



Telephone: (02) 9230 8336
Facsimile: (02) 9223 1906
DX 613 SYDNEY

**FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY**

A.B.N. 49 110 847 399

Your Ref:
Our Ref:

LEVEL 16
LAW COURTS BUILDING
QUEENS SQUARE
SYDNEY NSW 2000

24 October 2019

Mr Phillip Sweeney

By email: foi+request-5643-79ade514@righttoknow.org.au

Dear Mr Sweeney,

Internal Review Decision under Subsection 54C of the *Freedom of Information Act 1982*

I write to advise you of my decision following your request for internal review of the Federal Court of Australia's decision to refuse access to documents you requested under the *Freedom of Information Act 1982* (FOI Act) on 20 September 2019.

Authority

I am authorised under subsection 23(2) of the FOI Act to make decisions on behalf of the Federal Court of Australia (Federal Court) in relation to your internal review request.

Background

In an email which you sent to the Federal Court on 20 September 2019 regarding a proceeding numbered NSD1654/2018, which the Federal Court titled *Australian Securities & Investments Commission v MLC Nominees Pty Ltd ACN 002 814 959 & Anor* (Proceeding NSD1654/2018), you requested (access request):

I am seeking copies of any correspondence related to affidavits affirmed by PHILLIP CHARLES SWEENEY [Interested Person] to or from the Registrar (other than correspondence with Mr Sweeney).

This includes any correspondence related to the removal or attempted removal of these affidavits from the Case File.

On 18 October 2019, you were advised by letter of the decision made that day by Registrar Tredwell on behalf of the Federal Court to refuse your access request as he was satisfied that all reasonable steps had been taken to find documents within the scope of your request and no such documents existed (access refusal decision).

You sent an email to the Federal Court regarding that decision later on 18 October 2019 requesting an internal review (internal review request). In that email you said:

Justice Yates made an order on the 19 September 2019 to remove five affidavits from the Court File that confirmed that ASIC had given an undertaking to the Honourable Justice Kenny in VID 323 of 2011 which

relates to a Defined Benefit occupational pension scheme now administered by NULIS Nominees (Australia) Ltd - one of the respondents in NSD 1654/2018.

These affidavits were affirmed (and not sworn) on:

- (a) 1 May 2019;*
- (b) 1 August 2019;*
- (c) 5 August 2019;*
- (d) 21 August 2019; and*
- (e) 26 August 2019*

There was no order made with respect to an affidavit affirmed on 16 September 2019 which included Annexure (sic) PCS52 which was a copy of the article titled "Serial pest hijacks ASIC's case against NAB over fees scandal" and Annexure PCS53 which was a copy of a post on social media promoting the article in the Australian Financial Review which read:

"ICYMI Serial pest who bombarded ASIC with hundreds of request (sic) signed Pussy Galore and Goldfinger hijacks landmark fees-for-no-service case against NAB @asicmedia"

There was no order made with respect to an identical affidavit affirmed on 7 October 2019 which contained copies of the same articles.

Yet these affidavits were returned to the "Interested Person" so that James Frost could avoid being called to account for his clear Contempt in the fact (sic) of the Court by way of two publications that were not fair and accurate reporting of proceedings afoot in the Federal Court in NSD 1654 of 2018.

No other order was made with respect to other documents lodged by the "Interested Person" including an interlocutory application relating to a Contempt in the face of the Court by a publication by James Frost a reporter for the Australian Financial Review who published an article titled "Serial pest hijacks ASIC's case against NAB over fees scandal" which references NSD 1654/2018.

Even though no order was made by Justice Yates with respect to the interlocutory application and related Affidavit containing a copy of this defamatory and intimidatory article these documents were returned to me TWICE.

The only covering letter was from a junior employee named "Megan" who would not be acting without instruction from more senior administrative personal.

Therefore such an administrative instruction outside of the ruling of Justice Yates would fall within the scope of the Freedom of Information Act 1982 (Cth) as it applies to the Federal Court of Australia.

This is clearly now a matter of some public interest with respect to the administration of justice in the Federal Court of Australia.

A full history of my FOI request and all correspondence is available on the Internet at this address: https://www.righttoknow.org.au/request/documents_related_to_the_registr

Decision

Having considered your access request afresh; taking further steps to find copies of any correspondence, to or from a Registrar (other than with you), relating to affidavits affirmed by you (particularly those affirmed on 1 May 2019, 1 August 2019, 5 August 2019, 21 August 2019 and 26 August 2019) and lodged with the Court, including any correspondence relating to the removal or attempted removal of these affidavits from the Federal Court file, and taking into account the reasons and other information you advanced in your internal review request, I have decided, under subsection 24A(1) of the FOI Act, to refuse your access request. This is because I am satisfied that all reasonable steps to find documents that are within scope of your access request have been taken and no such documents exist.

Material taken into account

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

- your access request
- the access refusal decision
- your internal review request
- the FOI Act
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines)
- relevant caselaw.

Reasons for decision

Limited application of the FOI Act to the Federal Court

In the access refusal decision, Registrar Tredwell explained the limited application that the FOI Act has to the Federal Court. In particular, he explained that that Act does not apply to Judicial Officers¹ or any documents relating to the handling of complaints about Judicial Officers² and that the only request that can validly be made to the Federal Court under the FOI Act is to access a document that relates to “matters of an administrative nature”³. He also explained that the High Court of Australia (High Court) has considered the meaning of “matters of an administrative nature” in *Kline v Official Secretary to the Governor-General Of Australia & Anor*⁴ (*Kline*) and held that the phrase refers to documents “relating to the management and administration of registry and office resources”⁵.

I agree with and adopt Registrar Tredwell’s more detailed explanation of this limited application of the FOI Act to the Federal Court. As this is set out in the access refusal decision included on the Right to Know webpage for your relevant access request which you reference as above, I will not repeat that detailed explanation in this letter.

Searches and enquiries undertaken

Registrar Tredwell explains in the access refusal decision the enquiries and searches he undertook in an attempt to find any documents that were within the scope of your request.

On 21 October 2019 over two hours, I searched the Federal Court’s electronic file for Proceeding NSD1654/2018 comprehensively. I found no correspondence relating to any affidavits affirmed by you in relation to that proceeding (including those affirmed on 1 May 2019, 1 August 2019, 5 August 2019, 21 August 2019 and 26 August 2019) to or from the Registrar (other than correspondence with you), including any correspondence relating to the removal or attempted removal of these affidavits from the Federal Court’s electronic file for that proceeding.

Later that day, I spoke to all staff in the Federal Court’s NSW District Registry who I identified from my searching of the electronic file as having been involved in the processing in the Court of any of the affidavits that were affirmed by you and lodged with the Federal

¹ Paragraph 5(1)(b) FOI Act

² Subsection 5(1A) FOI Act

³ Section 5(1) FOI Act – see also paragraph 2.8 FOI Guidelines

⁴ [2013] HCA 52

⁵ At [47] – see also paragraph 2.9 FOI Guidelines

Court. I had them undertake searches of all email accounts and other repositories (electronic or otherwise) in which any such correspondence, if it existed, could have been stored and placed. I was subsequently informed by those staff that no such correspondence was found.

I am satisfied that all reasonable steps have been undertaken to find any such documents, if they existed, but that no document within the scope of your access request exists.

Documents that do not exist – subsection 24A FOI Act

As Registrar Tredwell explained in his access refusal decision, 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.*

As Registrar Tredwell also noted in that decision, as a result of the operation of this section the FOI Act provides a legally enforceable right to obtain access to various documents. This entitlement is, as section 11 makes clear, “subject to the Act” and as I (and Registrar Tredwell in his access refusal decision) have explained, in the case of the Federal Court, it applies only to a document that relates to “matters of an administrative nature” as narrowly interpreted by the High Court in *Kline*.

However, as also explained in the access refusal decision, subsection 24A(1) of the FOI Act 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.*

As detailed above, the searches and enquiries that I have made in attempting to find any documents that are within the scope of your access request have been comprehensive (as were those undertaken by Registrar Tredwell before making his access refusal decision). I am not aware of any further step that could be taken to locate any such document, if it existed, or any other Court staff who may be able to assist in locating any such document.

I am satisfied that no document exists that is within the scope of your access request.

For these reasons, I decided under subsection 24A(1) of the FOI Act to refuse your access request.

Could an administrative instructions relate to matters of an administrative nature?

In your internal review request, you suggest that an administrative instruction given to a junior employee of the Court outside of the ruling of Justice Yates in Proceeding NSD1654/2018 would be within the scope of the FOI Act as it applies to the Federal Court.

As I am satisfied that no document exists that is within the scope of your access request, I have not given any consideration to this hypothetical contention. I observe, however, that the High Court is very clear in its findings in *Kline* that, in the case of courts and selected

tribunals (including the Federal Court), the FOI Act applies only to documents which concern the management and administration of office resources⁶, such as financial and human resources and information technology⁷, or “logistical support”⁸.

Your review rights

If you are dissatisfied with my decision, you may apply to the Australian Information Commissioner for review. 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 Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to www.oaic.gov.au/freedom-of-information/foi-reviews.

Questions about this decision

If you wish to discuss this decision, you can contact me by email at foi@fedcourt.gov.au.

Yours sincerely



John Mathieson
Deputy Principal Registrar

⁶ At [41] and [47]

⁷ At [13]

⁸ At [74] and [76]

