



**FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS
119 NORTH QUAY
BRISBANE QLD 4000

13 June 2022

Margaret A
Right to Know

By email: foi+request-8606-d6c11bec@righttoknow.org.au
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Dear Margaret A

Request for an internal review under the Freedom of Information Act

I refer to your email correspondence of 15 May 2022 seeking internal review of a decision made 12 May 2022 under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

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 requests received on 10 March 2022 and 18 March 2022 (**FOI request**);
- the decision letter to you dated 12 May 2022 (**FOI decision**);
- your correspondence of 15 May 2022 requesting internal review (**review request**);
- the documents identified as falling within the scope of your request;
- the records of the searches conducted by Court staff;
- the third party submissions received following consultations under section 27A of the FOI Act;

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

Searches Undertaken

Prior to the FOI decision dated 12 May 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. I do not believe any further reasonable search or enquiry could find additional documents within the scope of your request. I am satisfied that, other than the documents already found, no other documents exist or they cannot be found.

Decision on Internal Review

In relation to your FOI request, the searches conducted by the Court found a significant number of documents which are identified clearly within the FOI decision. I will not specifically identify each of those pieces of correspondence again, but will refer to them collectively as the recruitment correspondence.

In relation to your FOI request, the searches conducted identified a significant number of documents consisting of confidential email communication between the Court and Ms Kate McMullan. I will not specifically identify each of those pieces of correspondence, but will refer to them collectively as the PID documents.

I refuse access to the recruitment correspondence and the PID documents. The recruitment correspondence and PID documents are conditionally exempt from disclosure under sections 47C, 47E(c), 47E(d) and 47F of the FOI Act and disclosure of the documents would be contrary to the public interest under section 11A(5) of the FOI Act.

Reasons for Decision

In providing these reasons, I note that the FOI decision includes the text of all relevant sections of the FOI Act, FOI Guidelines and relevant case law. I do not propose to quote those sections verbatim within this decision.

Documents Conditionally Exempt

I am satisfied that the recruitment correspondence and PID documents fall within the conditional exemptions provided within sections 47C, 47E(c), 47E(d) and 47F of the FOI Act.

Section 47C of the FOI Act (documents subject to deliberative process)

I am satisfied that the recruitment correspondence and PID documents contain deliberative matter or are in the nature of deliberative process.

The recruitment correspondence contain information, opinions and recommendations prepared for the purpose of a deliberative process of the Court. The correspondence includes advice, opinions, proposals and interim decisions or deliberations. The documents evidence a selection process that, at that point in time, had not yet been finalised.¹ The documents are preparatory and ancillary to the formal engagement of the relevant employee and a part of a wider deliberative process of the Court regarding recruitment.

The PID documents are confidential email communications, including attachments, between the Court and Ms McMullan in respect of Ms McMullan's investigation on behalf of the Australian Public Service Commission (APSC). They record an exchange about the investigation conducted by Ms McMullan.

I have read the reasons provided by the decision maker and agree with the decision maker's conclusions in finding that the PID investigation is analogous to the investigation conducted and considered in *Raiz and Professional Services Review* [2021] AATA 4360 (Raiz and PSR).

It is for these reasons that I consider that the recruitment correspondence and PID documents fall within the conditional exemption under section 47C of the FOI Act, and I agree with the findings of the decision maker for the FOI decision.

Section 47E of the FOI Act (certain operations of agencies)

I am satisfied that disclosure of the recruitment correspondence and PID documents would, or could reasonably be expected to have, a substantial adverse effect on the management or assessment of personnel by the Court² as well as the efficient conduct of the operations of the Court.³

The recruitment correspondence and PID documents specifically concern the Court's recruitment processes and therefore clearly relate to the management of personnel and the

¹ see FOI Guidelines 6.52-6.61

² see section 47E(c) of the FOI Act

³ see section 47E(d) of the FOI Act

assessment of those personnel and third parties. The PID documents, even where the subject matter wasn't so obviously recruitment, would relate to the management of personnel and the assessment of those personnel given the purpose of the PID regime to protect those making disclosures concerning misconduct in the Australian Public Service.

The recruitment processes themselves are essential to the proper and efficient operations of the Court, as no organisation could efficiently operate without a functional recruitment process. The documents themselves therefore relate to the efficient conduct of the Court's operations. Indeed, in this instance, the documents contain personal information about Court Registrars who are critical to the Court's proper and efficient operations. As has previously been indicated by the decision maker in the FOI decision, Registrars provide support to the Court's Judges, exercise various powers delegated by Judges and perform important statutory functions assigned to them by legislation.

I have read the analysis provided within the FOI decision on the application of the decision of *'YU' and Bureau of Meteorology (Freedom of Information)* [2021] AICmr75 to the PID documents. I agree with that analysis and finding that the disclosure of the PID documents would impact upon the Court's proper and efficient operations. Further, I am in agreement that the disclosure would have a substantial adverse effect on the management and assessment of Court staff and on the proper and efficient conduct of operations and I adopt the reasons of the FOI decision in that regard.

Accordingly, I am satisfied that all documents falling within the scope of your request are conditionally exempt under subsections 47E(c) and 47E(d) of the FOI Act.

Section 47F of the FOI Act (personal privacy)

I am satisfied that disclosure of the recruitment correspondence and PID documents would involve the unreasonable disclosure of personal information⁴ and fall within the exemption under subsection 47F(1) of the FOI Act.

I agree with the findings of the decision maker that the disclosure of the recruitment correspondence and PID documents would be an unreasonable disclosure of personal information under subsection 47F(1). The personal information contained within the recruitment correspondence is not well known and is not, generally speaking, available from publicly accessible sources. It is not information that directly concerns the usual duties or responsibilities of those individuals as public servants, where those individuals are in fact public servants. It also relates to the personal capabilities and attributes of those individuals. The documents themselves were sent and received on the understanding that such information would not be disclosed to third parties or made publicly available.

I consider that the disclosure of this information would have an adverse effect on the individuals concerned; that the information is such that the Australian community would regard it as sensitive; and that disclosure would undermine the morale of the individuals concerned. I

⁴ section 4 FOI Act

consider that disclosure of this information would also likely impact upon the health and wellbeing of the individuals concerned and damage their trust and confidence in confidential recruitment processes as well as causing tension between individuals within the workplace.

I am not persuaded that the limited publication of some of the personal information included within the recruitment correspondence would preclude me from finding that the documents captured by your request are unreasonable to disclose,⁵ let alone require that I do so. As remarked by the original decision maker, the limited publication of this information has already caused considerable harm and distress for the individuals concerned.

I am satisfied that it would be unreasonable to disclose the remainder of the personal information within the recruitment correspondence and PID documents as it is likely to lead to further harm and distress. I am satisfied that the personal information in the documents are conditionally exempt under section 47F of the FOI Act.

Public interest test

As I have found that the recruitment correspondence and PID documents are conditionally exempt under various sections of the FOI Act, I must also consider whether it would be contrary to the public interest to give you access at this time.⁶ I am satisfied that disclosure of the documents would be contrary to the public interest.

The disclosure of these documents may help promote the objects of the FOI Act, in as much as access might provide the Australian community, or a section of it, with access to information held by an arm of government, increasing knowledge about government activities, and enhancing the scrutiny of government decision-making.

However, as the decision maker has found, it is difficult to see how opinions about candidates, attributes and suitability of individuals candidates, and the direct contact details of public servants and others would be of serious concern or benefit to the public. It would seem that such information would merely serve to satisfy the curiosity of others. Further, that information would do nothing to inform debate on a matter of public importance, nor does the information promote effective oversight of public expenditure.

I have read and agree with the factors against disclosure identified by the decision maker and adopt those here. Those factors carry with them a very real and serious risk of harm to the Court and its former or current employees, and those who have sought employment within the Court. I give significant weight to each of those factors, and after considering each factor and the weight to be given to each, I have concluded that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding that information. I am therefore satisfied that disclosure of the documents would, on balance, be contrary to the public interest.

⁵ see *Re Jones and Commissioner of Taxation* [2008] AATA 834 and *Bradford v Australian Federal Police* [2021] AATA 3984

⁶ see section 11A(5) FOI Act.

Deletion of exempt or irrelevant material

Pursuant to section 22 of the FOI Act, I have considered whether it is possible and reasonably practicable to provide access to an edited version of the recruitment correspondence and PID documents to remove exempt material or material that is irrelevant to the scope of the request.

I am satisfied that, under section 22, upon redacting all irrelevant and exempt material, that the recruitment correspondence and PID documents would retain little or no value or meaning. It would therefore be futile to grant you access to redacted copies of those documents.

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 (OAIC) website. Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/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 <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely



Scott Tredwell
General Counsel