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**FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

Your Ref:
Our Ref:

HARRY GIBBS COMMONWEALTH LAW COURTS
119 NORTH QUAY
BRISBANE QLD 4000

PO BOX 13084
GEORGE STREET
BRISBANE QLD 4003

21 September 2017

I Whitaker

By email: foi+request-4049-8c8309e2@righttoknow.org.au

Dear Sir/Madam

Freedom of Information Act 1982 – Request for Access

I refer to your email of 25 August 2017 to the Federal Court of Australia in which you have sought access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

I request a document or documents (likely prepared under s.17 of the FOI Act) that details the year on year increase in remuneration (as a percentage, rounded to the nearest decimal point) paid to each of the Federal Court's SES staff for the financial years: 2014/15 to 2015/16 and 2015/2016 to 2016/2017 as determined from the group certificates/PAYG summaries issued to those SES staff (pro-rated, to reflect full year amounts, if necessary). I'm not interested in the names of the SES officers and so I'm happy for you to de-identify those. An example to illustrate the type of document(s) I'm seeking access to is set out below.

The Federal Court publishes its enterprise agreement which sets out the precise percentage salary increases that can be given to non-SES APSC staff. It follows therefore that there should be no problem for the Federal Court in disclosing the percentage increase in the remuneration levels of its SES staff. Obviously there would be considerable public interest if it were the case that the Federal Court is attacking the real wages, living standards and working conditions of its non-SES public servants, while at the same time granting its SES staff wage increases above that allowable under the enterprise bargaining policy that it enforces against its non-SES public servants. Such information would also be an invaluable insight into the current Commonwealth Government's views on its preferred distribution of wealth in Australian society for bosses vs workers and would further establish the prevailing view of the current Government that non-SES public servants constitute a lesser form of employee/human being.

On 13 September 2017 you sent a follow up email enquiring as to why the Court was yet to acknowledge receipt of your FOI request. In respect of that email I extend an apology on behalf of the Court. We were endeavouring to respond to your request as quickly and

efficiently as possible, but despite those efforts were not able to respond to your request prior to the expiry of the acknowledgment deadline.

Authorised decision-maker

I am authorised under section 23(1) of the FOI Act to make decisions on behalf of the Federal Court in relation to your request.

Decision

I have decided, pursuant to section 24A(1)(b)(ii) of the FOI Act, to refuse your request for access to documents on the basis that the document or documents you have request do not exist.

In making my decision I have had regard to:

- a. the terms of your request;
- b. the information held by the Court in respect of Senior Executive Service (SES) employee remuneration;
- c. the relevant provisions of the FOI Act and case law considering those provisions; and
- d. the FOI Guidelines issued by the Office of the Australian Information Commissioner.

Reasons for Decision

Document does not exist under paragraph 24A(1)(b)(ii)

I consider that the document or documents you have requested do not exist.

Section 11 of the FOI Act provides:

- (1) *Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:*
 - (a) *a document of an agency, other than an exempt document; or*
 - (b) *an official document of a Minister, other than an exempt document.*
- (2) *Subject to this Act, a person's right of access is not affected by:*
 - (a) *any reasons the person gives for seeking access; or*
 - (b) *the agency's or Minister belief as to what are his or her reasons for access.*

The FOI Act therefore provides a legally enforceable right to obtain access to various documents. Subsection 24A(1) of the FOI Act relevant provides:

- (1) *An agency or Minister may refuse a request for access to a document if:*
 - (a) *all reasonable steps have been taken to find the document; and*
 - (b) *the agency or Minister is satisfied that the document:*
 - (i) *is in the agency's or Minister's possession but cannot be found; or*
 - (ii) *does not exist.*

In seeking to respond to your request I am satisfied that all reasonable steps were taken to try to identify a document or documents falling within the scope of your request. Extensive consultation was undertaken with officers and staff within the Court's Corporate Services

Group who are responsible for human resources and national finance, including payroll. Thorough searches were also undertaken of the Courts records management and payroll systems. No document or documents were identified that fell within the scope of your request.

Section 17 of the FOI not applicable

I am not satisfied that there is a requirement on the Court, pursuant to section 17 of the FOI Act, to produce a document that meets the terms of your request.

Your FOI request indicates that the documents requested would likely be prepared under section 17 of the FOI Act. Section 17 provides:

- (1) *Where:*
- (a) *a request (including a request in relation to which a practical refusal reason exists) is made in accordance with the requirements of subsection 15(2) to an agency;*
 - (b) *it appears from the request that the desire of the applicant is for information that is not available in discrete form in written documents of the agency; and*
 - (ba) *it does not appear from the request that the applicant wishes to be provided with a computer tape or computer disk on which the information is recorded; and*
 - (c) *the agency could produce a written document containing the information in discrete form by:*
 - (i) *the use of a computer program or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or*
 - (ii) *the making of a transcript from a sound recording held in the agency;**the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.*
- (2) *An agency is not required to comply with subsection (1) if compliance would substantially and unreasonably divert the resources of the agency from its other operations.*

The FOI Guidelines issued by the Office of the Australian Information Commissioner provide:

2.33 The right of access under the FOI Act is to existing documents, rather than to information. The FOI Act does not require an agency or minister to create a new document in response to a request for access, except in limited circumstances where the applicant seeks access in a different format or where the information is stored in an agency computer system rather than in a discrete form (see Part 3 of these Guidelines). A request may nevertheless be framed by reference to a document that contains particular information.

The Guidelines provide further:

3.182 Section 17 requires an agency to produce a written document of information that is stored electronically and not in a discrete written form, if the applicant does not wish to be provided with a computer tape or disk. Examples include a transcript of a sound recording or a written compilation of information held across various agency databases. The obligation to produce a written document arises if:

- *The agency could produce a written document containing the information by using a 'computer or other equipment that is ordinarily available' to the agency for retrieving or*

collating stored information (s 17(1)(c)(i)), or making a transcript from a sound recording (s 17(1)(c)(ii)), and

- *Producing a written document would not substantially or unreasonably divert the resources of the agency from its other operations (s 17(2)).*

If those conditions are met the FOI Act applies as if the applicant had requested access to the written document and it was already in the agency's possession.

The Court does not maintain a digital record of the yearly increases of the remuneration of its SES employees as a percentage. Further, the development of a document of the type requested, using figures extracted from the payment summaries of the Court's SES employees is not something that could be achieved merely by the use of a computer or other equipment that is ordinarily available to the Court for retrieving or collating stored information. Such a document could only be produced by a Court employee physically assessing the individual circumstances behind each figure in each payment summary, considering variables such as salary sacrificing, commencement dates, promotion and entitlements and calculating a standardised percentage increase in remuneration following that assessment.

The production of the requested document is therefore outside the requirements of section 17 of the FOI Act and has not been produced for the purposes of your FOI request.

Publicly available information on SES remuneration

There is a range of material that is already publicly available in relation to SES remuneration, including the Court's Annual Reports and the Australian Public Service Commission's Remuneration Reports (available at <http://www.apsc.gov.au/publications-and-media/current-publications/remuneration-surveys>). In addition, there are the Remuneration Tables published on the Federal Court of Australia website.

Charges

You have not been charged for the processing of your request

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 Federal Court for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter.

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

Information Commissioner review

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

online: <https://forms.business.gov.au/aba/oaic/foi-review/>
email: enquiries@oaic.gov.au
post: GPO Box 2999, Canberra ACT 2601
in person: Level 3, 175 Pitt Street, Sydney NSW

More information about the Information Commissioner review is available on the Officer of the Australian Information Commissioner website. Go to www.oaic.gov.au/freedom-of-information/foi-reviews.

Yours sincerely



Scott Tredwell
Deputy District Registrar