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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

29 November 2019

Mr Phillip Sweeney

**By email:** [foi+request-5659-2d7138cc@righttoknow.org.au](mailto:foi+request-5659-2d7138cc@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 30 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 30 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 emails, letters, memorandum or other correspondence that would reveal why (my) Affidavit (affirmed on 7 August 2019) was not filed (while other Affidavits from the 'Interested Person' had been filed) and what has now become of this Affidavit and associated Exhibits.*

On 28 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 7 November 2019 requesting an internal review (internal review request). In that email you said:

*I am seeking an internal review. Some affidavits that I sent to the Registrar were placed on the Court file, while others were not.*

*The management of documents and their safekeeping is the hallmark of "administration". How can a court function if there is no integrity in document management and important documents such as affidavits "go missing" and there is no record of when the documents were received when they were placed on the Court*

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*file and what happened to the affidavits and other documents when they were removed from the Court file or were never placed on the Court file in the first place for no apparent reason.*

*It is a matter of public interest if the Federal Court does not have a robust document handling system which will need to be brought to the attention of the Attorney-General, the Hon Christian Porter MP.*

### **Decision**

Having considered your access request afresh; taking further steps to find copies of any emails, letters, memoranda or other correspondence that would reveal why your affidavit affirmed on 7 August 2019 was not filed (while other affidavits from the you had been filed) and what had become of that affidavit and its associated exhibits; 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 Officers<sup>1</sup> or any documents relating to the handling of complaints about Judicial Officers<sup>2</sup> 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”<sup>3</sup>. 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*<sup>4</sup> (*Kline*) and held that the phrase refers to documents “relating to the management and administration of registry and office resources”<sup>5</sup>.

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.

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<sup>1</sup> Paragraph 5(1)(b) FOI Act

<sup>2</sup> Subsection 5(1A) FOI Act

<sup>3</sup> Subsection 5(1) FOI Act – see also paragraph 2.8 FOI Guidelines

<sup>4</sup> [2013] HCA 52

<sup>5</sup> At [47] – see also paragraph 2.9 FOI Guidelines

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### 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 20 November 2019, over 30 minutes, I searched the Federal Court's electronic file for Proceeding NSD1654/2018 for the period from 8 August 2019, when you advised you sent the relevant affidavit to the Court by Express Mail, up to and including the time of that search. I found no emails, letters, memoranda or other correspondence that would reveal why that affidavit was not filed and what had become of that affidavit and its associated exhibits.

On 20 and 26 November 2019, 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 Court in the same period. I had them undertake searches of all email accounts and other repositories (electronic or otherwise) in which any such emails, letters, memoranda or other correspondence, if it existed, could have been stored and placed. I was subsequently informed by those staff that no such emails, letters, memoranda or other correspondence were found.

I am satisfied that all reasonable steps have been undertaken to find any such documents, if they existed, but that no documents 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.

### ***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](mailto: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](http://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](mailto:foi@fedcourt.gov.au).

Yours sincerely



John Mathieson  
Deputy Principal Registrar