FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY

LEVEL 16
LAW COURTS BUILDING
QUEENS SQUARE
SYDNEY NSW 2000

19 May 2022

Helen
Right to Know

By email: foi+request-8626-5dc68619@righttoknow.org.au

Dear Helen,

Request under the Freedom of Information Act

I refer to your email to the Federal Court of Australia (**Court**) dated 20 March 2022 requesting access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**). Specifically, you have requested the following:

> *Under the FOI Act, I request access to any and all documents (including but not limited to classification evaluation documents prepared for the "Legal 2" and "SES1" classification level registrar positions referred to in an Australian article published on 9 February 2022 titled Federal Court boss warned on job rule sidestep) that support acting assistant commissioner Kate McMullan's conclusion that, in relation to the "National Judicial Registrar role", "a role review process … had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load."*

On 25 March 2022, the Court acknowledged receipt of your FOI request and advised you that, because your request covered documents that contained personal information about individuals, under section 27A of the FOI Act the Court was required to consult with the persons concerned before making a decision about the release of the documents. For that reason, the period for processing your request was extended by a further period of 30 days in accordance with subsection 15(6) of the FOI Act.

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.

Scope of request

You have requested access to certain documents "*that support acting assistant commissioner Kate McMullan's conclusion*" regarding the Court's "*role review process*" in relation to the National Judicial Registrar role. As a matter of logic, documents that support Ms McMullan's conclusion regarding the Court's "*role review process*" regarding the National Judicial Registrar role, must be documents that were provided by the Court to Ms McMullan. Beyond those documents that were provided by the Court to Ms McMullan, it is not possible for the Court to know with any certainty what documents might or might not support Ms McMullan's conclusion, especially in circumstances where Ms McMullan was an employee of a different agency. For this reason, I have interpreted your request to encompass any and all documents that the Court provided to Ms McMullan during the course of her investigation in relation to the "role review process" concerning the "National Judicial Registrar role.

Searches undertaken

Extensive searches were undertaken by staff of the Court to identify any documents falling within the scope of your request. These searches included consultations with senior staff in the Court's Principal Registry and People and Culture teams, searches of the Court's human resources and recruitment inboxes, searches of staff emails, searches of the human resources shared drive, and searches of the Court's electronic document, records management and information systems. I am not aware of any other steps that could reasonably have been taken to identify the documents you have requested.

As a result of the searches undertaken, a number of documents were identified as falling within the scope of your request. These documents consist of confidential email communication, including attachments, between the Court and Ms Kate McMullan. I have decided not to provide specific detail about each document in my decision, as doing so would reveal exempt matter (see subsection 26(2) of the FOI Act).

Decision

I have decided to refuse access to the documents identified as falling within the scope of your request on the basis that the documents are exempt from disclosure under section 47C, subsections 47E(c) and 47E(d) and section 47F of the FOI Act. I consider that disclosure of the documents would be contrary to the public interest under subsection 11A(5) of the FOI Act. I also consider that it would be futile to grant you access to redacted copies of the documents under section 22 of the FOI Act.

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

- the terms of your request;
- the nature and content of the documents sought by your request;
- the relevant provisions of the FOI Act and relevant case law;
- the third party submissions received following consultations under section 27A of the FOI Act;
- the *Freedom of Information (Charges) Regulations 2019*; and

- the FOI Guidelines issued by the Office of the Australian Information Commissioner (**FOI Guidelines**).

Reasons for Decision

The documents found in response to your request are identical to the documents that were found in response to paragraphs (i) and (ii) of a previous FOI request made to the Court under the name "Velan" on 26 February 2022. I have therefore decided to adopt the reasoning I provided in the decision I issued on 27 April 2022 in response to paragraphs (i) and (ii) of the "Velan" request.

A copy of my reasons for decision in response to the "Velan" request have been published online at: https://www.righttoknow.org.au/request/8520/response/25304/attach/html/2/2022%2004%2027%20FOI%20Decision%20Velan.pdf.html. For your convenience, I also enclose a copy of those reasons for 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. 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 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 as to 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

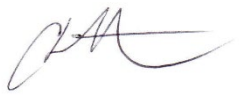
in person: Level 3, 175 Pitt Street, Sydney NSW

More information about the Information Commissioner review is available on the Office of the Australian Information Commissioner (**OAIC**) website at: 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, at: https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint.

Yours sincerely,



C Hammerton Cole
Registrar

FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY

LEVEL 16
LAW COURTS BUILDING
QUEENS SQUARE
SYDNEY NSW 2000

27 April 2022

Velan
Right to Know

By email: foi+request-8520-6f96271a@righttoknow.org.au

Dear Velan,

Request under the Freedom of Information Act

I refer to your email to the Federal Court of Australia (**Court**) dated 26 February 2022 requesting access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**). Specifically, you have requested the following:

> *i. documents recording the "role review processes" that Kate McMullan based her conclusions on,*
> *ii. documents setting out the classification assessments for the Legal 2 and SES1 versions of the National Judicial Registrar role that Kate McMullan would presumably have referred to when drawing her conclusions,*
> *iii. documents that show that it is possible to broadband a group of duties over an SES classification even though the Public Service Classification Rules forbid such an act.*

On 28 February 2022, the Court acknowledged receipt of your FOI request. On 25 March 2022, the Court advised you that, because your request covered documents that contained personal information about individuals, under section 27A of the FOI Act the Court was required to consult with the persons concerned before making a decision about the release of the documents. For that reason, the period for processing your request was extended by a further period of 30 days in accordance with subsection 15(6) of the FOI Act.

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.

Scope of request

In paragraphs (i) and (ii) of your request, you have requested access to certain documents that "*Kate McMullan based her conclusions on*" and that "*Kate McMullan presumably would have*

referred to when drawing her conclusions". Given that the Court is not in a position to know exactly what Ms McMullan, a third party, turned her mind to in making her decision, I have interpreted your request to refer to any documents the Court provided to Ms McMullan during the course of her investigation "*recording the 'role review processes'*" and "*setting out the classification assessments for the Legal 2 and SES1 versions of the National Judicial Registrar role*", as identified in paragraphs (i) and (ii) of your request.

Searches undertaken

Extensive searches were undertaken by staff of the Court to identify any documents falling within the scope of your request. These searches included consultations with senior Court staff, searches of relevant inboxes, searches of relevant shared drives, and searches of the Court's electronic document, records management and information systems. I am not aware of any other steps that could reasonably have been taken to identify the documents you have requested.

As a result of the searches undertaken, a number of documents were identified as falling within the scope of your request. These documents consist of confidential email communication, including attachments, between the Court and Ms McMullan. I have decided not to provide specific detail about each document in my decision, as doing so would reveal exempt matter (see subsection 26(2) of the FOI Act).

Decision

With respect to paragraphs (i) and (ii) of your request, I have decided to refuse access to the documents found on the basis that the documents are exempt from disclosure under section 47C, subsections 47E(c) and 47E(d) and section 47F of the FOI Act. I consider that disclosure of the documents would be contrary to the public interest under subsection 11A(5). I also consider that it would be futile to grant you access to redacted copies of the documents under section 22 of the FOI Act.

With respect to paragraph (iii) of your request, I have decided, under subsection 24A(1) of the FOI Act, to refuse that part of your request as I am satisfied that all reasonable steps have been taken to find the documents you have requested but the documents cannot be found or do not exist.

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

- the terms of your request;
- the nature and content of the documents sought by your request;
- the relevant provisions of the FOI Act and relevant case law;
- the third party submissions received following consultations under section 27A of the FOI Act;
- the *Freedom of Information (Charges) Regulations 2019*; and
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (**FOI Guidelines**).

Reasons for Decision

Documents that cannot be found or do not exist – subsection 24A(1)

Subsection 24A(1) of the FOI Act provides:

> *(1) An agency or Minister may refuse a request for access to a document if:*
> *(a) all reasonable steps have been taken to find the document; and*
> *(b) the agency or Minister is satisfied that the document:*
> *(i) is in the agency's or Minister's possession but cannot be found; or*
> *(ii) does not exist.*

As mentioned above, extensive searches were undertaken by staff of the Court to identify any documents falling within the scope of your request. I am satisfied that all reasonable steps have been taken to find any documents within the ambit of paragraph (iii) of your request, but that the documents cannot be found or do not exist. As there are no documents to provide you, I must refuse access to the documents requested in that paragraph of your request under subsection 24A(1) of the FOI Act.

Deliberative processes – s 47C of the FOI Act

I consider that the documents falling within the scope of paragraphs (i) and (ii) of your request are conditionally exempt under section 47C of the FOI Act. Subsection 47C(1) of the FOI Act prescribes that:

> *A document is conditionally exempt if its disclosure under this Act would disclose matter (**deliberative matter**) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:*
>
> *(a) an agency; or*
>
> *(b) a Minister; or*
>
> *(c) the Government of the Commonwealth.*

In relation to requests that concern conditionally exempt documents containing deliberative matter, the FOI Guidelines provides the following at paragraph 6.52:

> *... Deliberative matter is content that is in the nature of, or relating to either:*
> - *an opinion, advice or recommendation that has been obtained, prepared or recorded, or*
> - *a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or minister (s 47C(1)).*

Relevantly, the FOI Guidelines also provide:

> *6.55 The deliberative processes exemption differs from other conditional exemptions in that no type of harm is required to result from disclosure. The only consideration is whether the document includes content of a specific type, namely deliberative matter. If a document does*

not contain deliberative matter, it cannot be conditionally exempt under this provision, regardless of any harm that may result from disclosure.

6.58 A deliberative process involves the exercise of judgement in developing and making a selection from different options:

> *The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.*[1]

6.59 'Deliberative process' generally refers to the process of weighing up or evaluating competing arguments or considerations or to thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.[2]

6.60 The deliberative process must relate to the functions of an agency, minister or the government of the Commonwealth. The functions of an agency are usually found in the Administrative Arrangements Orders or the instrument or Act that established the agency. For the purposes of the FOI Act, the functions include both policy making and the processes undertaken in administering or implementing a policy. The functions also extend to the development of policies in respect of matters that arise in the course of administering a program. The non-policy decision making processes required when carrying out agency, ministerial or governmental functions, such as code of conduct investigations, may also be deliberative processes.[3]

6.61 A deliberative process may include the recording or exchange of:

- *opinions*
- *advice*
- *recommendations*
- *a collection of facts or opinions, including the pattern of facts or opinions considered*
- *interim decisions or deliberations.* [footnote omitted].

I have assessed the documents found in response to paragraphs (i) and (ii) of your request and consider that they all contain deliberative matter. As outlined above, these documents consist of confidential email communications, including attachments, between the Court and Ms McMullan in relation to Ms McMullan's investigation regarding a public interest disclosure (**PID**). The documents record the process by which the PID investigation was undertaken and disclose material prepared or recorded as part of that deliberative PID process, before any decision was made regarding that PID.

---

[1] See *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67. See *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19, [15]–[22]. See also *Carver and Fair Work Ombudsman* [2011] AICmr 5 in relation to code of conduct investigations.
[2] *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18].
[3] See *Re Murtagh and Commissioner of Taxation* [1984] AATA 249*, Re Reith and Attorney-General's Department* [1986] AATA 437*, Re Zacek and Australian Postal Corporation* [2002] AATA 473.

Relevantly, in the recent decision of *Raiz and Professional Services Review* [2021] AATA 4360 (**Raiz and PSR**), the Administrative Appeals Tribunal found that material collected and assessed during the course of an investigation made under the *Health Insurance Act 1973* (Cth) by the Professional Services Review was deliberative material and conditionally exempt under both sections 47C and 47E(d) of the FOI Act. In relation to the conditional exemption under section 47C, the Tribunal found, at paragraph [87] of that decision:

> *I reject Dr Raiz's arguments that this material is not deliberative material. I refer to paragraph 6.67 of the Guidelines that states that material that is gathered as a basis for intended deliberations may be deliberative matter. It is clear from Mr Topperwein's evidence that MBS data must be considered as a part of a PSR Committee investigation and further that the Committee must deliberate as to which MBS items to investigate. It is not relevant that the instructions to retrieve certain data technically occurs after the deliberative process as these instructions would reveal the outcomes of deliberations regarding which data to request. Therefore, disclosure of the contents of the requests for data, the data itself, and the staffs' interactions with the 'owners' of the data would all reveal information directly related to deliberations and necessary for the Committee's continuous deliberations.*

I consider that the investigation under the Health Insurance Act, discussed in Raiz and PSR, is analogous to the investigation that is the subject of items (i) and (ii) of your request. The documents record an exchange about the investigation conducted by Ms McMullan, all of which occurred before final conclusions/recommendations were reached by Ms McMullan.

For all of the reasons outlined above, I find that disclosure of the documents found in response to paragraphs (i) and (ii) of your request would disclose deliberative matter and, therefore, the documents are conditionally exempt under section 47C of the FOI Act.

In finding that these documents are conditionally exempt, I am required to consider whether it would be contrary to the public interest to give you access at this time. I discuss this later in my decision.

Operations of an agency – s 47E of the FOI Act

I consider that the documents falling within the scope of paragraphs (i) and (ii) of your request are conditionally exempt under subsections 47E(c) and 47E(d) of the FOI Act, which prescribe that:

> *A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:*
>
> *…*
>
> *(c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;*
>
> *(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

The FOI Guidelines provide the following elaboration on subsection 47E(c):

6.113 Where the document relates to the agency's policies and practices relating to the assessment and management of personnel, the decision maker must address both elements of the conditional exemption in s 47E(c), namely, that:

- *an effect would reasonably be expected following disclosure*
- *the expected effect would be both substantial and adverse.*

6.114 For this exemption to apply, the documents must relate to either:

- *the management of personnel – including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety*
- *the assessment of personnel – including the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and underperformance, counselling, feedback, assessment for bonus or eligibility for progression.*

The documents found in response to paragraphs (i) and (ii) of your request refer to a PID investigation that was undertaken in response to allegations concerning the recruitment and promotion of various Court staff. Those documents directly concern the "*management*" and "*assessment of personnel*" because the PID scheme provides a protected space for public officials to make disclosures relating to suspected wrongdoing or misconduct, thereby holding to account public officials in the work that they do. The documents therefore relate to paragraph 47E(c) of the FOI Act.

The FOI Guidelines provide the following elaboration on subsection 47E(d):

6.123 The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner. Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the conditional exemption will not apply.

The PID scheme promotes integrity and accountability across the Commonwealth public sector and provides a protected space for public officials to make disclosures relating to suspected wrongdoing or misconduct. The recent decision of *'YU' and Bureau of Meteorology (Freedom of Information)* [2021] AICmr75 (29 November 2021) upheld the importance of protecting information collected during a PID investigation process. In that case, the Information Commissioner accepted the Bureau of Meteorology's submission, at paragraph [31], as follows:

The PID Act provides public officials who make a disclosure under that Act with legislative protection from reprisals. I agree with BOM's submission that certain operations of the agency may be undermined if the confidentiality established under the PID Act was circumvented by a request for information under the FOI Act. I am also satisfied disclosure may result in employees losing confidence in BOM's ability to maintain confidentiality during a PID or other investigation into allegations of misconduct, which may have a substantial adverse effect on the Bureau's ability to manage its staff.

I accept that certain operations of the Court could be undermined if the confidentiality established under the PID Act was circumvented by an access application made under the FOI Act. The case of *YU* also refers to other relevant case law that highlights the importance of agencies being able to undertake confidential investigative processes, and the fact that the need for confidentiality will often extend past the time period of the investigation itself, since disclosure would likely undermine participation in future investigative processes by agency staff and/or members of the public.[4]

It is an important aspect of the operation of Commonwealth agencies that they are able to properly undertake activities under the PID scheme, and in doing so, continue encouraging the disclosure of suspected wrongdoing by public officials. Paragraph 6.122 of the FOI Guidelines further elaborates on the applicability of the conditional exemption in section 47E(d) of the FOI Act, stating the following:

> *The exemption may also apply to documents that relate to a complaint made to an investigative body. The disclosure of this type of information could reasonably affect the willingness of people to make complaints to the investigative body, which would have a substantial adverse effect on the proper and efficient conduct of the investigative body's operations. [footnote omitted].*

The release of the documents captured by paragraphs (i) and (ii) of your request would clearly bear on the Court's "*proper and efficient operations*". Not only do the documents relate to a PID investigation and thereby the proper and efficient operations of the Court, but the documents contain personal information about Registrars of the Court who are critical to the Court's proper and efficient operations. Registrars provide support to the Court's Judges, exercise various powers delegated by Judges and perform important statutory functions assigned to them by legislation. The documents, by relating to the PID scheme, thereby relate to the Court's ability to assess and investigate its staff, including Registrars.

I now turn to the question of whether disclosure of the documents would or could reasonably be expected to have a substantial adverse effect on the management and assessment of Court staff and on the Court's proper and efficient conduct of operations.

The release of the documents would, or could reasonably be expected to, have a substantial adverse effect on the management and assessment of personnel by the Court, as well as on the Court's operations, by:

- jeopardising the confidentiality regime established by the *Public Interest Disclosure Act 2013* (**PID Act**);
- discouraging people from utilising the PID process to disclose suspected wrongdoing by public officials, thereby undermining the proper functioning of both the Australian

[4] See, for example, *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2016] AATA 230; *'HJ' and Australian Federal Police* [2015] AICmr 71; *Australian Broadcasting Corporation and Australian Federal Police (Freedom of information)* [2020] AICmr 23; *'YA' and Australian Taxation Office (Freedom of Information)* [2021] AICmr 49; *'YB' and Department of Veterans' Affairs* [2021] AICmr 52.

Public Service Commission (**APSC**) (which conducted the investigation) and the Court (in its provision of materials to the APSC as part of that investigation);

- undermining participation in future investigative processes by Court staff and/or members of the public;
- compromising the Court's ability to carry out its obligations under the PID scheme and its ability to ensure that allegations of misconduct are properly investigated;
- adversely impacting the Court's ability to support, manage, assess or investigate its own staff;
- prejudicing the relevant Registrars' right to privacy, including undermining the expectations of Court employees regarding the protection of their privacy;
- negatively impacting the ability of the relevant Registrars to perform their current role;
- adversely affect the mental health of the relevant Registrars, including by causing them stress and anxiety by linking them to the allegations set out in the articles published in the media;
- exposing the relevant Registrars to the risk of having their personal details and the circumstances of their recruitment with the Court being the subject of further media articles or public speculation;
- damaging the relevant Registrars' relationship with colleagues and peers;
- causing litigants and practitioners to call into question any of the future decisions made by those Registrars in the exercise of their delegated judicial functions; and
- damaging the relevant Registrars' future prospects of employment.

In relation to the substantial adverse effect that disclosure of the documents would have on the confidentiality regime established by the PID Act, I note that the individual I consulted in relation to the document captured by paragraph (i) of your request, being an email communication, objected to disclosure of that document in full. It was clear from that consultation that the individual engaged in the email communication on the understanding that the sensitive information contained in the emails would not be communicated to third parties other than Ms McMullan and, furthermore, that those emails would not be made publically available on a website (whether that be via the Right to Know website or the Court's FOI disclosure log). I also note that there is no legislative or regulatory regime that requires the disclosure of any the documents requested. Rather, disclosure of the information requested would likely breach the Court's privacy and confidentiality obligations under the PID Act.

Further, there is not just one but a number of Registrars named in the confidential email communication who had their recruitment the subject of the PID. Disclosure of multiple Registrar names and/or information in the emails concerning those Registrars could impact the performance and morale of those Registrars, and could lead to animosity and disharmony between those Registrars and other staff of the Court. This would, in turn, have a substantial adverse effect on the proper and efficient conduct of the operations of the Court generally, and could result in employees choosing to leave the employ of the Court, causing the Court to lose the talent it obtained during its extensive recruitment processes.

For the reasons above, I consider that the documents captured by paragraphs (i) and (ii) of your request relate to the operations of the Court and, if disclosed, would or could reasonably be expected to have a substantial adverse effect on both the "*management or assessment*" of personnel and the "*proper and efficient conduct of the operations*" of the Court. Accordingly, I have determined that the documents are conditionally exempt under subsections 47E(c) and 47E(d) of the FOI Act.

In finding that the documents are conditionally exempt, I am required to consider whether it would be contrary to the public interest to give you access at this time. I discuss this later in my decision.

Personal privacy – s 47F of the FOI Act

I consider that the documents that fall within the scope of paragraphs (i) and (ii) of your request are conditionally exempt from disclosure under subsection 47F(1) of the FOI Act, which prescribes that:

> *A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).*

The term "*personal information*" is defined in subsection 4(1) of the FOI Act to have the same meaning as in section 6 of the *Privacy Act 1988* (Cth), that is:

> *...information or an opinion about an identified individual, or an individual who is reasonably identifiable:*
>
> *(a) whether the information or opinion is true or not; and*
>
> *(b) whether the information or opinion is recorded in material form or not.*

As discussed, the documents found in response to paragraphs (i) and (ii) of your request consist of confidential email communication, including attachments between the Court and Ms McMullan during the course of the investigation. The documents contain the names and direct contact details of a number of public servants. The documents also contain a plethora of other types of personal information about individuals, including details of their prior employment and suitability for certain roles. All of this information in the documents is clearly "*personal information*", especially in the context of the PID investigation.

To determine whether this personal information is conditionally exempt under subsection 47F(1), I am required to consider whether disclosure of that personal information would be unreasonable.

Subsection 47F(2) of the FOI Act prescribes that:

> *In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:*

(a) the extent to which the information is well known;
(b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
(c) the availability of the information from publicly accessible sources;
(d) any other matters that the agency or Minister considers relevant.

In considering what is unreasonable, the AAT in *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at 259 stated that:

> *…whether a disclosure is 'unreasonable' requires … a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance…it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information … and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party…*

The FOI Guidelines list at paragraph 6.143 additional factors, which are outlined in the leading Information Commissioner review decision on section 47F. In that decision, '*FG' and National Archives of Australia* [2015] AICmr 26, the Information Commissioner held that the following factors are relevant to the question of whether disclosure would be unreasonable:

- *the nature, age and current relevance of the information*
- *any detriment that disclosure may cause to the person to whom the information relates*
- *any opposition to disclosure expressed or likely to be held by that person*
- *the circumstances of an agency's collection and use of the information*
- *the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act*
- *any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information, and*
- *whether disclosure of the information might advance the public interest in government transparency and integrity.*

In relation to the question of whether disclosure would be unreasonable, the FOI Guidelines further provide, at paragraphs 6.144 and 6.145:

> *For example, in Colakovski v Australian Telecommunications Corp, Heerey J considered that '... if the information disclosure were of no demonstrable relevance to the affairs of government and was likely to do no more than excite or satisfy the curiosity of people about the person whose personal affairs were disclosed ... disclosure would be unreasonable'. This illustrates how the object of the FOI Act of promoting transparency in government processes and activities needs to be balanced with the purpose of s 47F to protect personal privacy, although care is needed to ensure that an FOI applicant is not expected to explain their reason for access contrary to s 11(2).*

The documents found in response to your request contain the names, direct contact details, and information in the nature of qualitative assessments of public servants who are or were employed by the Court or who work at third party agencies. Those documents were sent and received on the understanding that such information would not be disclosed to third parties or made publically available on a website. I consider that disclosure of such personal information would be unreasonable in these circumstances. Under the PID Act, the Court has significant obligations including with respect to the confidentiality of investigations and the protection of the identity of disclosers. None of the documents requested are ordinarily permitted to be disclosed to the public, and there are no other statutory disclosure frameworks that require release of such information.

I am not satisfied that there exists or should exist any presumption that the documents should be released merely because the personal information in them relates to employees of the Court and public servants. The information contained in the documents is personal, confidential and sensitive in nature. Where that information concerns Registrars who were considered as part of the PID investigation, their names and the assessment of their personal and professional attributes are not included in the emails because of their usual duties or responsibilities, but rather because of some connection with an investigation. Further, some of the names of these public servants do not appear in any of the media articles nor are those names personally identified in your request. Disclosure would ultimately prejudice these individuals' right to privacy.

In relation to any detriment that disclosure of the names, direct contact details and other identifying information could cause to the people concerned, I consider it highly likely that disclosure could cause tension and stress to the persons concerned. This is because disclosure could expose individuals to having their personal details and the circumstances of their recruitment with the Court, together with third party assessment of their strengths and weaknesses, being the subject of further media articles. These effects would, or could reasonably be expected, to include those discussed in respect of sections 47C and 47E above such as destroying employee's trust in the confidentiality of the PID regime and undermining the morale of employees. Disclosure may fetter the ability of public servants to deliberate as part of the PID process and could ultimately prejudice the individual protection of the right to privacy.

The recent publication of articles in *The Australian* concerning the Court's recruitment practices in 2018 exacerbates the likelihood and seriousness of any detriment to be caused by the release of the names, direct contact details and qualifications of public servants as they appear in the documents requested. The investigation was undertaken, and this correspondence and its attachments were received and responded to, on a confidential and need-to-know basis (as expressly referenced in the email communication itself). Release of such information would be in direct conflict with the Court's privacy obligations under the PID Act and *Privacy Act 1988* (Cth) and would damage the public's trust in the Court's ability to keep such matters confidential. Release of the information could also threaten the identity of persons who have made disclosures under the PID Act.

Moreover, I am of the view that the level of attention brought about by the articles published in *The Australian* mean that the privacy of individuals could reasonably be expected to be interfered with if any of their personal information, including names, direct contact details, and qualification information, were disclosed.

In respect of direct contact numbers, Deputy President S A Forgie considered, in *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 (9 November 2020), at paragraphs [129]-[130], the following:

> *In Colakovski, telephone numbers were considered to be "personal affairs" of a person as they would reveal the identity of the caller and, in the circumstances of that case, the reason for making the call. The definition of "personal information" no longer incorporates a reference to personal affairs. It now means, in part, "information … about an identified individual …". I find that a telephone number is about an individual in the sense that it identifies a means by which communication may be made with that individual. That is so whether it is a personal mobile or landline telephone number or a telephone number made available through an individual's place of employment.*
>
> *An individual may include his or her direct telephone number in correspondence directed to other persons. Unless published on an agency's website or made public in some other way, such as on a pamphlet or report available to the public, I consider that disclosure of an individual's telephone number in his or her place of employment is unreasonable. Its disclosure will provide an avenue by which others may choose to express their displeasure with the individual or with that for which he or she is responsible but its disclosure does not make any positive contribution to increasing public participation in Government processes or in increasing scrutiny, discussion, comment and review of the Government's activities.*

This further strengthens my finding that disclosure of the direct contact numbers of public servants is personal information that would be unreasonable to disclose. I consider this to also be the case for the direct email addresses for those public servants. The direct contact details of the public servants in the documents are generally not well-known nor available from publicly accessible sources. Disclosure of the direct contact details of Court staff would prejudice their right to privacy. Disclosure could expose these people to unsolicited and inappropriate approaches by parties external to the Court, causing contact to be made to them directly, despite the existence of more appropriate channels within the Court designed specifically for receiving and actioning general calls and enquiries. Although some of the direct contact details are included in the documents because of the individuals' usual duties or responsibilities, I consider that, in the circumstances, such direct contact information is unreasonable to disclose.

Additional considerations

In addition to all of the above considerations, in determining whether the names and direct contact details of public servants would be unreasonable to disclose, the fact that the FOI Act "*does not control or restrict any subsequent use or dissemination of information released*" (per paragraph 6.143 of the FOI Guidelines above) is an important consideration. In *'BA' and Merit*

Protection Commissioner [2014] AICmr 9 (30 January 2014), the Australian Information Commissioner held at paragraph 81:

> *... the FOI notion of 'disclosure to the world at large' has different meaning with developments in information technology. It is now considerably easier for a person who has obtained information under the FOI Act to disseminate that information widely, to do so anonymously and to comment upon or even alter that information ... Material that is published on the web may remain publicly available for an indefinite period. It may cause anxiety to a public servant that material about their suitability for a particular appointment can be publicly available long after the appointment and to an indeterminate audience.*

While some of the contents of the emails have already been published by *The Australian*, I do not consider that precludes me from finding that the documents captured by your request are unreasonable to disclose. Relevantly, the decision of *Re Jones and Commissioner of Taxation* [2008] AATA 834 provides, at paragraph [11], as follows:

> *When considering whether it is reasonable or not to disclose personal information, I regard the fact that the information may be available from other sources as merely a matter to be taken into account. For example that the will of the Applicant's deceased father was admitted to probate and hence might be the subject of a search at the Supreme Court registry does not of itself make the release of that document reasonable in these proceedings.*

The information published in the articles has not been publicly disclosed, published or authorised by the Court. In addition, the Court has not at any stage publicly commented as to whether what was published in the article is or is not an accurate reflection of the Court's records. The decision of *Bradford v Australian Federal Police* [2021] AATA 3984 further elaborates on these circumstances, providing, at paragraph [101], the following:

> *The Applicant argues that certain material claimed to be exempt under s 37 of the FOI Act was already in the public domain and that this means disclosure would no longer prejudice the proper administration of the law. The Applicant has only made assertions in this regard and has not evidenced the specific disclosure of the material at issue to the public at large. Such an argument would ordinarily be raised in the context of a conditional exemption where the application of a public interest test is relevant. However, the AFP cannot control all information reported in the media and has not at any stage publicly commented as to whether the media reports referred to by the Applicant are or are not accurate reflections of the AFP's records of events. The material claimed to be exempt under s 37 of the FOI Act has not, to the extent that it is disclosed in the documents, been publicly disclosed, published or authorised by the AFP.*

While the above decision was made in the context of section 37 of the FOI Act, I am of the view that similar reasoning would apply to the personal privacy conditional exemption under section 47F of the FOI Act. The level of personal information that has been published in the media articles has already caused some harm and distress for the people concerned. I consider it would be unreasonable to disclose the personal information in the documents given it is highly likely to lead to further harm and distress for those people and others, and in any event

disclosure of such information would be contrary to the confidentiality regime established by the PID Act.

In finding that the documents are conditionally exempt, I am required to consider whether it would be contrary to the public interest to give you access at this time. I discuss this below.

Public interest test

In finding that the documents in response to paragraphs (i) and (ii) of your request are conditionally exempt under section 47C, subsections 47E(c) and 47E(d), and section 47F of the FOI Act, I must now consider whether, as a result of subsection 11A(5) of the Act, it would be contrary to the public interest to give you access at this time. In this regard, subsection 11A(5) of the FOI Act provides:

> *The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.*

Subsection 11B(3) of the FOI Act lists factors that must be taken into account in considering the public interest test as follows:

> *Factors favouring access to the document in the public interest include whether access to the document would do any of the following:*
> *(a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);*
> *(b) inform debate on a matter of public importance;*
> *(c) promote effective oversight of public expenditure;*
> *(d) allow a person to access his or her own personal information.*

Subsection 11B(4) of the FOI Act lists factors that must not be taken into account in deciding whether access would be in the public interest. I have not considered those factors.

The FOI Guidelines provide non-exhaustive lists of other factors favouring disclosure (see paragraph 6.19) and against disclosure (see paragraph 6.22) that may be relevant in certain circumstances. Included in the factors weighing against disclosure in paragraph 6.22 of the FOI Guidelines are the following:

> *(h) could reasonably be expected to prejudice an agency's ability to obtain confidential information*
> *(i) could reasonably be expected to prejudice an agency's ability to obtain similar information in the future*
> *...*
> *(k) could reasonably be expected to harm the interests of an individual or group of individuals*
> *...*
> *(n) could reasonably be expected to prejudice the management function of an agency*

In relation to the harm that may result from disclosure, the FOI Guidelines state at paragraphs 6.20 and 6.21:

> *The FOI Act does not list any factors weighing against disclosure. These factors, like those favouring disclosure, will depend on the circumstances. However, the inclusion of the exemptions and conditional exemptions in the FOI Act recognises that harm may result from the disclosure of some types of documents in certain circumstances; for example, where disclosure could prejudice an investigation, unreasonably affect a person's privacy or reveal commercially sensitive information. Such policy considerations are reflected in the application of public interest factors that may be relevant in each particular case.*
>
> *Citing the specific harm defined in the applicable conditional exemption is not itself sufficient to conclude that disclosure would be contrary to the public interest. However, the harm is an important consideration that the decision maker must weigh when seeking to determine where the balance lies.*

Having regard to the relevant factors, I accept that disclosure of the documents might broadly promote the objects of the FOI Act by providing to the Australian community access to information held by the Government, increasing knowledge about Government activities, and/or enhancing the scrutiny of Government decision-making.

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

- prejudice the protection of the public servants' right to privacy, including the privacy of individuals where that privacy is additionally protected under the PID Act;
- undermine the confidentiality and secrecy provisions which are fundamental pillars of the PID scheme;
- fetter the ability of public servants to freely seek out information and explore different possible findings, including in relation to confidential APSC or internal investigations;
- undermine the protection of people who make, or wish to make, complaints or public interest disclosures, which could deter public officials from disclosing suspected wrongdoing, thereby having a substantial adverse effect on the management and assessment of staff of the Court;
- have a substantial adverse effect on the success of the APSC's investigation processes, given it relies heavily on the willingness of individuals to participate in a frank and candid manner, thereby damaging the Court's ability to support, manage, assess or investigate its own staff;
- compromise the impartiality and independence of people who investigate PID matters, including because of fear of risk that their opinions, findings and recommendations may be disclosed publicly;
- have a substantial adverse effect on the willingness of public servants to provide evidence for future investigations, which would have a substantial adverse effect on the Court's capacity to manage and assess its personnel;

- harm the interests of the individuals to whom the emails relate, including in relation to their individual wellbeing, and their relationships with colleagues;
- prejudice the management function of the Court by destroying trust in the Court's ability to keep recruitment processes and employee information confidential;
- lower the morale of employees and lead to deterioration in employee productivity and performance due to the negative impact that disclosure would have on employee trust and confidence in the Court;
- cause distress and anxiety for the individuals concerned in relation to media attention that may follow the release of the documents; and
- lead to unwarranted approaches to public servants which would adversely impact their ability to perform their role and functions, noting that the Court has general inquiry phone numbers and email addresses that members of the public can use.

In relation to the public interest factors against disclosure of the deliberative matter in the documents, I refer again to the decision in *Raiz and PSR* (discussed above). Notwithstanding that the investigation the subject of the FOI request in that matter was under review at the time of the Tribunal's decision, I consider the Tribunal's discussion at paragraph [103] of the decision to be relevant consideration with respect to the public interest test under section 11B of the FOI Act:

> *I am satisfied that there is a public interest in the information surrounding the Committee investigation remaining confidential. This is particularly the case whilst the investigations are still on foot. If the Committee members are aware that a person under review may have access to their deliberations and the information they seek in relation to their deliberations, this may fetter their ability to freely seek out information and explore different possible findings without concern of alerting the person under review. The HI Act has implemented statutory immunities for Committee members to ensure the proper functioning of the review scheme and that Committee members may effectively conduct reviews.*

Paragraph 6.5 of the FOI Guideline provides elaboration on the public interest test including, relevantly, that the public interest is "*not something of interest to the public, but in the interest of the public*".[5] I am unable to see how the information in the documents, in particular the names and direct contact details of certain public servants, would be of serious concern or benefit to the public. Disclosure of that level of personal information would, in my view, merely serve to satisfy the curiosity of others.

I consider that the factors against disclosure (set out above) carry with them a very real and grave risk of harm to the Court and its employees should the conditionally exempt information in the documents be released. I give significant weight to each of the above 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.

[5] See also *Johansen v City Mutual Life Assurance Society Ltd* (1904) 2 CLR 186, at [188] (Griffiths CJ).

Accordingly, I give the factors against disclosure greater weight than the factors favouring disclosure. I am satisfied that disclosure of the conditionally exempt information in the documents would, on balance, be contrary to the public interest.

For all the reasons outlined above, and as already stated, I have decided to refuse your request on the basis that the documents captured by paragraphs (i) and (ii) of your request are conditionally exempt under section 47C, subsections 47E(c) and 47E(d), and section 47F of the FOI Act. I have decided that disclosure of the documents would be contrary to the public interest under subsection 11(5) of the FOI Act.

Deletion of exempt matter or irrelevant material – s 22 of the FOI Act

Section 22 of the FOI Act requires an agency to provide access to an edited version of a document where it is reasonably practicable to edit the document to remove exempt material or material that is irrelevant to the scope of a request.

In relation to section 22 of the FOI Act, the FOI Guidelines explain, at paragraph 3.98:

> *Applying those considerations, an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.*

I consider that, under section 22, upon redacting the information due to the conditional exemptions discussed above, the documents retain no value or meaning. It would therefore be futile to grant you access to redacted copies of the documents.

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 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 as to 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 Office of the Australian Information Commissioner (**OAIC**) website at: 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, at: https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint.

Yours sincerely,

C Hammerton Cole
Registrar