



**FEDERAL COURT OF AUSTRALIA  
REGISTRY**

COMMONWEALTH LAW COURTS  
3 ANGAS STREET  
ADELAIDE SA 5000

GPO BOX 1350  
ADELAIDE SA 5001

20 May 2022

Michael V  
Right to Know

By email: [foi+request-8435-92d084dc@righttoknow.org.au](mailto:foi+request-8435-92d084dc@righttoknow.org.au)

Dear Michael V

**Request for an internal review under the Freedom of Information (FOI) Act**

I refer to your email correspondence of 20 April 2022 (11:30AM) seeking an internal review of the FOI decision made on 19 April 2022.

**Authorised decision-maker**

I am authorised to make a decision on behalf of the Federal Court of Australia (**Court**) in relation to your internal review request. In conducting the internal review, I acknowledge that an internal review is a merit review process and that I am required to bring a fresh, independent and impartial mind to the review.

**Material taken into Account**

In making my decision on internal review, I have considered the following material:

- your FOI request received on 14 February 2022 (8:28PM) (**FOI request**);
- the decision letter to you dated 19 April 2022;
- your request for internal review received on 20 April 2022 (11.30AM);
- the document identified as falling within the scope of your request;
- the records of the searches conducted by Court staff;
- the *Freedom of Information Act 1982* (Cth) (**FOI Act**) and relevant case law; and
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act.

## **Decision on Internal Review**

I refuse your request to access the documents described in item a) of your FOI request. I am satisfied that all reasonable steps have been taken to find the documents you have requested, but that the documents cannot be found or do not exist (see s 24A(1) of the FOI Act).

The searches conducted by the Court found one document within the scope of your request to access the documents described in item b) of your FOI request. That document is “Judicial Registrar Document” with handwritten notes (**Judicial Registrar Document**). I refuse access to this document. A large part of the document is not relevant to your request and is therefore outside its scope. The remainder of the document is conditionally exempt from disclosure pursuant to ss 47C, 47E(c) and 47F of the FOI Act and disclosure of those parts of the document would be contrary to the public interest under s 11A(5) of the FOI Act.

## **Reasons**

In providing these reasons, I note that the decision letter dated 19 April 2022 includes the text of sections of the FOI Act and FOI Guidelines. I do not propose to repeat the text in this internal review.

## ***Searches Undertaken***

Prior to the decision made on 19 April 2022, extensive searches were undertaken by staff of the Court to identify any documents falling within the scope of your request. I have reviewed these searches and spoken to Court personnel who were involved in this process. The process for undertaking the searches involved consultations with senior staff of the Court, searches of the Court’s human resources and recruitment inboxes, searches of staff emails, as well as searches of the Court’s human resources shared drive, the Court’s electronic documents, records management and information systems. The searches utilised key words based on Court staff’s knowledge of document titling practices in the Court. Staff engaged in extensive consultations to determine appropriate key word searches by reference to the description of the documents in your FOI request.

I am satisfied that the searches undertaken were thorough and comprehensive. The same work does not need to be undertaken again. I do not believe any further reasonable search or enquiry could find any documents in item a) of your FOI request or any additional documents in respect to item b). I am satisfied that, other than the document already found, no other documents exist or they cannot be found.

## ***Document is Conditionally Exempt***

I am of the view that the Judicial Registrar Document is conditionally exempt pursuant to ss 47C, 47E(c) and 47F of the FOI Act.

## **1. Section 47C of the FOI Act (documents subject to deliberative process)**

I am satisfied that the document contains deliberative matter. It is a memorandum that contains opinions and recommendations prepared for the purpose of a deliberative process of the Court. It is deliberative because the memorandum sets out a problem or challenge that the Court is facing, options for consideration on how to resolve this problem or challenge and the pros and cons of each option. It then contains a recommendation.<sup>1</sup> The handwritten notes set out the opinions of the reader on the content of the memorandum and a final note indicates that the recommendations are subject to further conditions being satisfied.

I have not considered if any harm would or could result from disclosure of the document as this is not required.

For the above reasons, I consider that disclosure of the Judicial Registrar Document would disclose deliberative matter and therefore is conditionally exempt under s 47C of the FOI Act.

## **2. Section 47E of the FOI Act (management or assessment of personnel)**

I am satisfied that disclosure of the document would, or could reasonably be expected to have, a substantial adverse effect on the management or assessment of personnel by the Court (see s 47E(c) of the FOI Act).

### Management or assessment of personnel

The Judicial Registrar Document relates to the management of personnel as explained in FOI Guideline 6.114. It relates to recruitment, promotion and compensation of Registrars of the Court. The exemption therefore applies.

### An effect would or could reasonably be expected following disclosure<sup>2</sup>

An effect would reasonably be expected following disclosure of the document. The document considers candidates for Registrar positions in the Court. It contains notes and recommendations in regard to each person, a number of whom are current Registrars of the Court. It also considers options in regard to the classification or other composition of a position and the budget implications of this. It would or could reasonably be expected that disclosure of this information would have an effect.

### The expected effect would be substantial and adverse<sup>3</sup>

The expected effect of disclosure of the document would be both substantial and adverse on the management of personnel by the Court. The disclosure of the document would or could be expected to:

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<sup>1</sup> See FOI Guidelines 6.52-6.61

<sup>2</sup> See FOI Guideline 6.113

<sup>3</sup> See FOI Guideline 6.113

- undermine the expectations of prospective and current Court employees regarding the protection of their privacy;
- diminish trust in the confidentiality of the Court’s recruitment process. This may in turn discourage prospective internal and external candidates from applying for positions and, ultimately, make it more difficult for the Court to attract and retain candidates to positions in future; and
- adversely impact the Court’s ability to openly and frankly discuss the classification or other composition of a position, leading to a deterioration in the rigour applied to the management of personnel.<sup>4</sup>

These effects on the management of Court personnel are both substantial and adverse.

For the reasons above, I consider that the document captured by paragraph (b) is conditionally exempt under s 47E(c) of the FOI Act.

### 3. Section 47F of the FOI Act (personal privacy)

I am satisfied that disclosure of the document would involve the unreasonable disclosure of personal information (see s 47F(1) of the FOI Act).

#### Personal information

The Judicial Registrar Document contains personal information because it includes information or an opinion about identified individuals (see definition of personal information in s 4(1) of the FOI Act).

#### Disclosure would be unreasonable<sup>5</sup>

Disclosure of that information would be unreasonable because:

- The information contained in the document is not well known and is not available from publicly accessible sources. The document is confidential and concerns a recent Registrar recruitment exercise. It includes opinions and recommendations on the appointment of persons to various Registrar positions. It also considers options in regard to the classification of these positions and the budget implications of this.
- The disclosure of the information prejudices the right to privacy of the individuals identified in the document and exposes them to unreasonable stress and anxiety. The FOI request was made in the context of a series of reports in the Australian newspaper

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<sup>4</sup> In *Department of Social Security v Dyrenfurth* (1988) ALD 232 at 238 it was held that the effects on the integrity of the system from disclosure of information regarding recruitment processes could reasonably be expected to give rise to a reduction in:

- “candour and frankness in written reports, assessment and references” if there is a risk that these documents would not remain confidential, and
- the “reliability and value” of documents and a greater emphasis on oral communication.

<sup>5</sup> See generally *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at 259; *FG’ and National Archives of Australia* [2015] AICmr 26 and *Colakovski v Australian Telecommunications Corp*

regarding the recruitment of Registrars to the Court. The document in question provides opinions and recommendations on a number of individuals, including the person who was the subject of the Australian newspaper article mentioned in the FOI request. This article does not identify the Registrar by name. If the document was released, it would release also the name of the Registrar concerned. It would therefore link them to the allegations in the newspaper article and expose them to the risk of having their personal details and circumstances of their recruitment being the subject of further media attention. It would also expose other Registrars who are named in the document to the possibility of unwanted media attention.

- The stress and anxiety caused is exacerbated because the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.<sup>6</sup>
- The role of a Registrar of the Court is one that requires the trust and confidence of the public. Persons who conduct this role should not be exposed to the risk that this standing is compromised by media speculation on the circumstances of their recruitment and the terms of their employment.

For the reasons above, I consider that the disclosure of the document captured by paragraph (b) of the FOI request would involve the unreasonable disclosure of personal information about the Registrars of the Court identified in the document. Accordingly, I find that the document is conditionally exempt under s47F of the FOI Act.

### ***Public interest test***

As I have found that the Judicial Registrar Document is conditionally exempt, I must also consider whether it would be contrary to the public interest to give you access at this time (see s 11A(5) of the FOI Act). I am satisfied that disclosure of the document would be contrary to the public interest.

I have taken into account the factors favouring access to the document as set out in s 11B(3) of the FOI Act. I accept that providing access to the document may:

- increase scrutiny, discussion, comment and review of the Court's recruitment activities;
- inform debate on the Court's recruitment activities; and
- promote effective oversight of public expenditure.

However, there are several factors that weigh against a finding that it would be in the public interest to disclose such information. Disclosure could reasonably be expected to:

- prejudice the protection of a person's right to privacy. The document is in regard to a recent Registrar recruitment exercise. It contains the opinions of Court staff on the

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<sup>6</sup> See FOI Guideline 6.143

merits of particular candidates, their suitability for certain roles and comments on remuneration;

- prejudice the management function of the Court by diminishing trust in the Court's recruitment processes and ability of the Court to keep employee information confidential;
- discourage prospective candidates from applying for roles with the Court due to a perception that the Court cannot keep recruitment processes confidential;
- harm the Registrar (who has not yet been named in the media but whose name appears in the document) by definitively linking them to the allegations and speculation in the Australian article. It could also expose other individuals named in the document to the risk of media speculation regarding their appointment;
- adversely affect the mental health of that public servant by causing them distress and anxiety by identifying them as the subject of recent media coverage; and
- diminish the confidence of the public in the Registrars of the Court by exposing them to the risk of further public speculation regarding the circumstances of their recruitment and the terms of their employment.

Finally, I consider that the document contains information that may be something **of** interest to the public, but that is not **in** the public interest. I agree with the view of the Registrar in her decision dated 19 April 2022 that "I am unable to see how information regarding the identity of the particular Registrar and details about the formulation of a certain position prior to that position being settled, would be of serious concern or benefit to the public. Disclosure of such information would, in my view, merely serve to satisfy the curiosity of others." I am also of the view that these reasons extend to the other persons whose personal information is included in the document.

I have weighed the factors for and against release of the document. I am satisfied that the factors in favour of disclosure are outweighed by the factors against disclosure. I am therefore also satisfied that, at this time and in these circumstances, access to the document is, on balance, contrary to the public interest.

#### ***Deletion of exempt or irrelevant material***

Pursuant to s 22 of the FOI Act, I have deleted the irrelevant and exempt material from the document. Having reviewed the redacted document, I consider that the number of deletions are so many that the remaining document would have no value to you.<sup>7</sup> It would therefore serve no purpose to provide a redacted copy to you.

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<sup>7</sup> See FOI Guideline 3.98

## **Your review rights**

If you are dissatisfied with my decision, under section 54L of the FOI Act 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.


More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to [Information Commissioner review - Home \(oaic.gov.au\)](http://www.oaic.gov.au/information-commissioner-review)

## **Complaints**

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint.

More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints. Go to [Make an FOI complaint - Home \(oaic.gov.au\)](http://www.oaic.gov.au/make-an-foi-complaint)

Yours sincerely



**Nicola Colbran**  
**National Judicial Registrar &**  
**District Registrar**