



Telephone: (02) 9230 8336
Facsimile: (02) 9223 1906
DX 613 SYDNEY

**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

6 December 2021

Shaun
via Right to Know

By email: foi+request-8004-3b1cc45a@righttoknow.org.au

Dear Shaun,

Request for an internal review under the *Freedom of Information Act 1982*

I refer to your email of 16 November 2021 seeking an internal review of a recent decision made by Registrar Muscat on behalf of the Federal Court of Australia (**Court**) refusing access to documents you requested under the *Freedom of Information Act 1982* (**FOI Act**). While your email does not specify the date of the FOI decision you are seeking an internal review of, I have proceeded on the basis that the reference in your email to “handling procedure for a man that wishes to prosecute a claim in common law” is a reference to the FOI request you made to the Court on 29 October 2021 and the corresponding decision made by Registrar Muscat on 4 November 2021.

I am authorised under the FOI Act to make a decision on behalf of the Court in relation to your internal review request.

Background

On 29 October 2021, you sent an email to the External.FOI@fedcourt.gov.au mailbox seeking access to documents under the *Freedom of Information Act 1982* (*Cth*). Specifically, you requested the following:

i require the internal procedure, directive(s), policy, (or other documents) that describe how a qualified employee, PUBLIC SERVANT (or other) of the said Federal Court of Australia handle the following:

1. The Federal Court of Australia is a Court of Law and a Court of Record and a common law Court and available to any PERSON (or other legal entity), man or woman. There is no publicly available procedure on how a qualified employee, PUBLIC SERVANT (or other) must handle a claim by a man or woman that wishes to prosecute said claim in common law at the Federal Court of Australia venue. I require the Federal Court of Australia documents that describe the procedure, directive, policy (or other) that a qualified employee, PUBLIC SERVANT (or other) of said Court depends on when a man or woman wishes to prosecute a claim in common law at the said Court venue.

In a decision dated 4 November 2021, Registrar Muscat refused access to the documents you requested on the basis that the documents did not relate to “matters of an administrative nature” in accordance with subsection 5(1) of the FOI Act. A copy of Registrar Muscat’s decision letter of 4 November 2021 is enclosed with this letter for ease of reference (**Annexure 1**).

On 16 November 2021, you sent an email to the External.FOI@fedcourt.gov.au mailbox seeking an internal review under the FOI Act. Specifically, you stated the following:

I am writing to require an internal review of Federal Court of Australia's handling of my FOI requirement for: 'Handling procedure for a man that wishes to prosecute a claim in common law'.

The response is insufficient and misleading.

1. It is acknowledged that the court has a case management system that manages cases and as acknowledged by the FOI employee at said Court, caters for a man/woman wishing to prosecute a claim in common law at the Federal Court.

2. There is no publicly available information on the handling of a claim by a man (or woman) in common law, as the handling of said claim commences when a qualified registry employee (or other) of said Court is presented a claim by a man (or woman) either over the counter of via surface mail (or other). All Court forms and fees are for legal entities eg natural person, corporation (and other legal entities) that are required to apply to the Federal Court. There are no Court forms for a man or woman that wishes to prosecute a claim in common law at the Federal Court venue. Said Court venue is a public Court, a Court of Record, a Court of Law and a common law Court, and, must provide the ordinary care and proper handling for a claim in common law by a man or woman. The law of the land is common law.

3. i require the internal documents that are administrative in nature or similar, that a qualified employee, Public Servant, or other at said Court would depend on so that said employee(s) do not trespass upon the case or deliberately or inadvertently deny or defer justice or right to a man (or a woman) and become liable.

4. If there is no handling procedure, then provide the documents that describe which role(s) (and backup role) at the said Court is responsible.

Summary of Decision on Internal Review

For the reasons set out below, after reviewing Registrar Muscat’s refusal decision of 4 November 2021 and considering your FOI request afresh, I have decided to refuse access to the documents sought in your FOI request of 29 October 2021. Due to the operation of subsection 5(1) of the FOI Act, I have determined that the documents you have requested are outside the scope of the FOI Act because they do not relate to “matters of an administrative nature”.

Materials taken into account

I have taken the following material into account in making my decision:

- your FOI request of 29 October 2021;
- Registrar Muscat’s decision letter to you dated 4 November 2021 (**Annexure 1**);
- your internal review request dated 16 November 2021;
- the FOI Act;

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- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act; and
 - the relevant case law.

Reasons for internal review decision

As Registrar Muscat explained in his decision letter of 4 November 2021, the FOI Act has very limited application to the Court. In particular, Registrar Muscat explained that, with respect to the Court, the FOI Act only applies to requests for access to documents that relate to “matters of an administrative nature” in accordance with subsection 5(1) of the FOI Act.

Subsection 5(1) of the FOI Act provides as follows:

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.

Registrar Muscat also explained that both the High Court of Australia and the Full Court of the Federal Court had considered the phrase “matters of an administrative nature” in the context of the FOI Act and determined its scope. The law in respect of what constitutes a document that relates to matters of an administrative nature is clear. Registrar Muscat outlined the relevant case law in his response. Namely, the decision of the High Court in *Kline v Official Secretary to the Governor-General* [2013] HCA 52.

The documents sought by you are not documents that relate to “matters of an administrative nature” for the purposes of subsection 5(1) of the FOI Act. As Registrar Muscat explained in his decision of 4 November 2021, the documents you have requested relate to legal proceedings and therefore to the Court’s exercise of judicial powers and functions. The documents you have requested do not relate to the management and administration of the Court’s registry and office resources. For this reason, I have decided to again refuse your request for access to documents under the FOI Act.

Publicly available material

As Registrar Muscat pointed out to you in his decision of 4 November 2021, the Court’s website contains a range of practice materials and other information in relation to making a claim or application to the Court. In accordance with the definition of “document” in subsection 4(1) of the FOI Act, publicly available material does not fall within the scope of the FOI Act.

Therefore, any relevant material that is available on the Court's website is not accessible pursuant to an FOI request.

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 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 at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

Yours sincerely



C Hammerton Cole
Registrar

ANNEXURE 1



FEDERAL COURT OF AUSTRALIA PRINCIPAL REGISTRY

LEVEL 16
LAW COURTS BUILDING
QUEENS SQUARE
SYDNEY NSW 2000

4 November 2021

Shaun
Right to Know

By email: foi+request-8004-3b1cc45a@righttoknow.org.au

Dear Sir/Madam,

Request under the Freedom of Information Act

I acknowledge receipt of your email to the Federal Court of Australia (the **Court**), dated 29 October 2021, seeking access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**). Specifically, you have requested the following:

i require the internal procedure, directive(s), policy, (or other documents) that describe how a qualified employee, PUBLIC SERVANT (or other) of the said Federal Court of Australia handle the following:

1. The Federal Court of Australia is a Court of Law and a Court of Record and a common law Court and available to any PERSON (or other legal entity), man or woman. There is no publicly available procedure on how a qualified employee, PUBLIC SERVANT (or other) must handle a claim by a man or woman that wishes to prosecute said claim in common law at the Federal Court of Australia venue. I require the Federal Court of Australia documents that describe the procedure, directive, policy (or other) that a qualified employee, PUBLIC SERVANT (or other) of said Court depends on when a man or woman wishes to prosecute a claim in common law at the said Court venue.

Authorised decision-maker

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

Decision

I have decided to refuse your request for documents on the basis that none of the documents are accessible under the FOI Act. The FOI Act does not apply to a request for access to a document of the Federal Court “*unless the document relates to matters of an administrative nature*” (subsection 5(1)), nor does the FOI Act apply to any request for material that is otherwise publicly available.

I have taken the following into account in making my decision:

- your request;
- the FOI Act and relevant case law; and
- the FOI Guidelines issued by the Office of the Australian Information Commissioner.

Reasons for Decision

Section 5(1) of the FOI Act and “matters of an administrative nature”

Subsection 5(1) of the FOI Act relevantly provides:

... 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.

The phrase “matters of an administrative nature” in the context of the operation of section 5 of the FOI Act has been considered at length by the High Court of Australia in *Kline v Official Secretary to the Governor General of Australia & Anor.*¹ In the joint judgment dismissing the appeal, Chief Justice French 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.”*²

Further, the High Court held that:

*...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.”*³

The “examples” referred to by the High Court were a second category of assistance and support provided to the Governor-General by the Office of the Official Secretary. That category of support was the management and administration of office resources, such as financial and human resources and information technology.⁴ 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.

Relevantly, 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.*⁵

In its reasoning, the High Court held to be erroneous the decision of *Bienstein v Family Court of Australia.*⁶ *Bienstein* suggested 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

¹ (2013) 249 CLR 645; [2013] HCA 52.

² *Ibid.*, at [19] (French CJ, Crennan, Kiefel and Bell JJ).

³ *Ibid.*, at [41] (French CJ, Crennan, Kiefel and Bell JJ).

⁴ *Ibid.*, at [13] (French CJ, Crennan, Kiefel and Bell JJ).

⁵ *Ibid.*, at [47] (French CJ, Crennan, Kiefel and Bell JJ).

⁶ (2008) 170 FCR 382.

independence would not need protection from the operation of the FOI Act.⁷ 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.⁸

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.*⁹

The documents you seek are documents in relation to any “claim in common law at the Federal Court of Australia venue”, and documents the Court and its officers depend on when a person “wishes to prosecute a claim in common law”. The documents sought relate to legal proceedings, and therefore the Court’s exercise of its substantive powers and functions or tasks that are referable to the Court’s exercise of judicial powers and functions. The documents do not relate to the management and administration of registry and office resources. Accordingly, none of the documents you have requested relate to “matters of an administrative nature” as that compound of words has been interpreted by the High Court, and therefore the FOI Act does not apply to them.

Material that is otherwise publicly available

Although the FOI Act provides a legally enforceable right to obtain access to “a document of an agency” (paragraph 11(1)(a)), under the FOI Act, a document of an agency does not include “material maintained for reference purposes that is otherwise publicly available” (paragraph 4(1)(d)).

Your request for internal documents of the Court appears to be rooted in the belief that “[t]here is no publicly available procedure” on how the Court and its officers “must handle a claim by a man or woman that wishes to prosecute said claim”. However, the Court’s website contains a range of practice materials and other information that guide its approach to dealing with claims that are filed in the Court. For example, the Court’s *Central Practice Note: National Court Framework and Case Management (CPN-1)* sets out the fundamental principles concerning the operation of the Court, including the individual docket system, national allocation protocols, and key principles of case management procedure. CPN-1 is accessible via the following link: <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/cpn-1>.

⁷ *Kline v Official Secretary to the Governor General of Australia & Anor* (2013) 249 CLR 645; [2013] HCA 52, at [51] (French CJ, Crennan, Kiefel and Bell JJ).

⁸ *Ibid*, at [51] (French CJ, Crennan, Kiefel and Bell JJ).

⁹ *Ibid*, at [75]-[76] (Gageler J).

To the extent that the materials you have requested are already publicly available, those materials are captured by paragraph 4(1)(d). Such materials fall outside the definition of a “document” under the FOI Act and therefore must be refused.

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 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,



Rohan Muscat
National Registrar