



**FEDERAL COURT OF AUSTRALIA  
REGISTRY**

COMMONWEALTH LAW COURTS  
3 ANGAS STREET  
ADELAIDE SA 5000

GPO BOX 1350  
ADELAIDE SA 5001

20 June 2022

Stork  
Right to Know

By email: [foi+request-8635-68338902@righttoknow.org.au](mailto:foi+request-8635-68338902@righttoknow.org.au)

Dear Stork

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

I refer to your email correspondence of 21 May 2022 (9:22PM) seeking an internal review of the decision made on 20 May 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 21 March 2022 (10:34PM) (**FOI request**);
- the decision letter to you dated 20 May 2022;
- your request for internal review received on 21 May 2022 (9:22PM) (**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 s 27A of the *Freedom of Information Act 1982* (Cth) (**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**).

## **Decision on Internal Review**

In relation to the documents described in your FOI request, the searches conducted by the Court found emails dated September and October 2018 within the scope of your request.

I refuse access to these emails. The emails are conditionally exempt from disclosure under ss 47C, 47E(c) and 47F of the FOI Act and disclosure of the documents 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 20 May 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 dated 20 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 would 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.

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

I am of the view that the emails are 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 emails contain deliberative matter. They set out an issue for consideration regarding the recruitment and appointment of a Registrar of the Court, contain opinions in relation to that issue, and proposals to address the issue.

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

For the above reasons, I consider that disclosure of the emails 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 emails 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 emails relate to the management of personnel as explained in FOI Guideline 6.114. They relate to the recruitment and appointment of a Registrar of the Court.

### An effect would or could reasonably be expected following disclosure<sup>1</sup>

An effect on the management of personnel would reasonably be expected following disclosure of the emails. The emails record an exchange of opinions, proposals and deliberations in regard to the recruitment and appointment of a Registrar of the Court.

### The expected effect would be substantial and adverse<sup>2</sup>

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

- 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 candidates to positions in future; and
- adversely impact the Court's ability to frankly discuss the appropriate classification or composition of a position, leading to a deterioration of the rigour applied to the management of personnel.<sup>3</sup>

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

---

<sup>1</sup> See FOI Guideline 6.113

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

<sup>3</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.

For the reasons above, I consider that the emails are 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 emails would involve the unreasonable disclosure of personal information (see s 47F(1) of the FOI Act).

#### Personal information

The emails contain personal information because each email includes information or an opinion about identified individuals (see definition of personal information in s 4(1) of the FOI Act). The emails contain the names of people, personal opinions about a Registrar involved in a recent recruitment process, details of annual leave and the personal contact details of those people.

#### Disclosure would be unreasonable<sup>4</sup>

Disclosure of that information would be unreasonable because:

- The information contained in the emails is not well known and is not available from publicly accessible sources. The emails are confidential documents regarding a recent Registrar recruitment exercise and the classification or other composition of a Registrar position.
- Disclosure of the information prejudices the right to privacy of the individuals identified in the documents 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 regarding the recruitment of Registrars to the Court. The successful candidate for one of these positions was the subject of the article mentioned in the FOI request. This article does not identify the Registrar by name. If the emails were released, it would disclose the name of the Registrar concerned. It would therefore link that person to the allegations in the article and expose them to the risk of having their personal details and circumstances of their recruitment with the Court being the subject of further media attention.
- The stress and anxiety would likely be exacerbated because the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.<sup>5</sup>
- The role of a Registrar of the Court is one of respect and trust.<sup>6</sup> Persons who conduct this role should not be exposed to the risk of personal embarrassment that their

---

<sup>4</sup> See generally *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at 259 and *FG' and National Archives of Australia* [2015] AICmr 26 and *Colakovski v Australian Telecommunications Corp*

<sup>5</sup> See FOI Guideline 6.143

<sup>6</sup> Registrars perform statutory functions assigned to them by the *Federal Court of Australia Act*, *Federal Court Rules 2011*, *Federal Court (Bankruptcy Rules) 2016* and the *Federal Court (Corporations) Rules 2000*.

standing is compromised by media speculation on the circumstances of their recruitment and the terms of their employment.

I am not satisfied that there is any presumption that the emails should be released merely because the personal information in them relates to officers of the Court and public servants. The information contained in the documents is personal, confidential and sensitive in nature.

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

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.

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 on whether what was published in the articles is or is not an accurate reflection of the Court's records.

For the reasons above, I consider that the disclosure of the emails would involve the unreasonable disclosure of personal information. Accordingly, I find that the documents are conditionally exempt under s 47F of the FOI Act.

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

As I have found that the emails are 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 emails would be contrary to the public interest.

I have taken into account the factors favouring access to the documents 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 and operations; and
- inform debate on the Court's recruitment activities.

However, in the context where there has already been an investigation into the recruitment of Registrars by the Court pursuant to the *Public Interest Disclosure Act 2013*, and there is an investigation underway by the Commonwealth Ombudsman into this earlier process, I find that only limited weight should be given to these factors. It is difficult to see how provision of the emails through an FOI request could, in all the circumstances above, inform debate on a matter of public importance when these other independent and impartial investigation processes have been completed or are underway.

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 emails contain a discussion in regard to the recruitment and appointment of a Registrar of the Court;
- discourage prospective candidates from applying for roles with the Court due to a perception that the Court cannot keep information connected to a recruitment process confidential;
- potentially harm the Registrar referred to in the emails by definitively linking them to the allegations and speculation in the newspaper article; and
- likely 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.

I have weighed the factors for and against release of the documents. 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 documents is, on balance, contrary to the public interest.

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

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

### **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)

---

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

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Nicola', with a long horizontal flourish extending to the right.

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