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**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

22 November 2019

Mr Phillip Sweeney

By email: foi+request-5655-a0f7a288@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 29 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 29 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 (of my affidavit affirmed on 15 August 2019 and received by the Court on 19 August 2019) were to be stored pursuant to Federal Court Rule 2.28(3)(b) after removal from the Court File on 19 September 2019 of other filed Affidavits.

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 25 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 'Affidavit related to Dr Ken Henry AC - NAB Chairman: NSD 1654/2018'.

Clearly any Affidavit which confirms that Dr Ken Henry AC as the Chairman of NAB was privy to evidence of fraud involving a NAB superannuation trustee well before the Hayne Royal Commission would be key evidence for ASIC to bring to the attention of Justice Yates.

Adele Ferguson in her book "Banking Bad" on page 372 writes:

"The most startling part of the report was Hayne's dressing-down of NAB executives Ken Henry and Andrew Thorburn. As well as singling them out for public shaming. Hayne noted that, with regard to the behaviour of its most senior executives 'NAB stands apart from the other major banks'.

Now it will be a matter of public interest if ASIC and its counsel Mr Tim Faulkner SC, conceals the complicity of Dr Henry in a case of breach of trust by NULIS Nominees (Australia) Ltd in NSD 1654 of 2018, when ASIC is at the same time in Contempt of the Federal Court in failing to honour the undertaking given to the Honourable Justice Kenny in VID 323 of 2011.

The default position to be assumed from the response to this FOI request is that the evidence provided to the Federal Court confirming that Dr Henry was privy to a fraud involving a NAB superannuation trustee has been put through the shredder in the Federal Court office.

It that is not the case then what happened to this evidence is of considerable public interest, especially after the comments of Royal Commissioner Hayne as reported by Adele Ferguson in her book "Banking Bad"?

An internal review may answer that question.

Otherwise, the Administrative Appeals Tribunal may be able to provide an answer.

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

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 File on 19 September 2019 of other filed Affidavits; 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 case law.

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 14 November 2019, over 40 minutes, I searched the Federal Court’s electronic file for Proceeding NSD1654/2018 for the period from 19 August 2019, when the Court received from you the affidavit which you affirmed on 15 August 2019 to which “Affidavit Exhibit PCS31” was annexed, up to and including the time of that search. I was familiar with that file having searched it comprehensively on 21 October 2019 and again, although less comprehensively, on 5 and 13 November 2019 in undertaking internal reviews of other access refusal decisions in relation to earlier access requests 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 File on 19 September 2019 of other filed Affidavits.

On 20 November 2019, I spoke to the 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 Court. I had them undertake searches of all email accounts and other repositories (electronic or otherwise) in which any such correspondence and documents, if they existed, could have been stored and placed. I was subsequently informed by those staff that no relevant email, phone log or other documents were 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

¹ Paragraph 5(1)(b) FOI Act

² Subsection 5(1A) FOI Act

³ Subsection 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

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.

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

A handwritten signature in dark ink, appearing to read 'John Mathieson', with a stylized flourish at the end.

John Mathieson
Deputy Principal Registrar