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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:

22 November 2019

Mr Phillip Sweeney

By email: foi+request-5702-929f22c2@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 10 October 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 10 October 2019 regarding a proceeding numbered NSD 1654/2018, 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 I seek is a copy of the covering letter dated 7 October 2019 titled "RE: Interlocutory Application Wrongly Returned {2nd Attempt to Return Interlocutory Application}".

On 29 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 on 3 November 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 'Confirmation that the Federal Court has evidence of a Contempt of Court'.

The hallmark of office "administration" is the management of documents whether paper documents or electronic documents such as email records.

Documents after a certain time are often archived so that they can be recovered at a later date. This is especially important for documents of a legal nature.

It is a serious matter when a journalist commits a contempt in the face of the Court by failing to report proceedings current afoot in an accurate and fair manner - to describe a party to a proceedings as a "Serial Pest" is clearly a contempt, especially when that party has been an Applicant who has obtained an undertaking from the Federal Court that is relevant to the current proceedings.

An interlocutory application and an associated affidavit containing copies of the published articles have been returned to the victim THREE times by junior clerks when no Order has been made by Justice Yeates with respect to this contempt of court by James Frost.

Clearly these junior clerks have been following instructions from someone higher in the chain of command at the Federal Court.

There must be an email chain or a paper memorandum instructing these junior clerks to "get rid" of evidence of this contempt of court by returning the evidence to the victim and hoping that the victim "just goes away" so that the administration of justice is not brought into disrepute by turning a blind eye to such a blatant contempt in the face of the court.

This conduct with respect to document administration may need to be appealed to the Administrative Appeals Tribunal and so I am seeking an Internal Review so that such an appeal might be avoided.

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

Decision

Having considered your access request afresh; taking further steps to find the covering letter dated 7 October 2019 titled "Re: Interlocutory Application Wrongly Returned (2nd Attempt to Return Interlocutory Application)" or a copy of it; 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 the document or a copy have been taken and no such document 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

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

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 19 November 2019 over 15 minutes, I searched the Federal Court’s electronic file for Proceeding NSD 1654/2018 for the period from 7 October 2019, when you apparently prepared and sent the letter you are seeking, up to and including the time of that search. I was familiar with that file having searched in comprehensively on 21 October 2019, and again, although less comprehensively, on 5, 13, 14 and 19 November 2019 in undertaking internal review 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 the requested document. I did not find the requested letter or any copy of it.

On 20 November 2019, I spoke to all staff in the Federal Court’s NSW District Registry whom I identified from my searching of the electronic file as having been involved in the processing in the Court of correspondence from you in relation to the relevant proceeding in the same period. I had them undertake searches of all email accounts and other repositories (electronic or otherwise) in which that letter or any copy of it, if it existed, could have been stored and placed. I was subsequently informed by those staff that the letter or any copy of it was not found.

I am satisfied that all reasonable steps have been undertaken to find the requested letter or any copy of it, if either or both existed, but that neither the letter nor a copy of it 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

⁴ [2013] HCA 52

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

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 the requested letter or any copy of it 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 the document or a copy, if it existed, or any other Court staff who may be able to assist in locating any such document.

I am satisfied that the requested document does not exist.

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



John Mathieson
Deputy Principal Registrar