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**FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY**

A.B.N. 49 110 847 399

LEVEL 16
LAW COURTS BUILDING
QUEENS SQUARE
SYDNEY NSW 2000

Your Ref:
Our Ref:

13 November 2019

Mr Phillip Sweeney

By email: foi+request-5651-2eba0d03@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 26 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 26 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):

The document(s) I seek are copies of any email, phone log or other documents that would reveal how the original affirmed paper document and electronic copy were to be stored pursuant to Federal Court Rule 2.28(3)(b) after removal from the Court File on 19 September 2019.

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:

I am writing to request an internal review of Federal Court of Australia's handling of my FOI request 'Storage of Documents removed from the Court file'.

The matter before the Federal Court in NDS 1654 of 2018 is now of much public interest and I will be appealing this and other FOI responses to the Administrative Appeals Tribunal on the basis that there must be some record of compliance with Federal Court Rule 2.28(3)(b).

Otherwise, the inference to be drawn is that five affidavits by the "Interested Person" were removed from the Court File in response to a Contempt in the face of the Court by reporter James Frost who disparaged a Whistleblower with an article titled "Serial Pest hijacks case against NAB over fees scandal" and put through the Federal Court office shredder.

These affidavits confirmed that ASIC had given an undertaking to the Federal Court in VID 323 of 2018 to investigate allegation of fraud (or more correctly a fraudulent breach of trust) that had been instigated by a convicted fraudster, Ken Jarrett, and where NULIS Nominees (Australia) Ltd had become a party to a conspiracy to defraud several hundred widows out of their survivorship pensions in their time of need and distress.

The Attorney-General's Department of South Australia and the Parliament of South Australia has been able to provide a wealth of supporting evidence that confirms the widows' entitlement to a survivorship pension which the directors of NULIS refuse to pay from at least 1 July 2016 when NULIS gained control of the Trust Estate of this occupational pension scheme established by a Trust Deed made on the 23 December 1913.

The removal of evidence of fraud and a conspiracy to defraud hundreds of vulnerable widows from the Court File with no record of where this evidence ended up is now very much a subject of public interests and on this basis I am requesting an Internal Review before lodging an appeal with the Administrative Appeals Tribunal.

I have previously successfully appealed FIO related matters to the Administrative Appeals Tribunal.

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

Decision

Having considered your access request afresh; taking further steps to find copies of any email, phone log or other documents that would reveal how the original affirmed paper document and electronic copy were to be stored pursuant to Federal Court Rule 2.28(3)(b) after removal from the Court's electronic file for proceeding NSD1654/2018 on 19 September 2019; 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 Australian & 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 5 November 2019, over half an hour, I searched the Federal Court’s electronic file for Proceeding NSD1654/2018 for the period from 19 September 2019, when Justice Yates ordered that, amongst other things, the affidavit which you affirmed on 26 August 2019 be removed from the court file, up to and including the time of that search. I was familiar with that file having searched it comprehensively on 21 October 2019 in undertaking an internal review of another access refusal decision in relation to an earlier access request from you and was thus able to focus quickly and specifically on searching for any document within scope of your access request under internal review here. I found no email, phone log or other documents that would reveal how the original affirmed paper document and electronic copy were to be stored pursuant to Federal Court Rule 2.28(3)(b) after removal from the Court’s electronic court file.

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 of the removal of that affidavit from the Court’s electronic file. I had them undertake searches of all email accounts and other repositories (electronic or otherwise) in which any such email, phone log or other document, if it existed, could have been stored or placed. I was subsequently informed by those staff that no such email, phone log or other document 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 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

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- (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.

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-/
enquiries@oaic.gov.au](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

A handwritten signature in black ink, appearing to read 'John Mathieson', written over a horizontal line.

John Mathieson

Deputy Principal Registrar