler J).

The second limb of your refusal of access is the assertion that any such records are in the possession of judicial officers. With respect, I doubt this to be exclusively the case. While it may be the case that some documents which fit the description in the request are in the possession of judicial officers, it is exceedingly improbable that all such documents could be held by the Judges of the Court. Your letter itself states that the Committee was "comprised mainly of judicial officers", rather than 'entirely' of judicial officers. Thus, documents in the possession of whomever else sat on the Committee, not being a judicial officer, cannot be covered by this claimed exemption.

There are also additional paragraphs in your request for internal review regarding your contention against the application of s 5(1)(b) to the documents requested. I will not set out those paragraphs in my decision but have taken them into account in making my decision.

I agree with you that any documents that are not exclusively in the possession of judicial officers are not precluded from access under s 5(1)(b) of the FOI Act. I also consider this was the view reached by the original decision-maker in the decision dated 11 August 2023.

The original decision-maker refused your request for access to documents under s 5(1)(b) of the FOI Act 'to the extent' that any documents you requested were only in the possession of judicial officers. Relevantly, the original decision dated 11 August 2023 provided:

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

On my reading of the original decision dated 11 August 2023, the original decision-maker was explaining to you that there may be some documents that were not found from the searches conducted because those documents are only in the possession of judicial officers. The searches conducted to identify any documents that fell within the scope of your FOI request did not extend to searches of any files held by judicial officers. Earlier in my decision I set out the searches that were undertaken to identify any documents that fell within the scope of your request.

Given that your FOI request seeks access to documents of a judicial committee, there may be some documents that are only in the possession of Judges of the Court. Access to those documents would be precluded from access under s 5(1)(b) of the FOI Act because Judges are not subject to the operation of the FOI Act. I therefore must refuse access to those documents under s 5(1)(b) of the FOI Act.

With respect to the documents that were found in relation to your FOI request, those documents are records of the Self Represented Litigants Committee that are in the possession of Court staff or other non-judicial officers of the Court. I can see from my review of the Court's original FOI file on your request that those are the documents that the original decision-maker determined do not relate to 'matters of an administrative nature' and therefore fall outside the scope of s 5(1) of the FOI Act. Those are the same documents to which I also refuse access under s 5(1) of the FOI Act.

Your review rights

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://business.gov.au)
email: foidr@oaic.gov.au
post: Director of FOI Dispute Resolution, GPO Box 5288, 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/freedom-of-information-guidance-for-government-agencies/freedom-of-information-reviews/information-commissioner-review-process>.

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 at: <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines/part-11-investigations-and-complaints>.

Yours sincerely



R Muscat
Registrar