



**FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY**

LEVEL 16
LAW COURTS BUILDING
QUEENS SQUARE
SYDNEY NSW 2000

24 March 2022

Shaun
Right to Know

By email: foi+request-8498-0dcb5c67@righttoknow.org.au

Dear Sir/Madam,

Request under the Freedom of Information Act

I refer to your email to the Federal Court of Australia (the **Court**) dated 22 February 2022 requesting access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**). Specifically, you have requested the following:

i require the name(s) and position(s) of the qualified employee, PUBLIC SERVANT or other that has responsibility to carry out all things necessary to ensure a man is not denied or deferred access to said Court venue to prosecute a said claim.

As a reminder, this communication does not seek documents that relate to a legal entity such as a person or corporation, but as man (or woman).

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 FOI Act.

Decision

I am of the view that the request you have made does not constitute a valid request under the FOI Act because it does not seek access to “a document of an agency” in accordance with subsection 11(1) of the FOI Act. I also consider that the information you have requested cannot be dealt with under section 17 of the FOI Act, as if it were a request for access to a written document of the Court.

In the event that your request is considered a valid request, I must refuse your request on the basis that the FOI Act does not apply to a request for access to a document of the Court “*unless the document relates to matters of an administrative nature*” (subsection 5(1)).

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 (**FOI Guidelines**).

Reasons for Decision

Access to documents – subsection 11(1)

Relevantly to your request, subsection 11(1) of the FOI Act provides that:

(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;

Subsection 4(1) of the FOI Act stipulates that a document is “a document of an agency” if:

(a) the document is in the possession of the agency, whether created in the agency or received in the agency.

Subsection 4(1) of the FOI Act also contains the following definition of a “document”:

document includes:

(a) any of, or any part of any of, the following things:

(i) any paper or other material on which there is writing;

(ii) a map, plan, drawing or photograph;

(iii) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;

(iv) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device;

(v) any article on which information has been stored or recorded, either mechanically or electronically;

(vi) any other record of information; or

(b) any copy, reproduction or duplicate of such a thing; or

(c) any part of such a copy, reproduction or duplicate;

but does not include:

(d) material maintained for reference purposes that is otherwise publicly available; or

(e) Cabinet notebooks.

The FOI Guidelines elaborate on the above relevant legislative provisions at paragraph 2.33, which provides:

The right of access under the FOI Act is to existing documents, rather than to information. The FOI Act does not require an agency or minister to create a new document in response to a request for access, except in limited circumstances where the applicant seeks access in a different format or where the information is stored in an agency computer system rather than in discrete form (see Part 3 of these Guidelines). A request may nevertheless be framed by reference to a document that contains particular information.

In your email, you say that you “require the name(s) and position(s) of the qualified employee... or other” who have the responsibilities outlined in your request. In my view, your email does not seek access to “a document of an agency”, as that term has been defined in the FOI Act, but rather your email seeks information on the identities of various Court staff.

As per the above, the FOI Act provides for “limited circumstances” in which a request for information is dealt with as if it were a request for access to a written document of the agency.

Section 17 of the FOI Act provides:

- (1) *Where:*
 - (a) *a request (including a request in relation to which a practical refusal reason exists) is made in accordance with the requirements of subsection 15(2) to an agency;*
 - (b) *it appears from the request that the desire of the applicant is for information that is not available in discrete form in written documents of the agency; and*
 - (ba) *it does not appear from the request that the applicant wishes to be provided with a computer tape or computer disk on which the information is recorded; and*
 - (c) *the agency could produce a written document containing the information in discrete form by:*
 - (i) *the use of a computer program or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or*
 - (ii) *the making of a transcript from a sound recording held in the agency; the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.*
- (2) *An agency is not required to comply with subsection (1) if compliance would substantially and unreasonably divert the resources of the agency from its other operations.*

The FOI Guidelines, at paragraph 3.210, elaborates on section 17 of the FOI Act as follows:

Section 17 requires an agency to produce a written document of information that is stored electronically and not in a discrete written form, if it does not appear from the request that the applicant wishes to be provided with a computer tape or disk on which the information is recorded...

Your request for certain information that “does not... relate to a legal entity such as a person or corporation, but as man (or woman)” is not information that is stored electronically by the Court. Accordingly, I do not consider that section 17 of the FOI Act is applicable to your request such that the Court could produce a written document by the use of ordinary computer systems to retrieve or collate that information.

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:

¹ (2013) 249 CLR 645; [2013] HCA 52.

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

*...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 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

Even if your request was considered a valid request for documents under the FOI Act, the documents you seek relate to the names and positions of Court staff and others responsible for "access to said Court venue to prosecute a said claim". Such documents, on their face, 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

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.

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).

documents sought 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 the FOI Act does not apply to them.

Further information

I note that your request is predicated on your belief that there is a distinction between, what you describe to be, a “legal entity such as a person or corporation”, and a “man (or woman).” You specify that you only seek documents in relation to the latter “man (or woman)” distinction.

Notwithstanding my decision above – that the request you have made does not constitute a valid request under the FOI Act, and in any event the FOI Act does not apply to the documents requested – the Court’s website provides a range of materials and information on its commitment to assist litigants and facilitate access to the Court. For example, the “Registry Services” webpage (<https://www.fedcourt.gov.au/services/registry-services>) lists what Registry staff can and cannot do to provide operational support to members of the public. The responsibility of this support is, as the webpage makes clear, not limited to a particular person or people, but applies to “Registry staff” generally. There is no distinction drawn between “a person or corporation” and a “man (or woman)”.

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-/](https://forms.business.gov.au/aba/oaic/foi-review/)

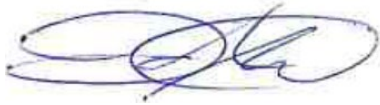
email: enquiries@oaic.gov.au

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 Office of the Australian Information Commissioner website. Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

Yours sincerely,

A handwritten signature in blue ink, appearing to be 'Rohan Muscat', written over a light blue circular stamp or watermark.

Rohan Muscat
National Registrar