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Your Ref:
Our Ref:

FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY

LEVEL 16
LAW COURTS BUILDING
QUEENS SQUARE
SYDNEY NSW 2000

18 October 2019

Mr Phillip Sweeney

By email: foi+request-5654-2eaccabc4@righttoknow.org.au

Dear Mr Sweeney,

Request under Freedom of Information Act

I refer to your email of 28 September 2019 to the Federal Court of Australia in which you have sought access to a range of documents under the *Freedom of Information Act 1982* (Cth) (FOI Act). I also refer to my letter of 11 October 2019 acknowledging receipt of your request.

In your request of 26 September 2019, you seek the following documents related to an affidavit affirmed by yourself on 26 August 2019, and lodged with the Court on 7 August 2019, in respect of Australian Securities & Investments Commission v MLC Nominees Pty Ltd & Anor, NSD1654/2018:

> *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.*

Authorised decision-maker

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

Decision

I have decided, pursuant to subsection 24A(1) of the FOI Act, to refuse your request for access to 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. The reason for this is that I am satisfied that all reasonable steps were taken to find documents within the scope of your request and that no such documents exist.

In making my decision I have had regard to:

a. the terms of your request;
b. the relevant provisions of the FOI Act and case law considering those provisions; and
c. the FOI Guidelines issued by the Office of the Australian Information Commissioner.

Reasons for Decision

Searches undertaken

The searches undertaken by the Court to identify documents within the scope of your FOI request have been exhaustive, involving discussions with all relevant staff within the New South Wales District Registry and a search of all correspondence related to Australian Securities & Investments Commission v MLC Nominees Pty Ltd & Anor, NSD1654/2018.

I am satisfied that by conducting these searches the Court has taken all reasonable steps to identify the documents requested.

Limited application of the FOI Act to the Federal Court

The FOI Act has a very limited application to the Federal Court.[1] It does not apply to Judicial Officers[2] or to any documents relating to the handling of complaints about Judicial Officers[3]. Although the Federal Court is a "prescribed authority" for the purposes of the FOI Act[4] the only request that can validly be made to it under the FOI Act is to access a document that relates to matters of an administrative nature"[5].

The High Court of Australia considered the operation of s 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".*[6]

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".*[7]

The examples referred to by the Court were a second category of assistance and support provided to the Governor-General by the Office of the Official Secretary. That category of

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[1] paragraphs 2.6 – 2.8 of the FOI Guidelines
[2] paragraph 5(1)(b) of the FOI Act
[3] subsections 5(1A) to (1C) of the FOI Act
[4] paragraph 5(1)(a)
[5] section 5
[6] at [19]
[7] at [41]

support was the management and administration of office resources, such as financial and human resources and information technology.[8] 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.*[9]

The High Court, in considering the decision of *Bienstein v Family Court of Australia*[10], 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.[11]

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.[12]

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.*[13]

Documents that do not exist - paragraph 24A(1)(b)(ii)

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.*

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[8] at 13]
[9] at [47]
[10] (2008) 170 FCR 382
[11] at [51]
[12] at [51]
[13] at [75] and [76]

(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 relevantly 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.

Correspondence to or from a Registrar

The exhaustive searches undertaken following your FOI request identified no documents falling within the scope of your request.

I am satisfied that all reasonable steps were taken to find documents within the scope of your request and that no documents within the scope of your request exist. Your request is therefore refused pursuant to subsection 24A(1) of the FOI Act.

As your request was refused pursuant to subsection 24A(1) of the FOI Act, it is not necessary for me to consider whether such correspondence would be of an administrative nature, relating to the administration of Court registry and office resources, for the purposes of the FOI Act.

Nonetheless, had I been required to so decide, I would have been satisfied that pursuant to subsection 5(1) of the FOI Act and following the decision of the High Court in *Kline v Official Secretary to the Governor General of Australia & Anor*, any email, phone log or other documents that would specifically 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, would not be documents of an administrative nature. In my view, these documents would not be accessible under the FOI Act.

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 Australian 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 Office of the Australian Information Commissioner website. Go to www.oaic.gov.au/freedom-of-information/foi-reviews.

Yours sincerely

Scott Tredwell
Registrar, Principal Registry