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**FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

Your Ref:
Our Ref:

HARRY GIBBS COMMONWEALTH LAW COURTS
119 NORTH QUAY
BRISBANE QLD 4000

PO BOX 13084
GEORGE STREET
BRISBANE QLD 4003

26 February 2018

Mr Andrew Garrett

By email: [REDACTED]

Dear Mr Garrett

Request under Freedom of Information Act

I refer to your email of 16 December 2017 to the Federal Court of Australia in which you have sought access to a range of documents under the *Freedom of Information Act 1982* (Cth) (FOI Act).

In your email of 16 December 2017 you make the following request (FOI request):

I ask you to consider this communicate as an application in writing under the provisions of the FOI Act for a copy of any document or thing of an Administrative Character related to me and/or entities related to be [sic] for the period 22nd January 2016 until today's date. Those documents or things ought [sic] include emails, minutes of meetings, notes of conversations on the home [sic] or otherwise related to me and in particular with reference to your decision dated 28 November 2017 and subsequently.

In addition, you requested the following:

I request that you delegate the courts powers to make a decision under the FOI Act and the Federal Court of Australia Act to a person who is not an officer of the Crown being [sic] Supreme Court of Hong Kong forwith [sic] and without delay and ask you to accept this communicate as a further Notice of Actual and Apprehended Bias consistent with the earlier Notices of Actual and Apprehended Bias served upon you

On 21 December 2017 the Court acknowledged receipt of your FOI request of 16 December 2017 and advised that due to the scope of that request, in conjunction with an additional request you had made on 25 November 2017, an application was made to the Australian Information Commissioner for an extension of time for the processing of those requests.

On 21 December 2017 the Australian Information Commissioner granted the court an extension of time under subsection 15AB(2) of the FOI Act in respect of both FOI requests to close of business 26 February 2018.

Authorised decision-maker

I am authorised under section 23(1) of the FOI Act to make decisions on behalf of the Federal Court in relation to your requests.

You requested on 16 December 2017 that the powers of the Court and its principal officer to make the FOI decision be delegated to a person who is not an officer of the Crown, but the Supreme Court of Hong Kong. Section 23 of the FOI Act does not permit such a person or body to be authorised to make FOI decisions on behalf of the Federal Court.

Decision

I have decided to refuse access to those documents sought pursuant to your FOI request for which the FOI Act does not apply due to the operation of s 5(1) of the FOI Act. This includes:

- documents directly related or associated with Court proceedings or in the custody or possession of Judicial Officers; and
- originating applications not accepted for filing and associated documents.

I have decided to grant access to those documents sought pursuant to your FOI request identified in Schedule A, being all other documents held by the Court within the scope of your FOI request.

In making my decision I have had regard to:

- a. the terms of your requests;
- b. the content of the documents within the scope of your request;
- c. the submissions of individuals consulted under s 27A of the FOI Act;
- d. the relevant provisions of the FOI Act and case law considering those provisions;
- e. the FOI Guidelines issued by the Office of the Australian Information Commissioner;

Reasons for Decision

Searches undertaken and documents identified

Searches undertaken

The searches undertaken by the Court to identify documents within the scope of your FOI request have been extensive and exhaustive, involving a search of the electronic and hard copy files of every relevant District Registry and the Principal Registry of the Federal Court. The search has encompassed 32 litigation files related to you and associated entities as well as files associated with rejected originating applications, applications for fee waiver, complaints and FOI requests. The search also included the open email accounts of all current and recent Federal Court staff. Consistent with the FOI Guidelines no search was undertaken of closed email accounts that could only be access via back-up systems.

Documents identified

The documents identified relating to you and/or the various entities to which you have been associated or otherwise falling within your FOI requests fit within the following categories:

- documents directly related or associated with Court proceedings or in the custody or possession of Judicial Officers;
- originating applications not accepted for filing and associated documents; and
- FOI requests

Documents directly related or associated with Court proceedings or in the custody or possession of Judicial Officers

A number of documents identified as potentially within the scope of your FOI request were directly related or associated with Court proceedings. This included an interlocutory application and all documents lodged, received or created in respect of that interlocutory application and applications to access the files for various proceedings. The documents identified also included a number of pieces of correspondence from you either addressed to the Court, or to the parties for various Court proceedings to which you, or entities to which you were associated, were a party. This correspondence either contained commentary from you in respect of those proceedings and/or flagged further actions or rights arising from those proceedings that you would exercise or had exercised.

Section 15(1) of the FOI Act provides:

Subject to section 15A, a person who wishes to obtain access to a document of an agency or an official document of a Minister may request access to the document.

Section 5(1) of the Act provides:

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 s 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”.¹

¹ at [19]

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, examples of which were given above. This is a common enough connotation of the epithet "administrative".*²

The examples referred to by the 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.³ The first category, which was thereby excluded from the management and administration of office resources, including 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.*⁴

The High Court, in considering the decision of *Bienstein v Family Court of Australia*⁵, 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.⁶

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.⁷

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.*⁸

² at [41]

³ at [13]

⁴ at [47]

⁵ (2008) 170 FCR 382

⁶ at [51]

⁷ at [51]

⁸ at [75] and [76]

Pursuant to s 5(1) of the FOI Act and following the decision of the High Court in *Kline v Official Secretary to the Governor General of Australia & Anor*, I am satisfied that any documents directly related or associated to Court proceedings are not documents to which the FOI Act applies, as they are not documents which concern the management and administration of registry or office resources. I am also satisfied that the FOI Act does also not apply to any document that is in the control or possession of a Judicial Officer. To the extent that your FOI request sought to access these documents your request is refused.

Originating applications not accepted for filing and associated documents

A number of documents were identified that were not documents directly related or associated with current or finalised Court proceedings, but were directly related or associated with an originating application that was not accepted for filing as you were prohibited from instituting proceedings in any registry of the Court without the leave of the Court by order of Justice Pagone on 26 February 2015 in proceeding VID600/2014.

These are documents that were all lodged, received or created in connection with a proceeding which you sought to commence. These documents are not, following *Kline v Official Secretary to the Governor General of Australia & Anor*, documents relating to the management and administration of registry and office resources.

I am satisfied that these documents, which include, but are not limited to, the originating application that was sought to be filed, any accompanying material and correspondence regarding the refusal to accept the application for filing are not matters of an administrative nature pursuant to s 5(1) of the FOI Act. They are not accessible under the FOI Act and to the extent your FOI request sought to access these documents it is refused.

FOI Requests

Included within the scope of your FOI requests are a range of documents related to previous FOI requests you have made. Schedule A contains a list of the relevant documents.

In *Federal Court of Australia and Garrett* [2015] AICmr 4 at [43] the Information Commissioner stated:

The documents that were released relate largely to Mr Garrett's FOI requests. The Federal Court's approach of releasing any document that does not relate to Mr Garrett's legal proceedings would appear to be a generous interpretation of s 5(1) and the 'management and administration of registry and office resources', in Mr Garrett's favour.

This statement would appear to cast doubt upon whether documents related to FOI requests can properly be said to be within the management and administration of registry and office resources, following *Kline v Official Secretary to the Governor General of Australia & Anor* and for the purposes of s 5(1) of the FOI Act.

I am nonetheless satisfied that it would be appropriate, consistent with previous Court practice, to grant access to the documents listed in Schedule A in response to your FOI requests. To the extent that the FOI Act might not apply to the documents listed in Schedule A, I provide access to those documents outside the FOI Act.

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 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

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 Officer of the Australian Information Commissioner website. Go to www.oaic.gov.au/freedom-of-information/foi-reviews.

Yours sincerely



Scott Tredwell

Deputy District Registrar

Schedule A
Schedule of Documents – AM Garrett FOI Request received 16 December 2017

No.	Date	Description
1.	06.02.2016	Email Andrew Garrett to John Mathieson and others
2.	16.02.2016	Email Caitlin Emery to John Mathieson
3.	05.04.2016	Email Andrew Garrett to Federal Court and others
4.	07.04.2016	Email Caitlin Emery to John Mathieson
5.	12.04.2016	Letter Tim Luxton to Andrew Garrett
6.	02.11.2016	Email Andrew Garrett to Federal Court
7.	16.11.2016	Letter John Mathieson to Andrew Garrett
8.	20.11.2016	Email Andrew Garrett to John Mathieson and the Federal Court
9.	29.11.2016	Letter John Mathieson to Andrew Garrett
10.	25.11.2017	Email Andrew Garrett to Federal Court