



**FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY**

LEVEL 16
LAW COURTS BUILDING
QUEENS SQUARE
SYDNEY NSW 2000

30 June 2022

Aiofe
Right to Know

By email: foi+request-8835-f7d0c7b6@righttoknow.org.au

Dear Sir/Madam,

Request under the Freedom of Information Act

I refer to your email to the Federal Court of Australia (**Court**) dated 1 May 2022 requesting access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**). Your request is too lengthy to extract in this letter.

On 11 May 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.

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 People and Culture team, 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, fourteen (14) documents were identified as falling within the scope of your request. I note that in interpreting the scope of your FOI request, and identifying the documents that fall within that scope, paragraph 3.54 of the FOI Guidelines (citing *Re Gould and Department of Health* [1985] AATA 63) was applied, which stipulates that an FOI request should be interpreted as extending to any document “*that might reasonably be taken to be included within the description the applicant has used*”.

The table below lists those documents identified, in accordance with the relevant paragraphs of your request.

Paragraph (1)	<ul style="list-style-type: none"> • Gazette Notice – Senior National Judicial Registrar • Gazette Notice – National Judicial Registrar & District Registrar • Gazette Notice – Judicial Registrar • Gazette Notice – Deputy District Registrar
Paragraph (2)	No documents found
Paragraph (3)	<ul style="list-style-type: none"> • Job Applications x 5
Paragraph (4)	<ul style="list-style-type: none"> • Selection Report – Senior National Judicial Registrar • Selection Report – National Judicial Registrar & District Registrar, WA • Selection Report – National Judicial Registrar & District Registrar, VIC • Selection Report – Judicial Registrar – FCC
Paragraph (5)	<ul style="list-style-type: none"> • Commissioner’s Representative Certificate – Senior National Judicial Registrar

Decision

With respect to paragraph (1) of your request, I have decided to grant you access in full to the documents found, being four gazette notices.

With respect to paragraph (2) of your request, I have decided, pursuant to subsection 24A(1) of the FOI Act, to refuse that paragraph of your request for access to documents as I am satisfied that all reasonable steps have been taken to find the documents you have requested (classification evaluations), but the documents cannot be found or do not exist.

With respect to paragraphs (3) and (4) of your request, I have decided to refuse access to those documents (job applications and selection reports) on the basis that the documents are exempt from disclosure under section 47C, subsections 47E(c), 47E(d) and section 47F of the FOI Act. I consider that disclosure of those 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 those documents under section 22 of the FOI Act.

With respect to paragraph (5) of your request, I have decided to grant you access to the document requested (a Commissioner's Representative Certificate) with minor redactions made to that document with respect to information that is conditionally exempt under section 47F of the FOI Act and for which disclosure would be contrary to the public interest under subsection 11A(5) 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

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

Paragraph (2) of your request

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 outlined 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 (2) of your request and that, as a result of the searches undertaken, no documents could be found that fell within paragraph (2) of your request. I am not aware of any other steps that could reasonably have been taken to identify the documents you have requested in that paragraph of your request. As there are no documents to provide to you, I have decided to refuse access to the documents requested in paragraph (2) of your request under subsection 24A(1) of the FOI Act.

Deliberative processes – s 47C of the FOI Act

Paragraphs (3) and (4) of your request

I consider that the job applications and selection reports captured by paragraphs (3) and (4) 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 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

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].

*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 relevant documents and consider that they relate to deliberative matter or are in the nature of a deliberative process. In particular, the job applications contain a collection of facts and/or opinions that were considered by the Court in the process of engaging or promoting public servants. The selection reports record proposals and interim decisions or deliberations in the process of engaging or promoting those public servants. All of these documents are preparatory and ancillary to the formal engagement of those employees.

Although you have identified in your request that you are only seeking access to certain parts of these documents, the matters recorded in the job applications and selection reports were recorded prior to the making of a final decision regarding the recruitment exercises in question and are clearly part of a wider deliberative process of the Court regarding recruitment.

For these reasons, I find that disclosure of the job applications and selection reports would disclose deliberative matter and, for this reason, those documents are conditionally exempt under subsection 47C(1) of the FOI Act.

In finding that those documents are conditionally exempt under section 47C of the FOI Act, 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.

Certain operations of agencies – s 47E of the FOI Act

Paragraphs (3) and (4) of your request

I consider that the job applications and selection reports captured by paragraphs (3) and (4) 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:

...

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.

- (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 job applications and selection reports clearly relate to the “*management of personnel*”, given that the documents concern the Court’s recruitment processes. The job applications contain the details of each relevant individual’s professional experience, accreditation and education, which were assessed by the selection panel against the qualifications of other candidates. The selection reports contain the names of persons recommended for employment as part of a comparative assessment of those persons against other applicants. For these reasons, the documents also relate to the “*assessment of personnel*”.

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.

In addition to relating to the management and assessment of personnel, the documents also relate to the “*efficient conduct of the operations*” of the Court, given that each of the documents concerns recruitment processes which are essential to the proper and efficient operation of the Court. Further, 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 exception described in paragraph 6.123 of the FOI Guidelines does not apply to the documents.

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.

You have indicated a range of information in the documents that is irrelevant to your request, including "*email addresses, telephone numbers, dates of birth, residential and postal addresses and any signatures*" in the job applications, and "*the names of unsuccessful candidates... deliberative content about the unsuccessful candidates... [and] deliberative content about the successful candidates*" in the selection reports. Notwithstanding this, I consider that the release of the job applications and selection reports, or at least the parts of those documents to which you seek access, would 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:

- undermining the expectations of Court employees regarding the protection of their privacy;
- destroying trust in the Court's confidential recruitment processes;
- lowering the morale of employees and leading to deterioration in employee productivity and performance due to the negative impact that disclosure would have on employee trust and confidence in the Court;
- discouraging future external and internal candidates from applying for job vacancies or promotions at the Court on the basis that candidates will not have confidence that their job applications or selection materials will remain confidential; and
- exposing the relevant individuals to the risk of having their personal details and the circumstances of their recruitment with the Court being the subject of further media attention.

Further to what is discussed above concerning the confidentiality of recruitment and employee engagement processes, the job applications and selection reports were brought into existence as part of a confidential recruitment process which compared the successful candidate, including their personal skills and attributes, against other candidates. Disclosure of any of these documents would compromise individual trust and confidence in the recruitment process given there is a general understanding that personal details in those documents will not be communicated to third parties and, furthermore, will 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 note that there is no legislative or regulatory regime that requires the disclosure of the documents requested. Rather, disclosure of the information requested would likely breach the Court's obligations in respect of privacy and confidentiality of employee records. In this regard, it is apparent that disclosure of the relevant recruitment documents would adversely impact the Court's recruitment processes in the future.

Similarly, I consider that candidates who have been successful in their application for a position at the Court would have every expectation that the details of their recruitment process would remain confidential. The parts of the selection reports to which you seek access includes

information regarding the names of the successful candidates and the number of candidates who applied for the positions in question. The parts of the job applications to which you seek access includes answers to questions posed as part of the applications process, as well as details of the relevant individuals' professional experience, accreditation and education. Such information is especially private and sensitive and its release could reasonably be expected to create tension amongst employees of the Court by permitting comparisons between individuals and, potentially, undermining the leadership of any such employees who are engaged in senior/managerial roles at the Court. The disclosure of the job applications and selection reports would prejudice the protection of employees' right to privacy and would potentially result in a deterioration of the morale and productivity of the relevant employees.

For the reasons outlined above, I consider that the documents captured by paragraphs (3) and (4) 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 these 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

Paragraphs (3), (4) and (5) of your request

I consider that the documents that fall within the scope of paragraphs (3), (4) and (5) of your request (being the job applications, selection reports, and Commissioner's Representative Certificate) 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.*

Paragraph 6.135 of the FOI Guidelines provides further guidance on the issue of who is reasonably identifiable:

... whether or not the individual is reasonably identifiable depends on the practicability of linking pieces of information to identify the individual.

The information in the job applications to which you seek access includes the answers to questions posed as part of the applications process, details of the relevant applicants' professional experience, accreditation and education, as well as dates and timestamps recorded on the job applications. The information in the selection reports to which you seek access includes the number of candidates and names of successful candidates who applied for roles within the public service. The Commissioner's Representative Certificate includes the signature of a public servant. Each of these documents clearly contain one or more pieces of "personal information". In particular, disclosure of any specific dates and timestamps recorded on the documents could be compared with other information that is available online (such as through LinkedIn) to identify the persons concerned.

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).

Disclosure that supports effective oversight of government expenditure may not be unreasonable, particularly if the person to whom the personal information relates may have reasonably expected that the information would be open to public scrutiny in future. On the other hand, disclosure may be unreasonable if the person provided the information to Government on the understanding that it would not be made publicly available, and there are no other statutory disclosure frameworks that would require release of the information.

I consider that the release of the personal information contained in the documents requested in paragraphs (3), (4) and (5) of your request would be an “*unreasonable disclosure of personal information*” under subsection 47F(1) of the FOI Act. I am not satisfied that there exists or should exist any presumption that such documents should be released merely because each individual is an employee of the Court and a public servant. The personal information contained in the documents is also not information about the performance of the usual duties or responsibilities of individual employees of the Court. Your request for the answers to questions posed as part of the applications process, details of the professional experience, accreditation and education of successful candidates, dates and timestamps recorded on the documents, the number of candidates and names of successful candidates who applied for roles within the public service, and the signature of the Commissioner’s Representative, is a request for information identifying persons involved in confidential recruitment exercises. Such personal information is not well known and is not, generally-speaking, available from publicly accessible sources with respect to those recruitment exercises.

Rather, all of the personal information contained in the documents requested is information the Australian community would regard as sensitive. I consider that disclosure would compromise the protection of the individuals' right to privacy. I also consider that disclosure would likely have an adverse impact on the health and wellbeing of those individuals which could, in turn, undermine the morale of Court employees and damage individual trust and confidence in confidential recruitment processes.

In fact, some of the individuals I consulted with under section 27A of the FOI Act strongly objected to the release of their personal information in the documents for these reasons. Other objections given by some of the individuals included that disclosure of the personal information would cause tension and complications in the workplace including by permitting comparisons between individuals, and that disclosure of their private information will expose those persons to risk of harassment and other risks to their personal safety.

With respect to the signature of the public servant in the Commissioner's Representative Certificate, as far as I am aware, that signature is not well known nor available from publicly accessible sources. In my view, disclosure of the signature of the individual public servant in this context increases the risk of the misuse of that signature which, if it occurred, would likely cause substantial distress and/or harm to that individual. In the decision of *Colin James Corkin and Department of Immigration and Ethnic Affairs* [1984] AATA 448 (16 October 1984), the Hon. Sir William Prentice (Senior Member) found at paragraph [14] as follows:

The signature is of paramount importance in one's activities in banking and financial matters, correspondence, the making of applications, the giving of receipts... The maker of a signature does not readily make it available to others who might take advantage of its possession to imitate it without permission. It is I consider, in an especially marked way - private to the individual, one's own. Its making, its characteristics, its privacy constitute part of the individual's pursuits of life, his commercial, professional and public business. I take it to be part of his "personal affairs" as much as the contents of his wallet, his credit cards, his private correspondence; and I find therefore that its release to the applicant would amount to the disclosure of information relating to the personal affairs of the person named.

Having regard to all of the above, I consider that, in the circumstances, disclosure of the personal information of the public servants in the job applications, selection reports and Commissioner's Representative Certificate would be an unreasonable disclosure of personal information.

Additional considerations

In addition to all of the above considerations, in determining whether any of the abovementioned personal information 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 also 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.

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 this personal information. It is possible that further media articles may flow from disclosure of the information and, consequently, result in stress and anxiety for the individuals concerned.

I have identified above the personal information in the documents that I consider would be unreasonable to disclose and that, as a result of containing such personal information, the job applications, selection reports and Commissioner's Representative Certificate are conditionally exempt under section 47F of the FOI Act. I am of this view including because the release of such information into the public domain has the potential to cause considerable harm and distress for the individuals concerned.

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

Paragraphs (3), (4) and (5) of your request

In finding that the job applications and selection reports found in response to paragraphs (3) and (4) of your request are conditionally exempt under sections 47C, 47E and 47F of the FOI Act, and that the Commissioner's Representative Certificate found in response to paragraph (5) of your request is conditionally exempt under 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 all of the relevant factors, I accept that disclosure of the documents found 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 enhancing the scrutiny of Government decision-making.

There are several factors, many of which have already been identified, that weigh against a finding that it would be in the public interest to disclose such information. The factors against disclosure are that it could reasonably be expected to:

- prejudice the protection of the individual right to privacy;

- harm the interests of the particular individuals concerned, including in relation to their individual wellbeing and their relationships with former or current colleagues.
- negatively impact the ability of public servants to perform their current roles, which would prejudice the operations of the Court;
- destroy trust in the Court’s recruitment processes and the confidentiality of negotiations between employees/prospective employees and the Court, which would prejudice the management function of the Court;
- permit comparisons between former and current employees of the Court and, consequently, create tension and animosity in the workplace;
- cause distress and anxiety for the individuals in relation to media attention that may follow the release of the documents;
- in relation to the release of signatures, expose those individuals to an increased risk of fraud and/or identity theft; and
- substantially affect the operations of the Court in terms of its ability to recruit and retain personnel.

Paragraph 6.5 of the FOI Guidelines 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*”.⁴ I am unable to see how the personal information in the documents you have requested, including the answers to questions posed as part of the applications process, details of the professional experience, accreditation and education of specific Court staff, the number of candidates who applied for roles within the public service and the signature of an individual public servant – all of which are personal and unique to the people concerned – would be of serious concern or benefit to the public. Disclosure of personal information of that nature 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, its former or current employees, and public servants generally, should the personal 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.

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

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.

⁴ See also *Johansen v City Mutual Life Assurance Society Ltd* (1904) 2 CLR 186, at [188] (Griffiths CJ).

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 have decided that a majority of the information in the job applications and selection reports that were found in response to paragraphs (3) and (4) of your request is irrelevant to the scope of your request and/or is information for which you gave your consent for the Court to redact. I consider that, under section 22 of the FOI Act, upon redacting the irrelevant material (including the material for which you consented to redaction) and the exempt material, the documents retain little or no value or meaning.

Further, with respect to three of the selection reports found in response to paragraph (4) of your request, being the ‘Selection Report – Senior National Judicial Registrar’, ‘Selection Report – National Judicial Registrar & District Registrar, WA’, and ‘Selection Report – National Judicial Registrar & District Registrar, VIC’, some of the information from those documents is already available on the Court’s disclosure log (see PA2925-06/43).

I consider that it would be futile to grant you access to redacted copies of the selection reports under section 22 of the FOI Act, especially having regard to what has already been published and is available to you. In relation to the job applications, it would also be futile to grant you access to redacted copies of the documents given that, as discussed above, redaction of irrelevant and exempt material from these documents would result in the documents retaining little or no value or meaning.

In relation to the Commissioner’s Representative Certificate found in response to paragraph (5) of your request that I have determined is exempt from disclosure under the FOI Act, I have decided that it is possible to prepare an edited version of that document with the exempt material, namely the signature of a public servant, deleted. Granting you access to a redacted copy of that document allows exempt material to be protected while, at the same time, promoting the objects of the FOI Act by providing you with access to meaningful information.

Access Format

The four (5) documents to which I have decided to grant you access are listed below:

1. Gazette Notice – Senior National Judicial Registrar;
2. Gazette Notice – National Judicial Registrar & District Registrar;
3. Gazette Notice – Judicial Registrar;
4. Gazette Notice – Deputy District Registrar; and
5. Commissioner’s Representative Certificate – Senior National Judicial Registrar (redacted).

I note that each of the documents listed above has already been provided on the Court's disclosure log and is therefore already available to you. I refer you to the following link where you can access those documents: <https://www.fedcourt.gov.au/disclosurelog> (see PA2925-06/30, PA2925-06/22 and PA2925-06/13).

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 Australian 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,

A handwritten signature in black ink, appearing to be 'C Hammerton Cole', written in a cursive style.

C Hammerton Cole
Registrar