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FEDERAL COURT OF AUSTRALIA

Your Ref:
Our Ref:

LEVEL 17
LAW COURTS BUILDING
QUEENS SQUARE
SYDNEY NSW 2000

9 April 2020

Mr Brett Wilson

By email: foi+request-6215-9a76f26c@righttoknow.org.au

Dear Mr Wilson

Request under the Freedom of Information Act

I refer to your email of 11 March 2020, sent to the Customer Service mailbox of the Federal Circuit Court of Australia. Your email reads as follows:

It is my will, that your court provide documents which provide that, the Federal Circuit Court of Australia is operating in accordance with Chapter III of the Commonwealth Constitution 1901 as proclaimed and gazetted, and that the Federal Circuit Court is operating as a Crown Court?

It is my will, the Court also provide documentation, copies of the Oath of Office for Justice Collier, Federal Court of Australia, District: Queensland copy of her sworn Oath to Queen Elizabeth II, Her Majesty's heirs and successors in the sovereignty of the United Kingdom, i.e. the Queen as per the Constitution Act 1900 Covering Clause two.

It is my will that the court confirms that the Constitution Act 1900 Covering Clause 5, is currently binding on all current serving Federal Court Judges in every Federal Court in every State of this Commonwealth.

On 31 March 2020, a request was made by the Federal Circuit Court to the Federal Court of Australia to transfer part of the request (namely, the request for 'copies of the Oath of Office for Justice Collier, Federal Court of Australia, District: Queensland copy of her sworn Oath to Queen Elizabeth II, Her Majesty's heirs and successors in the sovereignty of the United Kingdom' as outlined in paragraph 2 of your email above) under section 16 of the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

That request for partial transfer was accepted on 31 March 2020 by the Federal Court of Australia.

Transfers of requests under the FOI Act

Subsection 16(1) of the FOI Act provides:

Where a request is made to an agency for access to a document and:

- (a) the document is not in the possession of that agency but is, to the knowledge of that agency, in the possession of another agency; or
- (b) the subject-matter of the document is more closely connected with the functions of another agency than with those of the agency to which the request is made;

the agency to which the request is made may, with the agreement of the other agency, transfer the request to the other agency.

Subsection 16(3A) of the FOI Act provides:

Where:

- (a) a request is made to an agency for access to more than one document; and
- (b) one or more of those documents is a document to which subsection (1) ... applies;

this section applies to each of those documents as if separate requests for access had been made to the agency in respect of each of those documents.

Agencies may transfer requests for access to documents to other agencies so long as:

- (a) in the opinion of the agency that receives the request originally, another agency is in possession of the document or documents requested; or
- (b) the subject-matter of the document requested is more closely connected with the functions of the other agency.

Justice Collier is a judge of the Federal Court of Australia. The Federal Circuit Court of Australia and Federal Court of Australia are different Courts. You have requested, among other things, 'copies of the Oath of Office for Justice Collier, Federal Court of Australia, District: Queensland copy of her sworn Oath to Queen Elizabeth II, Her Majesty's heirs and successors in the sovereignty of the United Kingdom'. Those documents, being documents recording the oath, or oaths, Justice Collier has made, are more closely connected with the functions of the Federal Court of Australia than the Federal Circuit Court of Australia and, accordingly, the request for a transfer of the request made to the Federal Circuit Court in respect of those documents was accepted by the Federal Court of Australia.

Authorised decision-maker

I am authorised under the FOI Act to make decisions on behalf of the Federal Court of Australia (the **Court**) in relation to requests made under the FOI Act.

Reasons for decision

Introductory comments

In making my decision I have had regard to:

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

Applicable law and application of that law to the facts

Section 5(1) of the FOI Act provides:

For the purposes of this Act:

- (a) a court (other than a court of Norfolk Island) shall be deemed to be a prescribed authority;
- (b) the holder of a judicial office (other than a judicial office in a court of Norfolk Island) or other office pertaining to a court (other than a court of Norfolk Island) in his or her capacity as the holder of that office, being an office established by the legislation establishing the court, shall be deemed not to be a prescribed authority and shall not be included in a Department; and
- (c) a registry or other office of a court (other than a court of Norfolk Island), and the staff of such a registry or other office when acting in a capacity as members of that staff, shall be taken as a part of the court;

but this Act does not apply to any request for access to a document of the court unless the document relates to matters of an administrative nature.

FOI requests can be made to a court (and a registry or office of a court), although the FOI Act does not apply to any request for access to a document of the court unless the document relates to matters of an administrative nature.

The phrase ‘matters of an administrative nature’ has been considered by the Commonwealth judiciary.

In *Kline v Official Secretary to the Governor-General* [2012] FCAFC 184, when considering the word ‘administrative’ in context, the Full Court of the Federal Court concluded:

[c]ontext is especially important when considering the word “administrative”. Plainly, the point of distinction in the present context is not between matters of a judicial nature or matters of a legislative nature ...¹

The Full Court continued, stating:

the FOI Act applies only to requests for access to a document ... where the document relates to matters of an administrative nature: the FOI Act does not apply to requests for access to a document ... of any other character.²

The Full Court was of the view that the phrase ‘matters of an administrative nature’ was to be interpreted by reference to substantive powers and functions, on the one hand, and the apparatus for the exercise of such powers or functions (i.e. matters merely supportive of those powers or functions), on the other.³

By way of example, the Full Court stated:

¹ *Kline v Official Secretary to the Governor-General* [2012] FCAFC 184, [19].

² *Ibid*, [20].

³ *Ibid*, [21].

[t]he first respondent accepted, and we agree, that documents dealing with staffing arrangements within the Office, the costs of running the Office, or statistics about the activities undertaken by the Office, could all be the subject of a request for access to which the FOI Act would apply.⁴

But the Full Court went further, stating:

[w]e would add that, in our opinion, the expression “unless the document relates to matters of an administrative nature” goes to the character of the document so that, contrary to the submission of the applicant, a document would not so relate merely because it bore an annotation asking that an administrative task, such as filing, be carried out.⁵

When *Kline v Official Secretary to the Governor-General* [2012] FCAFC 184 was appealed to the High Court of Australia in *Kline v Official Secretary to the Governor-General* [2013] HCA 52, the appeal was dismissed. Chief Justice French and Justices Crennan, Kiefel and Bell observed that the Full Court of the Federal Court’s apprehension of ‘matters of an administrative nature’, especially with respect to the interpretation of that phrase by reference to substantive powers and functions, on the one hand, and the apparatus for the exercise of those powers, on the other, was correct.⁶

Mirroring the views of the Full Court of the Federal Court, the plurality of the High Court, in a joint judgment, dismissing the appeal, held that:

[t]he 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”.⁷

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”.⁸

The examples referred to by the High Court constituted a ‘secondary’ aspect of assistance and support provided to the authority making substantive decisions. That aspect of support was the management and administration of office resources, such as financial and human resources and information technology.⁹ The ‘primary’ aspect, which was thereby excluded from the management and administration of office resources, included assisting and supporting the discharge of substantive powers and functions.¹⁰

As relevant, the High Court then held that:

⁴ Ibid.

⁵ Ibid, [23].

⁶ *Kline v Official Secretary to the Governor-General* [2013] HCA 52, [41].

⁷ Ibid, [19].

⁸ Ibid, [41].

⁹ Ibid, [13].

¹⁰ Ibid.

[a]ccordingly, 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.¹¹

In a separate judgment, Justice Gageler also dismissed the appeal. His Honour held that:

[t]he 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.¹²

The documents that you seek, being documents recording an oath, or oaths, made by Justice Collier are not documents that ‘relate to matters of an administrative nature’ as that compound of words has been interpreted by the High Court. They are not documents that relate to the management and administration of registry and office resources.

Since the documents you have requested access to are not documents that relate to matters of an administrative nature for the purposes of section 5 of the FOI Act, the Court does not need to produce them pursuant to a request for access to documents under the FOI Act. Moreover, because the documents you have requested access to are not documents that relate to matters of an administrative nature for the purposes of section 5 of the FOI Act, the Court need not undertake searches for the documents because the documents you have requested are, by their nature, not documents that relate to matters of an administrative nature for the purposes of section 5 of the FOI Act.

Decision

Your request for access to a document, or documents, recording the oath, or oaths, made by Justice Collier in connection with her commission as a judge of the Court is denied.

Additional comments

I note that you requested, in paragraph 3 of your email of 11 March 2020 to the Federal Circuit Court, that ‘the court confirms that the Constitution Act 1900 Covering Clause 5, is currently binding on all current serving Federal Court Judges in every Federal Court in every State of this Commonwealth’.

It cannot go unnoticed that an agency may transfer a request for *documents* according to subsection 16(1) of the FOI Act. It was, and is, not open to the Federal Circuit Court to transfer your request for information about the ‘Constitution Act 1900 Covering Clause 5’ binding ‘all current serving Federal Court Judges in every Federal Court in every State of this Commonwealth’ because that aspect of your request is not a request for access to documents; it is a request for the Court to confirm a prevailing state of affairs.

¹¹ Ibid, [47].

¹² Ibid, [75] - [76].

For that reason, the Federal Circuit Court's request for transfer was construed not to be a request for the transfer of your request for confirmation that the 'Constitution Act 1900 Covering Clause 5' binds 'all current serving Federal Court Judges in every Federal Court in every State of this Commonwealth'. That is why I have not substantively considered that request for information in my decision.

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. The decision maker encourages 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 this 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 Australia 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 Officer of the Australian Information Commissioner website. Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

Yours sincerely



Susan O'Connor
National Judicial Registrar