



**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

13 July 2022

Julie-Anne  
Right to Know

**By email:** [foi+request-8899-6f26eeb9@righttoknow.org.au](mailto:foi+request-8899-6f26eeb9@righttoknow.org.au)

Dear Julie-Anne,

**Request under the Freedom of Information Act**

I refer to your email to the Federal Court of Australia (**Court**) of 14 May 2022 requesting access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**). Specifically, you have requested the following:

*I seek access to all documentation relating to the ADR accreditation of Registrar Peter Schmidt.*

As advised in the letter sent to you on 31 May 2022, your request seeks access to documents that contain personal information about individuals. It was considered that the individuals concerned might reasonably have wished to contend that the documents were conditionally exempt under section 47F of the FOI Act, and access to the documents would, on balance, be contrary to the public interest under the FOI Act.

In accordance with subsection 27A(3) of the FOI Act, the Court was required to give those individuals a “reasonable opportunity to make submissions in support of the exemption contention” before making a decision on the release of the documents that contain personal information about them.

For this reason, the Court determined that, under subsection 15(6) of the FOI Act, it was appropriate to extend the period for processing your request to 13 July 2022.

**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 senior staff in the Court’s People and Culture and National Operations teams and staff in the Principal Registry, to identify any documents falling

within the scope of your request. These searches included discussions with senior employees of the Court, searches of the human resources and recruitment inboxes, searches of individual staff members' inboxes, searches of the Court's national network drive and searches of the Court's electronic document, records management and information systems.

As a result of the searches undertaken, a total of twelve (12) documents were identified. The list below outlines the documents that were identified as falling within the scope of your request:

- An email dated 15 March 2021 with one (1) attachment,
- An email chain dated 15 March 2021,
- Three (3) documents comprising of email chains dated 19 March 2021,
- An email dated 19 March 2021, with one (1) attachment,
- A certificate dated 19 May 2021,
- A certificate dated 21 July 2021,
- An accreditation form dated 23 July 2021,
- An email dated 1 September 2021 with five (5) attachments,
- An email chain dated 2 September 2021 with four (4) attachments, and
- A letter dated 2 September 2021.

I am satisfied that by conducting these searches the Court has taken all reasonable steps to identify the documents you have requested.

### **Decision**

After careful consideration, I have decided to refuse your FOI request for the reason that the FOI Act does not apply to your request due to the operation of subsection 5(1) of the FOI Act.

Under subsection 5(1), it is only open to you to make a request for documents under the FOI Act that relate to "*matters of an administrative nature*". The documents you have requested are not documents that relate to "*matters of an administrative nature*" and, on this basis, I have determined that a valid request under the FOI Act has not been made.

However, in the event that the documents requested fall within subsection 5(1) of the FOI Act as it applies to the Court, I have decided that pursuant to sections 47C, 47E(c), 47E(d) and 47F of the FOI Act to refuse your request for access to the documents that fall within the scope of your request.

On this basis, I am satisfied that the documents identified are conditionally exempt as they would disclose a deliberative process and/or have an adverse effect on the operations of an agency and/or be an unreasonable disclosure of personal information. Further and on balance, disclosure would be contrary to the public interest under subsection 11A(5).

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

- the terms of your request;
- the nature and content of the documents that fall within the scope of your request;
- the relevant provisions of the FOI Act and case law considering those provisions;
- the third party submission received following consultation under section 27A of the FOI Act;

- the *Freedom of Information (Charges) Regulations 2019 (FOI Charges Regulations)*;
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (**FOI Guidelines**);
- the *Federal Court of Australia Act 1976 (Cth)*; and
- the *Federal Court Rules 2011 (Cth)*.

## Reasons for decision

### ***Subsection 5(1) of the FOI Act – Act to apply to courts in respect of administrative matters***

The FOI Act has a very limited application to the Court.<sup>1</sup> Although the Federal Court is a “*prescribed authority*” in accordance with paragraph 5(1)(a) of the FOI Act, subsection 5(1) makes clear that the only request that can validly be made to the Court under the FOI Act is to access a document that relates to “*matters of an administrative nature*”.

Subsection 5(1) of the FOI Act provides as follows:

*For the purposes of this Act:*

- (a) *a court (other than a court of Norfolk Island) shall be deemed to be a prescribed authority;*
- (b) *the holder of a judicial office (other than a judicial office in a court of Norfolk Island) or other office pertaining to a court (other than a court of Norfolk Island) in his or her capacity as the holder of that office, being an office established by the legislation establishing the court, shall be deemed not to be a prescribed authority and shall not be included in a Department; and*
- (c) *a registry or other office of a court (other than a court of Norfolk Island), and the staff of such a registry or other office when acting in a capacity as members of that staff, shall be taken as a part of the court;*

*but this Act does not apply to any request for access to a document of the court unless the document relates to matters of an administrative nature.*

The High Court of Australia considered the operation of section 5 of the FOI Act and the meaning of the phrase “*matters of an administrative nature*” in *Kline v Official Secretary to the Governor General of Australia & Anor* (2013) 249 CLR 645; [2013] HCA 52. In the joint judgment dismissing the appeal the Chief Justice and Justices Crennan, Kiefel and Bell acknowledged that:

*The FOI Act does not apply to any request for access to a document of either a court or a specified tribunal, authority or body “unless the document relates to matters of an administrative nature”.*<sup>2</sup>

Further, the High Court held:

*...the exception of a class of document which relates to “matters of an administrative nature” connotes documents which concern the management and administration of office resources,*

<sup>1</sup> paragraphs 2.8 – 2.10 of the FOI Guidelines.

<sup>2</sup> at [19].

*examples of which were given above. This is a common enough connotation of the epithet “administrative”.<sup>3</sup>*

The examples referred to by the High Court were a second category of assistance and support provided to the Governor-General by the Office of the Official Secretary. That category of support was the management and administration of office resources, such as financial and human resources and information technology.<sup>4</sup> The first category, which was thereby excluded from the management and administration of office resources, included assisting and supporting the Governor-General’s discharge of substantive powers and functions.

As relevant, the High Court then held that:

*Accordingly, the only documents which courts and specified tribunals, authorities and bodies are obliged to open to increased public scrutiny are those documents relating to the management and administration of registry and office resources.<sup>5</sup>*

The High Court, in considering the decision of *Bienstein v Family Court of Australia*<sup>6</sup>, held that decision to be erroneous in suggesting that even documents held by a court which related to individual cases might be characterised as documents relating to matters of an administrative nature, or that since some powers and functions of a judicial officer were administrative in nature, those administrative powers and functions which were not closely related to judicial independence would not need protection from the operation of the FOI Act.<sup>7</sup>

The High Court held that the reasoning in *Bienstein* accorded no weight to the circumstance that a judicial officer is not subject to the operation of the FOI Act, only a registry or office of a court or specified tribunal is subject to the operation of the FOI Act, and then only in respect of documents relating to administrative matters.<sup>8</sup>

In a separate judgment, Justice Gageler also dismissed the appeal. His Honour held that:

*The distinction sought to be drawn by the appellant between documents which “relate to administrative tasks ... to support or assist the exercise of ... powers or the [performance] of ... functions”, on the one hand, and documents which answer that description but which would “disclose the decision-making process involved in the exercise of those powers or performance of those functions in a particular matter or context”, on the other, is too fine to be sustained. The true distinction is more robust and more practical.*

*Matters which do not relate to the provision of logistical support do not become “administrative” merely because they are in some way preparatory to an exercise of a substantive power or to the performance of a substantive function.<sup>9</sup>*

The documents you have sought are not documents that relate to “*matters of an administrative nature*” as that compound of words has been interpreted by the High Court. They are not documents that relate to the management and administration of registry and office resources but, rather, they are documents relating to the delegation of powers. That is, a Court function under section 53A of the *Federal Court of Australia Act 1976* (Cth) and Part 28 of the *Federal*

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<sup>3</sup> at [41].

<sup>4</sup> at 13.

<sup>5</sup> at [47].

<sup>6</sup> (2008) 170 FCR 382.

<sup>7</sup> at [51].

<sup>8</sup> at [51].

<sup>9</sup> at [75] and [76].

*Court Rules 2011 (Cth) (Rules)*. Specifically, the exercise of certain powers of the Court by Registrars in respect of alternate dispute resolution in proceedings. This cannot be considered to relate to “*matters of an administrative nature*”.

Section 53A of the *Federal Court of Australia Act 1976 (Cth)* provides:

**53A Arbitration, mediation and alternative dispute resolution processes**

(1) *The Court may, by order, refer proceedings in the Court, or any part of them or any matter arising out of them:*

(a) *to an arbitrator for arbitration; or*

(b) *to a mediator for mediation; or*

(c) *to a suitable person for resolution by an alternative dispute resolution process;*

*in accordance with the Rules of Court.*

(1AA) *Subsection (1) is subject to the Rules of Court.*

(1A) *Referrals under subsection (1) (other than to an arbitrator) may be made with or without the consent of the parties to the proceedings. Referrals to an arbitrator may be made only with the consent of the parties.*

(2) *The Rules of Court may make provision for the registration of awards made in an arbitration carried out under an order made under subsection (1).*

(3) *This section does not apply to criminal proceedings.*

Section 59 of the *Federal Court of Australia Act 1976 (Cth)* provides further guidance on alternative dispute resolution:

**59 Rules of Court**

(1) *The Judges of the Court or a majority of them may make Rules of Court, not inconsistent with this Act, making provision for or in relation to the practice and procedure to be followed in the Court (including the practice and procedure to be followed in Registries of the Court) and for or in relation to all matters and things incidental to any such practice or procedure, or necessary or convenient to be prescribed for the conduct of any business of the Court.*

(1A) *The Judges of the Court, or a majority of them, may make Rules of Court prescribing matters required or permitted by:*

(a) *any other provision of this Act; or*

(b) *any other law of the Commonwealth;*

*to be prescribed by the Rules of Court.*

(2) *In particular, the Rules of Court may make provision for or in relation to:*

...

(zf) *the referral of any proceedings in the Court, or any part of such proceedings or any matters arising out of such proceedings, to a mediator or an arbitrator for mediation or arbitration, as the case may be; and*

(zg) *the procedures to be followed by a mediator or an arbitrator in mediating or arbitrating anything referred for mediation or arbitration under this Act; and*

(zh) *the attendance by persons at conferences conducted by mediators or arbitrators for the purposes of mediating or arbitrating anything so referred; and*

(zi) *the procedure when any such mediation or arbitration ends, both where it has resulted in an agreement or award and where it has not ...*

The Rules provide a legislative framework for alternative dispute resolution processes, including mediation in the Federal Court of Australia. Division 28.3 of the Rules deals specifically with mediation including the powers of a Registrar in relation to mediation or alternative dispute resolution processes (see rules 28.02 to 28.04).

I am of the view that documents relating to the alternative dispute resolution accreditation of a Registrar could reasonably be interpreted as relating to the discharge of the substantive powers and functions of adjudication or tasks. Registrars provide support to the Court's Judges, as well as exercising various powers delegated by Judges and performing important statutory functions assigned to them by legislation. Therefore, your request is referable to the exercise of judicial, rather than administrative, powers and functions which connotes documents that concern the management and administration of office resources, such as financial, human resources and information technology.

Since requests for access can only be made for documents relating to "*matters of an administrative nature*", I have determined that your FOI request could not have been validly made under the FOI Act. Alternatively, if a valid request has been made, the documents you have requested does not relate to "*matters of an administrative nature*" and, as such, the documents requested cannot be accessed under the FOI Act.

#### ***Conditional exemption under section 47C of the FOI Act – Deliberative processes***

I have also considered whether the documents found in relation to your request are conditionally exempt from disclosure under subsection 47C(1) of the FOI Act.

Subsection 47C(1) 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.*<sup>10</sup>

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.*<sup>11</sup>

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.*<sup>12</sup>

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 am required to assess the material to decide if it relates to a deliberative matter or is in the nature of the deliberative processes.<sup>13</sup> Upon assessment, I am satisfied that nine (9) of the documents that fall within the scope of your request include deliberative matter, as they record exchanges and/or information about the proposed mediation accreditation of a Registrar. Specifically, the documents record discussions around the Registrar's mediation accreditation prior to its finalisation and implementation.

The identified documents that fall within the conditional exemption under subsection 47(1) of the FOI Act are:

- an email dated 15 March 2021 with one (1) attachment,
- an email chain dated 15 March 2021,
- two (2) email chains dated 19 March 2021,
- an email dated 19 March 2021, with one (1) attachment,
- an accreditation form dated 23 July 2021,

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<sup>10</sup> 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.

<sup>11</sup> *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18].

<sup>12</sup> 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.

<sup>13</sup> *Secretary, Department of Employment, Workplace Relations v Small Business and Staff Development and Training Centre Pty Ltd* (2001) 114 FCR 301.

- an email dated 1 September 2021 with five (5) attachments,
- a certificate dated 19 May 2021, and
- a certificate dated 21 July 2021.

These exchanges took place prior to the making of a final decision regarding the mediation accreditation in question and are clearly part of a wider deliberative process.

Therefore, I find that disclosure of these documents would disclose deliberative matter and, for this reason, the documents are conditionally exempt under subsection 47C(1) of the FOI Act.

The question of whether disclosure would or would not be contrary to the public interest under subsection 11A(5) of the FOI Act is considered separately in the relevant section below.

***Conditional exemptions under sections 47E(c) and 47E(d) of the FOI Act – Operations of an agency***

I have considered whether the documents falling within the scope of your FOI request are conditionally exempt from disclosure under subsections 47E(c) and 47E(d) of the FOI Act.

Sections 47E(c) and (d) relevantly provide that a document is conditionally exempt if its disclosure under the FOI 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 provides the following in relation to 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.*

[footnotes omitted]

Paragraph 6.123 of the FOI Guidelines provides guidance on section 47E(d):



*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.*

For the reasons outlined below, I am satisfied that the documents captured by your FOI request are conditionally exempt, as disclosure under the FOI Act would have a substantial adverse effect on the management or assessment of personnel by the Court and on the proper and efficient conduct of the operations of the Court under subsections 47E(c) and 47E(d) of the FOI Act.

The documents which were identified as falling within the scope of your FOI request relates to both the:

- *“management of personnel”* in the sense of relating to the broader human resource policies and activities of the Court, and
- *“assessment of personnel”* in the sense of relating to a broader management and assessment processes concerning *“competency”*, *“in-house training requirements”* and *“appraisals”*.<sup>14</sup>

In reaching this conclusion I have also considered *“the context of the document and the integrity of the system”* that require these documents.<sup>15</sup> The twelve (12) documents captured by your FOI request relate specifically to the Court’s broader accreditation policies and activities. For example, they include discussions about the proposed arrangements for a Registrar’s mediation accreditation within the Court. There are also certificates regarding a Registrar’s competency and the final decision as to that mediation accreditation.

The importance of this consideration was discussed in *Department of Social Security v Dyrenfurth* (1988) 15 ALD 232 where it was held that the effects on the integrity of the system from disclosure of these types of documents could reasonably be expected to give rise to:

- *“difficulties between those concerned, in particular if those persons were associated with one another in their employment”*, which effects the *“proper and efficient conduct of the operations of the agency”*,
- a reduction in *“candour and frankness in written reports, assessments and references”* if there is a risk that these documents would not remain confidential, and
- a reduction in the *“reliability and value”* of documents and a greater emphasis on oral communication.<sup>16</sup>

In this context, the release of this information would clearly have an adverse impact on the integrity of the Court’s broader accreditation activities and would likely result in the Court disclosing sensitive information about employee/s. This may lead to the Court breaching its responsibility to protect the privacy of their employee/s.

Turning back to the requirements of section 47E of the FOI Act, the FOI Guidelines require that *“for the conditional exemption to apply, the potential effect that would be expected to occur following disclosure must be both substantial and adverse.”*<sup>17</sup>

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<sup>14</sup> FOI Guidelines, paragraph 6.114.

<sup>15</sup> FOI Guidelines, paragraph 6.116.

<sup>16</sup> (1988) 15 ALD 232 at 238.

<sup>17</sup> FOI Guidelines, paragraphs 6.91.

The release of the documents captured by your FOI request would, or could reasonably be expected to, have a substantial adverse effect on the management of personnel by the Court in several respects. The first is that disclosure of the information would destroy trust in the confidentiality of the Court's accreditation policies and activities and record keeping processes.

The content of the communication regarding employee qualifications, experience and potential accreditation is sensitive information. Disclosure of this information would have a substantial adverse impact on the Court's proper and efficient operations in terms of discouraging open written communication in relation to accreditation of employees, discussions around specific functions of employees within the Court including disclosure of qualifications, or general discussion about implementing such processes.

The documents include information concerning an employee's qualifications, a discussion around the proposed accreditation arrangements and a final outcome of an application. The release of such information could reasonably be expected to create a reduction in "*candour and frankness*"<sup>18</sup> if there is a risk that such communication would not remain confidential, but rather become publicly accessible upon the making of an FOI request. This could in effect, impede the operations of the Court in respect of these matters.

Further, the documents or information 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, as well as exercising various powers delegated by Judges and performing important statutory functions assigned to them by legislation. Release of the documents would impact the Court's future accreditation processes and activities which would bear on the Court's "proper and efficient operations" moving forward. The exception described in paragraph 6.123 of the FOI Guidelines does not apply to the documents.

Finally, the release of the identified documents could reasonably be expected to substantially damage the trust and morale of employees of the Court. The employee involved in and the subject of this communication would expect that the details of this process would remain confidential. For these reasons, I conclude that disclosure of the documents is likely to have a substantial adverse effect on both the "*management of personnel*", and the "*proper and efficient operations*" of the Court.

I am satisfied that the release of the documents that fall within the scope of your request would bear on the Court's "*proper and efficient*" operation. The documents relate to broader human resource processes and activities which are essential to the proper and efficient operation of the Court. It is imperative that the Court be able to conduct accreditation processes and retain the level of confidentiality that is expected by its employees. Successful processes and activities must have a level of trust so that all involved are comfortable to communicate honestly and freely.

It is imperative that employees and senior Court staff feel comfortable in discussing "*competency*", "*in-house training requirements*" and "*appraisals*".<sup>19</sup> Only then can the Court, and indeed its employees, make a proper assessment in relation to any application for activities such as mediation accreditation.

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<sup>18</sup> *Department of Social Security v Dyrenfurth* (1988) 15 ALD 232 at 238.

<sup>19</sup> FOI Guidelines, paragraph 6.114.

Further, an objection raised during consultation under section 27A of the FOI Act noted that disclosure of the documents would affect the Court's mediation scheme.

I find that disclosure of the documents could reasonably be expected to have a substantial adverse effect on the operations of the Court as sensitive information was communicated between senior Court staff and several employees on the understanding that such information would not be disclosed to third parties or made publicly available on a website.

Furthermore, it is important to note that the Court's recruitment processes have been the subject of several media articles. Those media articles have been the driver of numerous FOI requests from the "Right to Know" website to the Court since February 2022. Disclosure of the information contained within the identified documents carries the risk that the personal details and circumstances of the Court's broader accreditation activities and processes become subject to media attention. It is highly likely that further media attention may have an impact on the proper and efficient operations of the Court.

I consider that should this information now be disclosed, it would act as a discouragement or curtailment to future communications between internal stakeholders. It is likely to inhibit open and candid communication from employees<sup>20</sup> which, in turn, impacts on the quality and outcome of the process in terms of securing a pool of accredited mediators.

For all of the reasons outlined above, I consider that the disclosure of the documents falling within the scope of your FOI request is conditionally exempt under section 47E of the FOI Act, as its disclosure would have a substantial adverse effect on the Court's management or assessment of its personnel and on the proper and efficient conduct of the operations of the Court.

As discussed in the relevant section below, I am satisfied that disclosure would be contrary to the public interest under subsection 11A(5) of the FOI Act.

### ***Conditional exemption under section 47F of the FOI Act – Personal privacy***

I have considered whether the documents that fall within the scope of your request are conditionally exempt from disclosure under subsection 47F(1) of the FOI Act.

Subsection 47F(1) 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.*

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<sup>20</sup> *Department of Social Security v Dyrenfurth* (1988) 15 ALD 232 at 238.

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

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...*

In relation to the matters that ought to be taken into account in determining whether disclosure 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.*

I have determined that the documents falling within the scope of your request are conditionally exempt under subsection 47F(1) of the FOI Act as they contain information that is “*personal information*” as defined in subsection 4(1) of the FOI Act and for which disclosure of that personal information would be “*unreasonable*” under subsection 47F(1) of the FOI Act.

The “*personal information*” contained within the documents includes:

- the names and titles of employees,
- residential addresses and personal telephone numbers,
- personal and work email addresses,
- telephone numbers of Court staff,
- employee signatures,
- external stakeholders names, titles and signatures,
- the employment history of an employee, and
- the qualifications, professional experience and personal attributes of an employee.

Publication of the names and titles of public servants is one thing, but revealing telephone numbers that give direct access to them is another.<sup>21</sup> Those direct contact numbers are, generally, not well-known nor available from publicly accessible sources. Disclosure would provide an avenue to express displeasure with those individuals, and a means to pursue matters through them when there is no need for those individuals to be contacted.

Disclosure of the twelve (12) documents identified above would be unreasonable for several reasons, including that the Court would breach its obligations to protect the personal privacy

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<sup>21</sup> See *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 (9 November 2020) at [128], per (Deputy President S A Forgie).

of Court employee/s. Most of the information contained within the documents is personal and specific to the individual/s. I do not consider that the information in these documents would usually be available from publicly accessible sources. However, even if some of the personal information was published in one context, this does not mean it is not personal information for the purposes of the *Privacy Act 1988* (Cth).

The FOI Guidelines provide guidance on the issue of who is reasonably identifiable. At paragraph 6.135 it is said that “*whether or not the individual is reasonably identifiable depends on the practicability of linking pieces of information to identify the individual.*” At paragraph 6.136 the FOI Guidelines provide that:

*The information needs to convey or say something about a person, rather than just identify them. The mere mention of a person’s name or signature may, however, reveal personal information about them depending on the context ... [footnote omitted]*

The information provided during discussions and subsequent decision and approval usually contains information that is intended to “*convey or say something about a person*”. Again, looking at the context in which this personal information was provided, much of it will be identifying due to its detailed and unique nature and the context in which it originated.

Consultation pursuant to section 27A was carried out in relation to the documents and the objections to the information being disclosed included:

- disclosure would constitute an unreasonable disclosure of personal information, and
- the personal information was provided to the Court for a specific purpose and therefore there is an obligation to keep that information confidential.

I consider that disclosure of the personal information in the documents falling within the scope of your request would constitute an “*unreasonable disclosure of personal information*”. Accordingly, the documents you have requested are conditionally exempt under subsection 47F(1) of the FOI Act.

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

In finding that the documents falling within the scope of your FOI request are conditionally exempt pursuant to sections 47C, 47E(c), 47E(d) and 47F of the FOI Act, I am required to consider under subsection 11A(5) of the FOI Act whether it would be contrary to the public interest to give you access at this time. This test is applied in addition to any public interest considerations already discussed above, and may result in the need to consider one or more factors twice.<sup>22</sup>

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.*

There are a number of factors that must be taken into account in considering the public interest test. These are set out in subsection 11B(3) of the FOI Act. There are also certain factors which must not be taken into account (see subsection 11B(4) of the FOI Act). The FOI

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<sup>22</sup> FOI Guidelines, paragraph 6.138.

Guidelines provide non-exhaustive lists of other factors favouring disclosure (see paragraph 6.19), and factors against disclosure (see paragraph 6.22), that may be relevant in certain circumstances.

Paragraph 6.5 of the FOI Guidelines provide the following elaboration on the ‘public interest test’:

*The public interest test is considered to be:*

- *something that is of serious concern or benefit to the public, not merely of individual interest*
- *not something of interest to the public, but in the interest of the public*
- *not a static concept, where it lies in a particular matter will often depend on a balancing of interests*
- *necessarily broad and non-specific, and*
- *related to matters of common concern or relevance to all members of the public, or a substantial section of the public [footnotes omitted].*

Importantly, and as provided in paragraph 6.5 of the FOI Guidelines, the test requires more than something merely being *of interest* to the public. Rather, the question is whether disclosure of the document/s is *in the interest* of the public.

I accept that there is a public interest in the integrity of public sector accreditation processes and activities and that disclosure of related documents would go some way to promoting the objects of the FOI Act. Specifically, certain documents could be considered to promote “*better-informed decision-making*” by the public sector<sup>23</sup> and to enhance “*scrutiny, discussion, comment and review*” of public sector activities.<sup>24</sup>

Whilst disclosure of certain documents might be considered to promote the objects of the FOI Act, there are several factors that weigh against a finding that it would be in the public interest to disclose the specific documents requested. In considering the public interest test, I have taken many factors into account. They can be summarised as follows:

- disclosure could be reasonably expected to prejudice the protection of individuals right to privacy,
- upon consultation, it was raised that disclosure would constitute an unreasonable disclosure of personal information and that personal information was provided to the Court for a specific purpose and therefore there is an obligation to keep that information confidential,
- disclosure may expose the concerned individuals to the risk of inappropriate and unsolicited approaches,
- disclosure of the information would destroy trust in the confidentiality of the Court’s broader accreditation processes and activities. This in turn, may discourage employees considering undertaking the role of accredited mediator from applying and, ultimately, make it more difficult for the Court to attract and maintain mediators,
- in relation to those documents that contain deliberative matter, disclosure may inhibit future deliberations, including deliberative discussions and the exchange of opinions, engaged in between colleagues prior to formal decisions being made,

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<sup>23</sup> Subsection 3(2)(a) of the FOI Act.

<sup>24</sup> Subsection 3(2)(b) of the FOI Act.

- the documents contain sensitive information about an employee that is private to the individual, and
- because the FOI Act does not restrict any subsequent dissemination of information disclosed, the release of the document into the public domain has the potential to result in misuse and to cause harm and anxiety for the persons concerned.

I give significant weight to each of the above factors and, after careful consideration, I have concluded that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. On balance, it appears that the matter is not necessarily “*of common concern or relevance to all members of the public, or a substantial section of the public.*”<sup>25</sup>

Therefore, I have decided that the disclosure of the documents subject to the conditional exemptions would be contrary to the public interest and, on that basis, access to the documents should be refused.

### ***Redaction not appropriate under section 22***

Section 22 of the FOI Act requires me to consider whether access may be granted to edited copies of the documents, with exempt or irrelevant matter deleted. Notwithstanding my findings detailed above to refuse access to the documents on the basis that they are exempt under the FOI Act, section 22 requires me to consider whether access may be granted to the document following the redaction of exempt information.

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 conclude that, even if the names, residential address, personal email addresses, personal telephone number, work telephone numbers, employment history, qualifications, professional experience and personal attributes were redacted, the remaining information makes them easily identifiable.<sup>26</sup>

I consider that, under section 22, upon redacting the exempt information due to the conditional exemptions of deliberative processes, operations of an agency and personal privacy, the relevant documents retain no value or meaning. It would therefore be futile to grant you access to redacted copies of the documents as they would convey very “*little of its content or substance.*”

### **Charges**

You have not been charged for the processing of your request.

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<sup>25</sup> FOI Guidelines, paragraph 6.5.

<sup>26</sup> FOI Guidelines, paragraph 6.131.

## **Your Review Rights**

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

### ***Internal review***

Under section 54 of the FOI Act, you may apply in writing to the Federal Court for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter.

Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.

### ***Information Commissioner review***

Under section 54L of the FOI Act, you may apply to the Australia Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review/>

email: [enquiries@oaic.gov.au](mailto: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. Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

## **Complaints**

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely,



B Henderson  
**FOI Officer**