Australian Government
Office of the Australian Information Commissioner

'@' and [agency] *(Freedom of information)* [2026] AICmr @ (@ 2026)

Decision and reasons for decision of
Rocelle Ago, General Manager Freedom of Information Case Management
Delegate of the Australian Information Commissioner for the purposes of s 55K of the *Freedom of Information Act 1982*

Applicant	'@'
Respondent	@
Decision date	[date] 2026
Reference	MR__/_____
Catchwords	Freedom of Information — Whether documents relate to matters of administrative nature — (CTH) *Freedom of Information Act 1982* s 5

Decision

1. Under s 55K of the *Freedom of Information Act 1982* (the FOI Act), I [set aside/affirm/vary] the decision of the [agency] (the Court) of [date], [if relevant] as varied on [date(s)].

2. Within 28 days of this decision:

   a. the Court must process the applicant's request and notify the applicant of its decision in accordance with s 26 of the FOI Act, and

   b. the Court must advise whether it has fully implemented my decision or whether it will be seeking review of the decision by the Administrative Review Tribunal.

Key points

3. This decision discusses the application of s 5 of the FOI Act to a request for documents to the Court. It finds the requested documents [do/do not] relate to matters of an administrative nature and are therefore [within/outside] the scope of the FOI Act.

OAIC

Reasons for decision

Scope of IC review

4. On [date], the applicant applied to the Court for access to […].

5. On [date] the Court refused the applicant's request on the basis that the documents requested are outside the scope of the FOI Act, as none of the documents requested are, or relate to, matters of an administrative nature within the meaning of s 5 of the FOI Act. The applicant disputes the Court's decision.

6. The issue to be decided in this IC review is whether the documents relate to matters of an administrative nature for the purposes of s 5 of the FOI Act.

7. In an IC review of an access refusal decision, the respondent bears the onus of establishing that its decision is justified or that I should give a decision adverse to the applicant.[1]

8. In making my decision, I have had regard to the following:

   - the [agency]'s decision[s] of [include dates for all decisions] and reasons for those decisions
   - the document[s] at issue
   - the FOI Act[2]
   - the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act[3] to which agencies must have regard in performing a function or exercising a power under the FOI Act,[4] and
   - the parties' submissions.

Application of the FOI Act to courts (s 5)

9. The FOI Act has a restricted application to courts, judges and court registries. Specifically, s 5 provides the FOI Act does not apply 'unless the document relates to matters of an administrative nature.

10. [Set out R's position].

11. [Set out A's position].

12. [Draft reasons…]

13. […]

Finding

14. I find that the documents sought by the applicant in this matter [do not/ do] relate to matters of an administrative nature. Therefore, s 5 of the FOI Act [applies/ does not apply] to these documents to exclude them from the operation of the FOI Act.

Rocelle Ago

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[1] FOI Act s 55D(1).

[2] Set out in Annexure A.

[3] See, Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (FOI Guidelines).

[4] Set out in Annexure A.

General Manager Freedom of Information Case Management
Delegate of the Australian Information Commissioner for the purposes of s 55K of the *Freedom of Information Act 1982*

[date] 2026

Annexure A

Relevant provisions of the FOI Act, FOI Guidelines, and decisions

Application of the FOI Act to courts (s 5)

Section 5(1) of the FOI Act states:

> **Act to apply to courts in respect of administrative matters**
>
> Courts other than courts of Norfolk Island--general
>
> (1) 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 FOI Guidelines relevant explain:

> The FOI Act has a restricted application to courts, court registries and the Official Secretary to the Governor-General. Specifically, the FOI Act does not apply to a request for access to a document of a court or registry, or the Official Secretary to the Governor General 'unless the document relates to matters of an administrative nature' (ss 5 and 6A). The FOI Act does not apply to the holder of a judicial office (s 5(1)(b)), or to the Governor-General. A further exclusion exists for documents relating to the handling of complaints about judicial officers (ss 5(1A)–(1C)).
>
> …
>
> The phrase 'matters of an administrative nature' is not defined in the FOI Act. In *Kline v Official Secretary to the Governor General*, the High Court held that the phrase refers to documents that concern 'the management and administration of office resources, such as financial and human resources and information technology'. By contrast, the phrase does not apply to documents that relate to the discharge of a court's or the Governor- General's 'substantive powers and functions'. The High Court approved a similar distinction drawn by the Full Federal Court in the decision on appeal between the substantive functions or powers of a court or the Governor-General, and the office 'apparatus' supporting the exercise or performance of those substantive powers and functions.
>
> Applying that distinction, the High Court held in *Kline* that the FOI Act did not apply to an FOI request to the Official Secretary to the Governor General for access to documents relating to the administration of the Order of Australia, including decisions on the award of Australian honours. As to courts, the High Court observed that the FOI Act applies only to documents relating to the management and administration of registry and office resources, and not to documents relating to the discharge of the substantive powers and functions of adjudication or tasks referable to the exercise of judicial, rather than administrative, powers and functions.[5]

[5] FOI Guidelines at [2.8] and [2.10] – [2.11]. Footnotes omitted.

Review rights

Review by the Administrative Review Tribunal

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Review Tribunal (ART). The ART provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the ART must be made within 28 days of the day on which the applicant is given the IC review decision (see s 18(1) of the *Administrative Review Tribunal Act 2024* and rule 5(3) of the *Administrative Review Tribunal Rules 2024).* An application fee may be payable when lodging an application for review to the ART. Further information is available on the ART's website (www.art.gov.au) or by telephoning 1800 228 333.

Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at http://www.ombudsman.gov.au.

From:	s22
To:	s22 ; DL_OAIC_Intake and Eligibility; DL_OAIC_FOI Case Management
Cc:	TYDD,Liz; PIRANI,Toni; OAIC - ACFOI; OAIC - Legal; OAIC - Media
Subject:	Case summary: 'ATS' and Federal Circuit and Family Court of Australia [2025] AICmr 20 (24 January 2025) [SEC=OFFICIAL]
Date:	Tuesday, 28 January 2025 10:49:47 AM
Attachments:	2025-AICmr20.rtf

Good morning,

Please find attached and enclosed the decision of the Freedom of Information Commissioner in *'ATS' and Federal Circuit and Family Court of Australia* [2025] AICmr 20 (24 January 2025): D2025/001038. I am sending this out on the Commissioner's behalf.

OAIC Ref: MR21/00221

Decision: Affirm

Key points: This decision discusses the application of s 5 of the FOI Act to a request for documents to the Court. It finds the requested documents do not relate to matters of an administrative nature and are therefore outside the scope of the FOI Act. It finds that correspondence and other documents to or from judges and their associates – even if they discuss the administration of the judgment – are not subject to the FOI Act because they relate to the Court's conduct of proceedings in particular litigation matters and are part of the Court's judicial functions.

Catchwords: Freedom of Information — Whether documents relate to matters of administrative nature — (CTH) Freedom of Information Act 1982 — s 5(1)

Thank you to @s22 for case managing this file. No updates to the FOI Guidelines are required.

Kind regards,

OAIC

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The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

'ATS' and Federal Circuit and Family Court of Australia [2025] AICmr 20 (24 January 2025)

Decision and reasons for decision of
Freedom of Information Commissioner, Toni Pirani

Applicant	'ATS'
Respondent	Federal Circuit and Family Court of Australia
Decision date	24 January 2025
Application number	MR21/00221
Catchwords	Freedom of Information — Whether documents relate to matters of administrative nature — (CTH) *Freedom of Information Act 1982* — s 5(1)

Decision

1. Under s 55K of the *Freedom of Information Act 1982* (the FOI Act), I affirm the decision of the Federal Circuit and Family Court of Australia (the Court) of 25 February 2021.

Key points

2. This decision discusses the application of s 5 of the FOI Act to a request for documents to the Court. It finds the requested documents do not relate to matters of an administrative nature and are therefore outside the scope of the FOI Act. It finds that correspondence and other documents to or from judges and their associates – even if they discuss the administration of the judgment – are not subject to the FOI Act because they relate to the Court's conduct of proceedings in particular litigation matters and are part of the Court's judicial functions.

Reasons for decision

Scope of IC review

3. On 26 January 2021, the applicant applied to the Court for access to:

   - All administrative documents, including those stored on the left-hand side of any appeal file folder, any communications to or from Strickland J and his associates in relation to the following matters:

- …
- In any reference to the Applicant or to and from [named individual legal practitioners and judges] in the FCC or their associates or any other third parties.

4. On 25 February 2021, the Court refused the applicant's request on the basis that the documents requested are outside the scope of the FOI Act, as none of the documents requested are, or relate to, matters of an administrative nature within the meaning of s 5 of the FOI Act. The applicant disputes the Court's decision.
5. The issue to be decided in this Information Commissioner review (IC review) is whether the documents relate to matters of an administrative nature.
6. In making my decision, I have had regard to the following:
   - the Court's decision and reasons for decision
   - the FOI Act[1]
   - the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act[2] to which agencies must have regard in performing a function or exercising a power under the FOI Act,[3] and
   - the parties' submissions.

Application of the FOI Act to courts (s 5)

7. The FOI Act has a restricted application to courts, judges and court registries. Specifically, s 5 provides the FOI Act does not apply 'unless the document relates to matters of an administrative nature'.
8. In summary, the applicant submitted:
   - the Court has sought to apply s 5 to the documents in a blanket way instead of considering its application to individual documents
   - the applicant is seeking documents located in the pockets of the files she saw during court proceedings. When she applied for access to her case file under the court rules, the Court told her that the documents cannot be produced to her as they were administrative documents and should be sought via the FOI Act
   - when she applied for access to those documents under the FOI Act, access was refused as they are deemed not to be documents of an administrative nature, and
   - the applicant alleges there had been bias on the part of court officers and that there had been a "cover-up" to deny access to the documents.
9. In its reasons for its decision, the Court said:

> The phrase 'matters of an administrative nature' was clarified by the High Court in *Kline* at [47]. In the joint judgment of the High Court, the phrase 'matters of an administrative nature' was described as documents which concern the management and administration of office resources, such as financial and human resources and information technology. That judgment also makes it clear

[1] Section 5 set out in Annexure A.

[2] See, Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (FOI Guidelines).

[3] Set out in Annexure A.

that, in the view of those judges, documents held by a federal court relating to individual cases can never be characterised as documents "relating to 'matters of an administrative nature'".

I am satisfied that in light of section 5 of the FOI Act and the clarification provided by the High Court in *Kline*, your request concerns documents of the Court that are not documents related to 'matters of an administrative nature' within the meaning of *Kline*. I am satisfied that there were no documents relating to the management and administration of registry and office resources falling within the scope of your request.

10. **The phrase 'matters of an administrative nature' is not defined in the FOI Act. However, in *Kline v Official Secretary to the Governor General* [2013] HCA 52, the High Court of Australia considered the meaning of that phrase with respect to s 6A of the FOI Act and documents of the Official Secretary of the Governor-General. The High Court said:**

> The 'non-application' of the FOI Act to requests for access to documents of the Official Secretary, as stated in s 6A(1), inevitably refers to a class of documents relating to matters which are not 'of an administrative nature'. In conformity with the exclusion of the Governor-General from the operation of the FOI Act, those documents relate to the discharge of the Governor-General's substantive powers and functions. By contrast, 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 [such as financial and human resources and information technology]. This is a common enough connotation of the epithet 'administrative'.
>
> …
>
> The analogous exclusion of federal courts and specified tribunals, authorities and bodies from the general operation of the FOI Act, except for documents which relate to matters of an administrative nature, also involves a balance of conflicting public interests. There is a long-recognised public interest in the protection of judicial independence to enable holders of judicial office to exercise authority without fear or favour—judges work in public, are obliged to give reasons, and are subject to appellate review. However, not every action undertaken by a judge in the discharge of the substantive powers and functions of adjudication is undertaken in public. For example, revision of an unrevised transcript of proceedings heard in open court may occur in chambers. That task is referable to the exercise of judicial, rather than administrative, powers and functions.
>
> …
>
> 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]

11. **In *'BY' and High Court of Australia* [2014] AICmr 51, the former Freedom of Information Commissioner, Dr James Popple, considered a request for a range of documents that related to the applicant in that matter, including internal communications.[5] In applying *'Kline'* to decide that the documents were not of an administrative nature, former Commissioner Popple said:**

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4 *Kline v Official Secretary to the Governor General* [2013] HCA 52 at [41], [45] – [47] (French CJ, Crennan, Kiefel, and Bell JJ).

5 *'BY' and High Court of Australia* [2014] AICmr 51.

> In making a decision on this IC review, I must be independently satisfied that none of the documents relates to matters of an administrative nature: that none of the documents relates to 'the management and administration of registry and office resources'.[6]

12. It is apparent from the wording of the request that the applicant seeks documents related to litigation matters which include communications to or from a particular judge and their associates, as well as communications involving other lawyers, judges and their associates.

13. The Court described the documents in its submissions as consisting of:

    - correspondence comprising emails to parties and internal correspondence regarding the filing of court materials, court events and the conduct of proceedings[7]
    - court orders and reasons for judgment
    - transcripts of proceedings
    - bench sheets and appearance sheets[8]
    - distribution of judgment checklist[9]
    - finalised appeal checklists,[10] and
    - records of inspection.[11]

14. As *Kline* and the FOI Guidelines explain, documents of a judicial officer and documents relating to the exercise of judicial functions are excluded from the operation of the FOI Act, as are documents about tasks that a referrable to the exercise of the Courts judicial function. Taking into account the subject matter of the request and the Court's description of the documents, I consider that the requested documents are associated with the conduct of proceedings in particular litigation matters and are part of the Court's judicial functions. Accordingly, I am satisfied that the documents sought are about tasks that are referrable to the exercise of the Court's judicial function, and not the administration of the Court. I am similarly satisfied that the documents are not documents that relate to the management and administration of office resources, which is described in *Kline* as relating to the management of financial and human resources and information technology.[12]

15. With reference to the scope of the applicant's request discussed above, I consider that correspondence and other documents to or from judges and their associates – even if

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[6] *'BY'* at [11].

[7] The Court advised this correspondence includes internal correspondence between registrars and judges' chambers and the registry, as well as correspondence between the Courts and parties in relation to court events, court orders, court directions and documents filed or attempted to be filed. 'Correspondence' forms the bulk of the left-hand side of the above mentioned files.

[8] The Court advised these documents record the names of parties appearing at court events (including legal representatives), start and end times, the manner in which the event was conducted (for example, in person, in chambers, or by telephone or other electronic means), and the recording of orders.

[9] The Court advised this is an internal document that is used by the registry following the delivery of reasons for judgment.

[10] The Court advised this is an internal document that is used by the registry following the conclusion of an appeal.

[11] The Court advised this is an internal document recording details of when a party to proceedings inspects a file, including the name, date and time of inspection.

[12] *Kline* at [13].

they discuss the administration of the judgment – are not subject to the FOI Act because as the High Court determined in *Kline*, even if some of the powers and functions of a judicial officer could be considered 'administrative' in nature, as a judicial officer he or she would still not be subject to the operation of the FOI Act. [13]

16. Similar to another IC review decision involving the Court,[14] it is apparent that the requested documents relate to particular litigation matters. In these circumstances I consider they relate to the exercise of the Court's substantive adjudicative functions and powers and not to matters of an administrative nature.

17. Accordingly, I am satisfied that the documents sought by the applicant in this case do not relate to matters of an administrative nature. Therefore s 5 of the FOI Act applies to these documents to exclude them from the operation of the FOI Act.

Toni Pirani
Freedom of Information Commissioner

24 January 2025

[14] *Lilo Hana von Schoeler and Federal Circuit Court of Australia* [2021] AICmr 16 (4 June 2021) at [18].

Annexure A

Relevant provisions of the FOI Act, FOI Guidelines, and decisions

Section 5(1) of the FOI Act provides:

Act to apply to courts in respect of administrative matters

Courts other than courts of Norfolk Island—general

(1) 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 FOI Guidelines relevantly explain:

The FOI Act has a restricted application to courts, court registries and the Official Secretary to the Governor-General. Specifically, the Act does not apply to a request for access to documents of a court or registry or the Official Secretary 'unless the document relates to matters of an administrative nature' (ss 5, 6A). The Act does not apply to the holder of a judicial office (5(1)(b)), nor to the Governor-General

...

As to courts, the Court observed that the Act applies only to documents relating to the management and administration of registry and office resources, and not to documents relating to the discharge of the substantive powers and functions of adjudication or tasks that are referable to the exercise of judicial, rather than administrative powers and functions.[15]

[15] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* [2.8] and [2.11].

Review rights

Review by the Administrative Review Tribunal

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Review Tribunal (ART). The ART provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the ART must be made within 28 days of the day on which the applicant is given the IC review decision (see s 18(1) of the *Administrative Review Tribunal Act 2024* and rule 5(3) of the *Administrative Review Tribunal Rules 2024).* An application fee may be payable when lodging an application for review to the ART. Further information is available on the ART's website (www.art.gov.au) or by telephoning 1800 228 333.

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If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at http://www.ombudsman.gov.au.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the **Access our information** page on our website.

Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

BKXP and Department of Foreign Affairs and Trade (Freedom of Information) [2022] AATA 423 (2 March 2022)

Division:	FREEDOM OF INFORMATION DIVISION
File Number(s):	**2018/5540**
Re:	**BKXP**
	APPLICANT
And	**Department of Foreign Affairs and Trade**
	RESPONDENT

DECISION

Tribunal:	**Deputy President B W Rayment OAM QC**
Date:	**2 March 2022**
Place:	**Sydney**

The reviewable decision is affirmed.

..........................**[sgd]**...

Deputy President B W Rayment OAM QC

Catchwords

FREEDOM OF INFORMATION – country information assessments prepared by the Department of Foreign Affairs – access to draft version of reports – access to source and commentary documents - public interest considerations – substantial adverse effect considerations – documents affecting national security, defence or international relations, reviewable decision affirmed.

Legislation

Administrative Appeals Tribunal Act 1975 (Cth)
Freedom of information Act 1982 (Cth)
Migration Act 1958 (Cth)

Cases

Attorney-General's Department v Cockcroft (1986) 10 FCR 180
Carr v The State of Western Australia [2007] HCA 47
Kline v Official Secretary to the Governor-General [2013] HCA 52
McKinnon v Secretary, Department of Treasury [2006] HCA 45; (2006) 228 CLR 423
Secretary, Department of Prime Minister and Cabinet and Summers [2019] AATA 5537
O'Sullivan and Australian Federal Police [2011] AATA 188

Secondary Materials

Direction No. 84 – Consideration of Protection Visa Applications under s 499

REASONS FOR DECISION

Deputy President B W Rayment OAM QC

2 March 2022

1. The applicant applied for a protection visa and, following refusal by a delegate of the immigration authorities applied to this Tribunal in its Migration and Refugee Division (MRD) for review of the delegate's decision.

2. A Ministerial direction under s.499 of the *Migration Act 1958*, Direction 84, bound both the delegate and the Migration and Refugee Division of this Tribunal to take into account, amongst other things, particular country information published by the respondent (DFAT) concerning the applicant's country of origin (China).

3. Clause 3 of Direction 84 provided as follows:

> *Where the Department of Foreign Affairs and Trade has prepared country information assessment expressly for protection status determination purposes, and that assessment is available to the decision maker, the decision maker must take into account that assessment, where relevant, in making their decision. The decision maker is not precluded from considering other relevant information about the country.*

4. The terms of Direction 84 are similar to its predecessor, Direction 56 made on 21 June 2013. So for at least eight years, a similar direction has been in place. Its terms have led the respondent (DFAT) to formulate processes which have been followed by its Country Information Service now for a number of years, in the knowledge that decision-makers are bound by direction 84 or its predecessor to take into account what the country reports say. Those processes involve first a framework document, which will be explained below, but which allows DFAT to know what information decision-makers need to obtain. Then they involve at first one or more persons from DFAT's Country Information Service, who will visit the country in question and with the help of the embassy or consulate abroad (the post), interview locals including in some cases diplomats from foreign countries who also have local knowledge, prepare, with others in some cases, progressive drafts of the report which will be sent to various persons for checking and comment, including the post abroad, Australia's security agencies, trusted non-government organisations and the like. The drafts will be progressively refined as they pass through more hands. The facts asserted will be vetted by more senior persons within the respondent from the point of view of bilateral relations with the country concerned. Statements made on sensitive matters, such as human rights abuses, can occasion concerns from the country in

question. Australia must be sure it can defend statements made in such an area if they are challenged. At all stages up to final approval of a report, its communications including the progressive drafts are classified and accordingly, not made available to the public. Statements made in drafts are not intended by their direct authors (who will often be junior officers) to be released to the public, unless and until they have been through the vetting process by more senior or more specialised members of DFAT and other Commonwealth officers who are consulted. To take one example, a statement made in an early draft may be incorrect, or omit important matter, and may be corrected by a later draft. Releasing an incorrect draft under the FOI request may confuse or positively mislead a decision-maker, or make a decision-maker doubtful or cautious in accepting an inconsistent (correct) statement in the final report. Although these proceedings arise under the Freedom of Information Act, they confront or challenge DFAT processes about the gathering of information for country reports for protection status determinations, except as to the FOI request for the final country reports themselves. Where a conditional exemption is engaged by a particular document, such as a deliberative document, or a document the disclosure of which may adversely affect the efficient and proper operations of an agency, including DFAT itself, public interest questions must be resolved before a decision is made to release the document. DFAT regards its classification of the drafts and associated documents as an important part of the proper and efficient conduct of its operations, to use the language of s.47E (d) of the *Freedom of Information Act 1982* (the FOI Act, or the Act). Vetting drafts from the point of view of avoiding or minimising damage to Australia's bilateral relations with other countries is one object of the classification of drafts and to that extent the processes of DFAT lead to an unconditional exemption under s.33(a)(iii) of the FOI Act.

5. The applicant made a request for documents under the FOI Act in the following terms:

> *1. A copy of all country information assessments prepared by the Department of Foreign Affairs and Trade (**DFAT**) expressly for protection status determination purposes in relation to China (**country information**), including <u>but not limited to</u>:*
>
> > *a. DFAT Summary of CIRs re: The Treatment of Children in China, 24 July 2003, CX82789;*

b. DFAT RRT Country Information Request – Population and family planning regulations in Fujian Province, 13 March 2012, CX83325;

c. DFAT RRT Information Request, 12 November 2010, CHN37505; and

d. DFAT Country Report: People's Republic of China, 3 March 2015.

2. A copy of all draft versions of each piece of country information.

3. A copy of all material relied upon by DFAT in preparing each piece of country information, including file notes, correspondence with any source contacted, audio video recordings, source material and any other records.

4. A copy of all correspondence between DFAT and the Department of Immigration and Border Protection regarding each piece of country information.

5. A copy of all correspondence between DFAT and the Administrative Appeals Tribunal or the Immigration Assessment Authority regarding each piece of country information.

6. The names and positions of the authors of each piece of country information.

7. The names and positions of the owner and/or person responsible for final sign off of each piece of country [information].

6. For the purposes of this review, the reviewable decision is taken by s.42D(4) of the *Administrative Appeals Tribunal Act 1975* to be a reconsidered decision of the respondent dated 2 July 2019.

7. By that decision, the respondent gave access to some documents within the scope of the request, and gave partial access to others, and refused access to a number of documents.

8. The review went before the Information Commissioner in the first instance, and then to this Tribunal when the Information Commissioner decided that it was more appropriate for the Tribunal to deal with the review.

9. The applicant no longer seeks access to several documents and those documents are omitted from the ones examined in these reasons. This review focuses upon the documents listed in Exhibit A, a list agreed between the parties.

10. The matters in issue on the review relate to some exemptions expressed in the FOI Act to be unconditional, and to some conditional exemptions asserted by the respondent to apply, and to the correctness of decisions by the respondent that it would, on balance, be contrary to the public interest to give access to conditionally exempt documents.

11. Search issues, and any scope issues which previously were in dispute between the parties, no longer arise.

12. Mr Mostafa of counsel for the applicant, submitted that the drafts and other documents ought to be, as he put it, “interrogable” in the public interest. That would enable an applicant who may be adversely affected by a statement in the final report to know its basis, he submitted.

13. The respondent’s case on this review is well summarised in the reviewable decision.

14. The reviewable decision sets forth at paragraphs 19-21 the process followed within DFAT to arrive at a published country information report:

> *19. The process of deciding whether a person is owed protection obligations under the Convention Relating to the Status of Refugees 1951 (Refugee Convention) or under Australia’s complementary protection regime can be difficult and complex. Country information reports are intended to assist decision makers with their deliberations. The Department is independent from the protection visa decision making process, which is undertaken by Home Affairs. The requirement for decision makers to take into account the country information reports (where they are available) means that they must be as rigorous, accurate and reliable as possible.*

20. The Department's Country Information Section (CIS), based in Canberra, prepares the country information reports. Country information reports are prepared for protection status determination purposes only and provide the Department's best judgement and assessment at the time of publication. They are distinct from Australian Government policy with respect to the countries in question. The reports provide a general, rather than an exhaustive country overview. They are prepared with regard to the current caseload for decision makers in Australia without reference to individual applications for protection visas. Country information reports do not contain policy guidance for decision makers.

21. Preparation of country information reports will commonly involve the following steps:

a. CIS consults Home Affairs' Country of Origin Information Section (COISS) and the AAT on priority caseloads for updated or new country information reports.

b. The Director of CIS or a senior executive officer within Multilateral Policy Division (MPD) contacts the Head of Mission at the relevant post to request assistance with the preparation of the report and to propose timing for a field visit.

c. A responsible CIS officer contacts Home Affairs' COISS and the Migration and Refugee Division of the AAT (AAT MRD) to request specific information about the current caseload and any specific information shortfalls relevant to the claims being made.

d. The CIS officer undertakes documentary research of open source and Departmental information.

e. The CIS officer undertakes a field visit to the relevant country, where the officer typically has discussions with relevant government officials from the country, international and non-governmental organisations, journalists, other diplomatic missions, academics, human rights groups and representatives of specific groups in the Australian asylum claim case load.

f. The CIS officer uses the information gathered to prepare an initial draft of the report, which [is] shared with the relevant Australian diplomatic post for preliminary comment.

g. The CIS officer then sends a revised draft to the Department's geographic division with responsibility for bilateral relations with the relevant country and to the Office of National Intelligence (ONI) (formerly the Office of National Assessments) for their comment.

h. The CIS officer sends a de-classified version of the draft (without footnotes) to Home Affairs for comment from the COISS country experts.

i. Once comments from the Department's geographic desk, ONI and COISS have been incorporated into the draft, the CIS officer sends it to the post for formal clearance by the relevant Head of Mission.

j. The head of MPD then formally clears the report for publication and release to decision makers at Home Affairs and the AA T. The country information report is then published on the DFAT website.

15. As to the drafts and the final published country information reports, the reviewable decision at paragraphs 25-31 asserts that:

25. The Department has in place strict security arrangements to protect draft reports

from unauthorised use or disclosure. Draft reports are classified until the final stage

of the process, and the clearance process requires explicit approval by the relevant

Head of Mission and Canberra based senior executive officer that text of the final

report can be publicly released as an unclassified document. Draft reports are never *made publicly available, or made available outside the areas of the Government that specifically contribute to their drafting. In consulting with Home Affairs' COISS, the Department expressly states in correspondence that COISS is not to share draft reports with visa decision makers and that any comment that the Department considers have originated from decision makers will be disregarded. The Department therefore takes explicit measures to ensure that decision makers do not see draft reports. This means any material in the draft reports that is excluded from the published reports is never seen by decision makers and so is not able to improperly influence the protection visa decision making process.*

26. The integrity of the country information assessment regime is heavily reliant on a single, publicly available document representing the Department's best judgement and assessment of a country as at the time of publication.

27. Each published country information report represents the Department's carefully considered assessment with respect to the political, economic and social climate of the country concerned at the relevant time. It is for protection status determination processes only, and is distinct from Australian Government policy with respect to the country in question. The process involves a complex assessment of information from a range of sources that, in isolation, may not represent the best or most reliable evidence or may be skewed toward a particular bias. The experts in the Department's CIS consider and weigh this information during the intensive drafting and consultation process.

28. Disclosure of information that was excluded from the final reports for various reasons has the serious potential to undermine the integrity and credibility of the entire country information process.

29. The disclosure of draft reports could also undermine and adversely affect the determination of protection visa applications more generally as decision makers could no longer rely on a single definitive version of a country report. Furthermore, should drafts be made publicly available, it would likely open up an area of legal challenge of visa decision making that could result in country information reports losing their status as final and authoritative. This would have a substantial adverse effect on the Department's mandated role in preparing authoritative country information reports, because the integrity of the reports would be undermined. More broadly, this would have a very substantial adverse effect on the ability of the Australian Government to effectively and efficiently manage and process protection visa applications overall.

30. The initial drafting of the reports occurs at a junior officer level (APS5-EL 1). The judgements, assessments and nuances contained within the draft reports have therefore not been internally reviewed, tested, or cleared by more senior officers, and are not likely of a publicly releasable standard. As such, the assessments and judgements in the draft reports do not represent the Department's fully considered view.

31. The release of drafts could set a precedent that would make it difficult (if not *impossible) for the Department to continue to produce its country information reports. It could, for example, limit the Department's ability to use junior officers, because the Department would need to manage the risk of a draft containing material that was potentially damaging to international relations or contained errors or inaccuracies due to the relative inexperience of the drafter. This would have significant resource implications for the Department's operations, and would severely limit the Department's ability to play a central role in providing country information to assist decision makers at the primary and review levels. For example,*

if draft reports could only be prepared by senior officers this would necessarily mean

that fewer reports could be prepared in a given period, and reports would take longer to write, because of the competing demands on senior officials in the Department.

16. In the public session the respondent relied mainly upon the evidence of Dr Lee to prove those aspects of the reviewable decision just mentioned. Dr Lee’s evidence did support the various assertions in the reviewable decision which I have set out above.

17. Of the various documents said to be exempt, the most numerous are the drafts of the published country reports, which number 102 documents extending over some 2,800 pages. It will be convenient in these reasons first to consider the draft reports, both as to whether exemptions are engaged, and, where relevant, as to whether it is, on balance, in the public interest that they should be disclosed.

18. The various exemptions said to affect those documents, or parts of them, include both conditional and unconditional exemptions specified in the FOI Act. I have heard evidence both in open session, with cross-examination by Mr Mostafa for the applicant, and in confidential session, in the absence of the applicant. The evidence was led by the

respondent from senior officers of DFAT, and an officer of the Department of Home Affairs.

19. Dr Lee, the First Assistant Secretary of the Multilateral Policy Division of DFAT since February 2018, was previously Deputy Head of Mission at the Australian Embassy in Indonesia for four years, and from 2012 to 2014, was Australia's Ambassador for Climate Change, and from 2009 to 2012, was High Commissioner to Bangladesh.

20. As part of his duties, he is responsible for DFAT's preparation of country reports, prepared for the purposes of Direction 84 as is indicated in paragraph 21 of the reviewable decision set out above.

21. At paragraphs 30-34 of his affidavit, Dr Lee said:

> *30. From previous discussions with Ms Marcia Pius, the Director of CIS, I understand that the process of preparing the reports typically involves the following steps:*
>
>> *30.1. Based on an email drafted by the Director of CIS, I contact the Head of Mission at the Post accredited to the country under research to request assistance with the preparation of the report and to propose timing for a field visit.*
>>
>> *30.2. A CIS research officer contacts the Department of Home Affairs' Country of Origin Information Services Section (COISS) and the Migration and Refugee Division of the Administrative Appeals Tribunal* **(***MRD***)** *to seek a framework document for the country, which will include numbers in the current caseload and information relating to the claims being made. The framework documents typically also highlight areas where decision-makers are unable to obtain information relevant to claims.*
>>
>> *30.3. The research officer commences documentary research of both open-source material and DFAT reporting (usually in the form of cables).*

30.4. The research officer undertakes a field visit to the country under research. The field visit typically includes discussions with relevant government officials from the country under research, international and non-governmental organisations, journalists, academics, human rights groups and representatives of specific groups in the Australian asylum caseload.

30.5 The research officer uses the information gathered to prepare an initial draft of the report. The initial draft is then shared at junior level with the Australian Post that hosted the visit, to ensure that the information contained within the draft is accurate and the analysis accords with the Post's understanding of the actual situation in the country.

30.6. The revised draft is then sent to the Division within the Department responsible for bilateral relations with the country under research and to the Office of National Intelligence (ONI) (formerly Office of National Assessments (ONA)) for their comment, to ensure that the information and analysis in the draft are consistent with their understanding.

30.7. A de-classified version of the draft (whereby the footnotes are stripped) is sent to COISS to seek any comment from the country of origin information researchers within COISS. The email covering the draft states explicitly that the draft is not to be shared with decision makers. If CIS has reason to believe that it has, any comments provided by COISS will be disregarded. In this way, CIS can utilise the subject knowledge of COISS researchers while ensuring that decision makers are kept separate from the process.

30.8. It is vital for decision makers to be strictly excluded from the process of drafting to ensure that there is no actual or apprehended bias arising from their subsequent decisions. For this reason, AA T MRD is not provided with a draft of the report, as AAT MRD has no research function but rather relies on CIS and COISS to provide country of origin information. AAT MRD and

Home Affairs decision makers are provided only with the final, cleared public report, which is then also published on the Department's website.

30.9. A further draft of the report, taking into account any comments obtained from the Department's bilateral divisions, ONI and COISS researchers, is sent back to the Post for formal Head of Mission clearance. The Head of Mission has a formal clearance role and must confirm that the information, analysis and assessments contained in the draft report are accurate and fairly portrayed, and that the content of the report, stripped of footnoted references, can be released to the public.

30.10. The version of the report as cleared by the Head of Mission is sent to me and I have the final responsibility to decide to release the report to decision-makers and to make it publicly available.

31. The reports are updated periodically as required, to reflect changes to economic, political, human rights and humanitarian situations in relevant countries. The updates to reports follow a similar process as described above.

32. Drafts are currently prepared by relatively junior officers and are subject to a rigorous review and clearance process. It is important to bear in mind that a country information report is not simply a collation of objective facts. It is a record of assessments and evaluations based on a combination of factual information and analysis. A draft report will often go through multiple points of review from various perspectives, such as from the relevant Australian overseas mission (Post) and from more experienced members of the CIS, in order to arrive at a final product that is reflective of the Department's considered views.

33. As noted at 30.4 above, CIS officers gather information for the preparation of the reports from a variety of formal and informal sources. Given that the reports deal with sensitive issues of human rights abuses and persecutory conduct in *countries, the information obtained informally is often more valuable than that received through more formal channels.*

34. Early drafts will include references to source material. This facilitates the review process, because those who are examining the draft report can see for themselves the factual material which the drafter relied upon in making their various assessments and opinions. The final report will generally not include these source references. The reason for this is that it protects sources by preventing attribution of sources. I discuss protection of sources further below.

I accept that evidence, upon which he was not cross-examined in the relevant respects.

22. Each of documents 1-100, and documents 195 and 196 in Exhibit A, claim exemptions for the drafts under sections 47C, 47E(d) and 33(a)(iii) of the FOI Act. Of those, only s.33(a)(iii) is a complete exemption provision. The confidential evidence concerning the exemption in s.33(a)(iii) was not exhaustive but rather illustrated certain concrete examples. Since, as will appear, I have concluded that the drafts all attract conditional exemptions and since I have also concluded that on balance, it is not in the public interest to disclose the draft reports, and having regard to the way the case was conducted in public session, it will not be necessary to discuss in any detail the impact of s.33(a)(iii) in relation to the drafts.

23. Section 47C provides as follows:

Public interest conditional exemptions – deliberative processes

General rule

(1) 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 purpose of, the deliberative process involved in the functions of:

(a) an agency; or

(b) a Minister; or

(c) the Government of the Commonwealth.

Exceptions

(2) Deliberative matter does not include either of the following:

(a) operational information (see section 8A);

(b) purely factual material.

Note: An agency must publish its operational information (see section 8).

(3) This section does not apply to any of the following:

(a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;

(b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;

(c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

24. Section 47E(d) provides as follows:

Public interest conditional exemptions – certain operations of agencies

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

25. The guidelines issued under s.93A of the Act by the Information Commissioner have relevance to public interest factors, amongst other things. Section 93A is in the following terms:

Guidelines

(1) The Information Commissioner may, by instrument in writing, issue guidelines for the purposes of this Act.

Note: For variation and revocation of the instrument, see subsection 33(3) of the Acts Interpretation Act 1901 .

(2) For the purposes of the performance of a function, or the exercise of a power, under this Act, regard must be had to any guidelines issued by the Information

Commissioner under this section including, but not limited to, guidelines issued for the purposes of the following provisions:

(a) paragraph 9A(b) (information publication scheme);

(b) subsection 11B(5) (public interest factors);

(c) subsection 15(5A) (decisions on requests).

(3) Guidelines are not legislative instruments.

26. The words “a substantial adverse effect” in s.47E(d) are discussed in the guidelines at paragraphs 5.19 to 5.21 in the following terms:

Substantial adverse effect

5.19 Several conditional exemptions require the decision maker to assess the impact and scale of an expected effect or event that would follow disclosure of the document. That is, the expected effect needs to be both ‘substantial’ and ‘adverse’.

5.20 The term ‘substantial adverse effect’ broadly means ‘an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person’. The word ‘substantial’, taken in the context of substantial loss or damage, has been interpreted as ‘loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal’.

5.21 A decision maker should clearly describe the expected effect and its impact on the usual operations or activity of the agency in the statement of reasons in order to show their deliberations in determining the extent of the expected effect. Of course, it may sometimes be necessary to use general terms to avoid making the Statement of Reasons itself an ‘exempt document’ (s 26(2)).

WHETHER S.47C AND s.47E(d) ARE ENGAGED BY THE DRAFTS

27. My inspection of the drafts and associated documents including source documents, satisfies me that all of them are conditionally exempt under both s.47C and s.47E(d) of the FOI Act. From the earliest draft to the penultimate draft, they are documents of a deliberative nature. They are classified, a matter which is known to those who prepare

them, and they are progressively amended, supplemented, and refined as they pass through the drafting proceed. Each draft is in effect a recommendation by its author or authors, intended to be submitted to others in due course for their consideration. They therefore engage s.47C.

28. The reasons indicated in the evidence for the drafts being classified are various. To effectively declassify the drafts, by releasing them under the FOI Act in this case, and in the case concerning Bangladesh, the review in which was heard at the same time as this review, would frustrate the processes determined upon by DFAT for the preparation of country information reports prepared for protection determination purposes. It would also have an effect on the processes followed by DFAT for the future preparation of country reports. The effect in both respects, would be a substantial adverse effect within the meaning of s.47E(d), so that that provision is also engaged. Some incorrect drafts would be released, if the drafts were released. Experts within DFAT or within intelligence agencies or the post will not have checked some drafts. That risks detracting from the final report, if the drafts are released. The drafts contain some matter which if released, would or could reasonably be expected to damage Australia's bilateral relations. The drafts are progressively vetted, so that in DFAT's estimation, the final report may be relied upon by decision-makers. Earlier drafts have not been refined to that extent. Source information appears in some reports and DFAT expressly or impliedly undertook not to reveal non-open sources. Releasing the drafts with source information would prejudice the ability of DFAT to obtain such information in the future. Merely to remove names would not necessarily protect sources of particular information because particular information may lead to the identification of its source. Foreign diplomats who communicated information to DFAT did so on understandings as to confidentiality of the communication.

29. Releasing drafts in these proceedings could affect not only the past, but also the future. DFAT may be obliged to change its processes radically if the drafts are made available in this case. For example, junior officers who do initial leg-work may no longer be able to be involved and more senior and specialised officers may need to be involved in the early stages, with a consequent disturbance to their schedules. Dr Lee gave evidence as to the likely effect, in his opinion, of releasing the drafts in this case on DFAT's future processes in relation to country reports.

30. For those reasons I also conclude that the release of the drafts would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of DFAT, to use the language of s. 47E(d) of the Act. The words "would or could reasonably be expected to" have been authoritatively construed in relation to s.33(a)(iii) of the Act, as is discussed below, and I have assumed the same meaning for the expression in s.47E(d).

31. Both s.47C and s.47E(d) are conditional exemptions, and sections 11A(5) of the Act, together with s.11B of the Act, read together with the objects provisions, particularly s.3. Those provisions are as follows:

Section 3:

Objects — general

> *(1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth, by:*
>
> > *(a) requiring agencies to publish the information; and*
> >
> > *(b) providing for a right of access to documents.*
>
> *(2) The Parliament intends, by these objects, to promote Australia's representative democracy by contributing towards the following:*
>
> > *(a) increasing public participation in Government processes, with a view to promoting better-informed decision-making;*
> >
> > *(b) increasing scrutiny, discussion, comment and review of the Government's activities.*
>
> *(3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.*
>
> *(4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.*

Section 11A(5)

> *(5) 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.*

Section 11B

Scope

(1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).

(2) This section does not limit subsection 11A(5).

Factors favouring access

(3) 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.

Irrelevant factors

(4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:

(a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;

(b) access to the document could result in any person misinterpreting or misunderstanding the document;

(c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;

(d) access to the document could result in confusion or unnecessary debate.

Guidelines

(5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

32. S.11B(5) requires regard to be had to the guidelines published by the Information Commissioner. Those guidelines include at 6.4-6.6 the following:

6.4 There is a single public interest test to apply to each of the conditional exemptions. This public interest test is defined to include certain factors that must be taken into account where relevant, and some factors which must not be taken into account

6.5 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.*

6.6 It is not necessary for a matter to be in the interest of the public as a whole. It may be sufficient that the matter is in the interest of a section of the public bounded by geography or another characteristic that depends on the particular situation. A matter of particular interest or benefit to an individual or small group of people may also be a matter of general public interest.

THE SUBMISSIONS OF THE APPLICANT ON THE PUBLIC INTEREST

33. Mr Varess, who instructed Mr Mostafa of counsel for the applicant gave evidence that in his experience decision-makers often place considerable reliance on DFAT country information reports, and the respondent did not put that evidence in issue. I accept that evidence of Mr Varess.

34. The main point made by the applicant on the question of the public interest was that assessments made by DFAT should be “interrogatable” so that claimants for protection status would be able to ascertain the basis of those assessments, in effect, for the purpose of challenging them in an appropriate case. He submitted that on the basis of DFAT assessments being opaque, those affected adversely by them without knowing how they were arrived at were at a disadvantage. He referred to the Information Commissioner’s guidelines, and submitted that the release of the documents would enhance scrutiny and shed light upon the reasons for government decision-making.

35. Mr Mostafa submitted that the release of drafts would not produce an undesirable consequence because a decision-maker would know that a draft was only a draft and would not prefer a draft to a final version. He submitted that redactions could overcome arguments made by the respondent about dangers (such as the suggestion that the release of drafts may impede the future gathering of information by the respondent) which release of the drafts might occasion.

36. Mr Mostafa also stressed in his submissions that it is for the respondent to discharge an onus in accordance with s.61(1)(b) of the FOI Act. In that connection he referred to the decision of DP Forgie in *O'Sullivan and Australian Federal Police* [2011] AATA 188 at [45] and following.

THE SUBMISSIONS OF THE RESPONDENT ON THE PUBLIC INTEREST

37. Mr Justin Davidson, who appeared for the respondent, submitted that the release of the drafts would tend to undermine the policy objective of the country reports being the authoritative statement, such that decision-makers might rely upon any differences between the drafts and the final published report, so that decision-making in the area may no longer be consistent, as is the intention of the making of a direction under s.499 of the *Migration Act 1958.*

38. He also submitted, referring to evidence to be called in the review, that if the drafts were released, that would have an impact on the comprehensive and rigorous way in which they are prepared at present. The respondent accepted that to give access to the drafts will promote understanding of how the final country information was arrived at, but submitted that such access would come at too high a cost.

39. He referred also to the need to protect sources, submitting that mere redaction of the name of the source would not be sufficient to protect their identity, because they may be identifiable by reason of the particular information attributed to a source in the drafts. This is a matter to which evidence was directed in confidence.

40. Mr Davidson also put submissions about the drafts insofar as they were identical with the final published country information report. He submitted that although such parts of the drafts are not exempt, the work of their dissection from the drafts would not be practicable

within the meaning of s.22(1)(c) of the FOI Act. I should say at once concerning this submission that my examination of the draft documents, which number 102, and which extend to some 2800 pages, certainly suggests that such a task would be very onerous and time consuming. Such a limited disclosure would be of no use to the applicant, such that to give access to those parts of the drafts which found their way into the final published version would disclose information that would reasonably be regarded as irrelevant to the FOI request. In my opinion, a task which would, if done, tell the applicant nothing about the balance of the contents of the drafts. It would reasonably be regarded as irrelevant to the request and it is not reasonably practicable for the agency to do it.

41. It should also be mentioned that the applicant submitted after the hearing was concluded that the effect of certain subsequent statements attributed to government spokesmen was to recognise that matters dealt with in evidence at the hearing as to the relationship with China have changed since that time. The respondent submitted to the contrary. No application has been made to reopen the evidence before the Tribunal. It is the Tribunal's duty to attend to the evidence before it, and a suggestion such as that made in correspondence by the applicant would require the re-opening of the case.

CONSIDERATION

42. I accept that on balance, it is not in the public interest that the drafts should be disclosed.

43. In the interests of brevity, I will call that finding, which arises with other documents listed in Exhibit A as well, the public interest finding. Unless otherwise stated that shorthand expression will incorporate the proposition that my reasons are the same as those for the draft reports, set out below.

44. I received evidence in confidential session from Ms Lawson which satisfies me that a number of the drafts contain statements which if released, would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth, thus attracting an unconditional exemption under s.33(a)(iii) of the FOI Act. However, because I make the public interest finding none of the draft documents, all of which engage s.47C and s.47E(d) will be released, and in these reasons it is not necessary to deal with s.33(a)(iii) in relation to the drafts.

45. It seems to me that the reasons I have given for finding that the drafts are exempt under s.47E(d) also bear on the public interest question.

46. Drafts, particularly earlier drafts contain errors of fact or evaluation, including omissions of necessary qualifications which were weeded out by more senior officers as the drafts were refined. Release of drafts containing errors may detract from the authority of the final reports, and confuse or mislead decision-makers.

47. As is shown in the confidential evidence of Ms Lawson, there are remarks in some of the drafts which if released in their present form, would or could reasonably be expected to cause damage to Australia's bilateral relations with the country in question. Once the drafts had been vetted from that point of view, the department was satisfied that if the comments lead to challenges from the country in question, DFAT will be able to defend them in the language in which they are cast.

48. The work of those who prepared draft reports was done on the basis that it will be considered by others from a variety of different points of view. They know all drafts are classified and that their work will be checked by superiors. If it had been otherwise, they may have been hesitant to frankly state their views. A wholesale change in Departmental processes, so that senior and more experienced drafters would be required to be involved at all stages would no doubt be disruptive, and that would be contrary to the public interest.

49. In the construction of an Act, context and purpose are generally to be taken into account. As was remarked in *Kline v Official Secretary to the Governor-General* [2013] HCA 52; (2013) 249 CLR 645; at [37] the FOI Act "does not pursue its objects, as legislative purposes, at any cost". Rather, as French CJ, Crennan, Kiefel and Bell JJ explained:

> *'… The statutory scheme is complex in achieving a balance between the exposure of some government processes and activities to increased public participation and scrutiny, by making information freely available to persons on request, and exempting other government processes and activities from public participation and scrutiny, in order to secure a competing or conflicting public interest in non-disclosure.'*

50. As was observed by Gleeson CJ in *Carr v The State of Western Australia* [2007] HCA 47; (2007) 232 CLR 138 at 143 [5]:

> *'Another general consideration relevant to statutory construction is one which I referred in Nicholls v R. It was also discussed, in relation to a similar legislative scheme, in Kelly v R. It concerns the matter of purposive construction. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object. As to federal legislation, that approach is required by s 15AA of the Acts Interpretation Act 1901 (Cth) (the Acts Interpretation Act). It is also required by corresponding state legislation, including, so far as presently relevant, s 18 of the Interpretation Act 1984 (WA). That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.*

51. It should also be mentioned that in accordance with s.61 of the FOI Act, the onus rests upon the respondent to establish that the decision is justified, or that the Tribunal should give a decision adverse to the applicant. This provision was recently discussed by Perry J, sitting as a Deputy President of the Tribunal in *Secretary, Department of Prime Minister and Cabinet and Summers* [2019] AATA 5537 at [39]-[47].

52. Her Honour there said:

> *[39] It was not in issue that, by virtue of s 61(1)(a) of the FOI Act, the onus lies upon the Department on this review of establishing that the decision of the Information Commissioner is not justified, or that the Tribunal should give a decision adverse to the applicant in relation to the request for access. That provision does not specify that the onus must be discharged on the balance of probabilities or according to some other standard.*

*[40] The Department submitted in its SFIC at [44] that "*the phrase 'could reasonably be expected to' does not require the decision-maker to be satisfied, on the balance of probabilities, that the release of the document will cause damage of a relevant kind. What is required is a possibility (and not probability) of damage that is reasonably based and supported not only by assertion but by evidence of probative value*" (footnotes omitted). The respondent submitted that the onus of establishing that the exemptions are made out must be discharged by the Department on the balance of probabilities, relying upon the decision in* Fisse v Secretary, Department of the Treasury *[2008] FCAFC 188; (2008) 172 FCR 513 ; at [30] and [36] (Buchanan J) and [91] (Flick J) (citing with approval* Jorgensen v Australian Securities and Investments Commission *[2004] FCA 143; (2004) 208 ALR 73 ; (*Jorgensen*) at [65] (Weinberg J)): see the respondent's statement of facts, issues and contentions (****RSFIC****) at [16]; cf eg the approach adopted in* Sullivan v Civil Aviation Safety Authority *[2014] FCAFC 93; (2014) 226 FCR 555 ; at [115] (Flick and Perry JJ).*

[41] However, the decision in Fisse *concerned the question of whether the Tribunal had erred in holding that a report was exempt under s 34(1)(a) of the FOI Act on the ground that it was created for the purpose of consideration by, and was in fact submitted to, Cabinet, as well as s 36(1)(b) on the ground that disclosure would be contrary to the public interest because it would breach Cabinet confidentiality. Section 33, on the other hand, requires the Tribunal relevantly to engage in an evaluative task, namely, to determine whether, if disclosed, the document "*would, **or could reasonably be expected to**, cause damage*" to one of the enumerated interests. The answer initially given by Mr Howe QC for the Department to this difficulty was that the Tribunal must be satisfied on the balance of probabilities that damage to the international relations of the Commonwealth is a reasonable possibility (T, 21 March 2019 at 8.34–9.9) — a test, with respect, that makes little sense. On being further pressed, however, he submitted that "*basically your Honour simply needs to be satisfied as to whether or not the infliction of harm is a real possibility based upon matters of substance and not just mere assertion or allegation and the like*" (T, 21 March 2019 at 9.8–9). However, even to speak of "*a real possibility*" is to impose a gloss on the words of the section.*

[42] In this regard it is true that in Jorgensen *Weinberg J stated with respect to the onus imposed by s 61 of the FOI Act that it "*seems*" that the applicant has the onus*

*of proving that the decision to claim the exemption is justified "*on the balance of probabilities*", citing* Searle Australia Pty Ltd v Public Interest Advocacy Centre *(1992) 36 FCR 111 (*Searle*) at 116. It is also true to say that the grounds on which the exemption was claimed in* Jorgensen *included s 37(1)(b) of the FOI Act which provided that a document was exempt if its disclosure "*would, or could reasonably be expected to*" have certain effects. However, Weinberg J does not appear to have definitively decided the issue, but only to have indicated what "*seems*" to be the test. Nor, with respect and in any event, does the decision in* Searle *support the proposition that an applicant must establish that it is more probable than not that an exemption expressed in terms of reasonable expectations applies to the documents in question. To the contrary, the Full Court in* Searle *held that the words "*could reasonably be expected to*" in s 43(1)(b) and (c) of the FOI Act "*are ordinary words of the English language and are used in the sense in which they would be employed in common parlance*" (at 122). In so holding, the Full Court approved the approach of Bowen CJ and Beaumont J in* Attorney-General's Department v Cockcroft *(1986) 10 FCR 180 (*Cockcroft*) at 190 that:*

> *In our opinion, in the present context, the words "could reasonably be expected to prejudice the future supply of information" were intended to receive their ordinary meaning. That is to say,* ***they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous****, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act. It is undesirable to attempt any paraphrase of these words. In particular****, it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like****. To construe s 43(1)(c)(ii) as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an* ***unwarranted gloss*** *upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based: see* Kioa v West *[(1985) 159 CLR 550] per Mason J and per Gibbs CJ.*

> *The majority of the Tribunal thought an assessment of what was more probable than not was called for. As Woodward J has pointed out, there are difficulties in this approach for the legislature has chosen not to introduce the notion of a "probable" result: cf* Ex parte White; Re White *(1885) 14 QBD 600 . It is also unnecessary to consider whether an "even chance" or something of that kind is needed.* ***It is preferable to confine oneself to the language of the provision itself and to attempt to form an opinion, on the evidence, as to what can reasonably be expected to happen if disclosure occurs****. In our opinion, in departing from the terms of s 43(1)(c)(ii) and requiring the applicants to establish a case on the balance of probabilities, the majority of the Tribunal fell into error in their construction of the provision.*

(emphasis added)

[43] With respect to these passages, the Full Court in Searle *at 123 explained that:*

> *Their Honours did not suggest … that it was sufficient that there be a* ***possibility*** *not irrational, absurd or ridiculous that the specified consequence would occur. Their Honours specifically rejected that approach, saying that the words "could reasonably be expected" meant what they said. The practical application of their Honours' view will not necessarily lead to a result different from that proposed by Sheppard J [also in Cockcroft].*
>
> *In the application of s 43(1)(b), there would ordinarily be material before the decision-maker which would show whether or not the commercial value of the information would be or could be expected to be destroyed or diminished if the information were disclosed. It would be for the decision-maker to determine whether, if there were an expectation that this would occur, the expectation was reasonable.*

(emphasis in the original)

[44] Applying these principles, the Full Court in Searle *found at 123 that the Tribunal in that case had fallen into error:*

In par 58 of its reasons, the Tribunal said:

> *A decision-maker is required to make a judgment as to whether there is a 'reasonable' basis for a claim that disclosure of information would destroy or diminish the commercial value of such information, as distinct from something that is 'irrational, absurd or ridiculous'.*

However, the question under s 43(1)(b) is not whether there is a reasonable basis for a claim for exemption but whether the commercial value of the information could reasonably be expected to be destroyed or diminished if it were disclosed. These two questions are different. The decision-maker is concerned, not with the reasonableness of the claimant's behaviour, but with the effect of disclosure. The Administrative Appeals Tribunal failed to determine that question and erred in law in this respect.

[45] The Full Court's understanding in Searle *of the relevant passages in* Cockcroft *was subsequently approved by Hayne J in* McKinnon v Secretary, Department of Treasury *[2006] HCA 45; (2006) 228 CLR 423 ; (*McKinnon*) at [60] who held that:*

> *The expression "not irrational, absurd or ridiculous" is not synonymous with "reasonable grounds". Of course, absurd, irrational or ridiculous grounds are not reasonable grounds. But the words "reasonable grounds" do not denote grounds which are "not irrational, absurd or ridiculous". The statutory words are to be given their ordinary meaning. It will seldom be helpful, and it will often be misleading, to adopt some paraphrase of them.*

(See also McKinnon *at [129] (Callinan and Heydon JJ); and eg in the Tribunal,* Bui *at [15]–[17] (Allen SM).)*

[46] This view of the authorities is reflected in the Guidelines issued by the OAIC (the ***FOI Guidelines****) to which regard must be had by virtue of s 93A(2) of the FOI Act. Specifically, the FOI Guidelines state at [5.17] that the use of the word "*could*" in this context is less stringent than "*would*", and requires an analysis of the* **reasonable expectation** *rather than the certainty of an event or damage occurring: see also eg* Lobo *at [74] (Deputy President Forgie).*

[47] Applying the decisions in Searle *and* Cockcroft *and the FOI Guidelines, the question posed by s 33 is therefore (relevantly) whether disclosure of the Letters "*would, **or** could reasonably expected to*" cause damage to the international relations of the Commonwealth.*

53. Therefore Courts and this Tribunal are bound to construe s.33(a)(iii), and it follows, s.47E(d) of the Act as explained by the Full Court of the Federal Court in *Cockcroft*, noting the remarks of Hayne J in *McKinnon*.

54. Where s.47C is being considered, which uses different language, the Tribunal requires evidence which is relevant and rationally probative, rather than evidence which proves the matter on the balance of probabilities, although in practice, there is often little difference between the two. Under s.47C, in this case, the relevant facts appear from the terms of the documents in question itself, and their context.

55. The statements made in *Summers* affect not only the exemptions claimed under s.33(a)(iii) but those claimed under s.47E(d), which both use the language “would, or could reasonably be expected to”. The s.47C exemptions require the Tribunal to make factual and evaluative determinations, and for that purpose, the Tribunal requires relevant and rationally probative evidence.

56. S.11A (5) of the Act has a temporal element. The public interest question should be decided at the date of these reasons.

57. I accept the submissions of Mr Davidson for the respondent on the public interest question in relation to the drafts.

58. Mr Mostafa’s submissions summarised in paragraph [34] above suggested that applicants seeking a protective determination were at a disadvantage if they wished to challenge adverse comments in a final report published by DFAT, which the decision-maker is bound to take into account. Decision-makers are not bound by a DFAT report and they may access the reports concerning the same country, here China, of other countries, such as the United Kingdom and the United States State Department, Canada and non-government organisations. In the MRD, such reports are available through the AAT library. Delegates dealing with protection determinations have access to similar reports from the COISS section of their department. Applicants may give evidence of their own experience in the country in question, or lead evidence from others, if it happens that a suggestion they wish to make of a factual matter differs from a DFAT assessment in a country report.

59. No evidence was led before me that any applicant was in fact disadvantaged by the statements in any DFAT report. Nor was Dr Lee challenged on his evidence that DFAT had an independent role in the preparation of the reports and strove to make its assessments rigorous and defensible. He said that DFAT takes very seriously its responsibility to ensure that the information on which decision-makers rely is as accurate as possible. He added that the Head of Mission has a formal clearance role and must confirm that the information, analysis and assessments contained in the draft final report are accurate and fairly portrayed, before the final report is published. I accept Dr Lee's evidence.

60. It is true that the practice of DFAT is not to identify source information for statements in the published report. DFAT must protect its confidential sources, and not revealing sources enables it to do so. Identifying all open sources might perhaps make that task somewhat more difficult. Whether or not to identify open sources assessed to be reliable is a matter, in my opinion, for individual countries, including this country, to decide when drafting final country reports.

61. Those are my reasons for finding that, on balance, it is not in the public interest to disclose the draft reports.

62. The cross-examination of Dr Lee by Mr Mostafa, dealt, amongst other things, with the different position of a remark in a draft report attributed in a footnote to an open source. If the open source document were assessed by DFAT to be reliable, and the open source found its way into the final published report, Dr Lee agreed that the footnoted open source could be released without damage in the respects discussed in paragraphs 32-74 of his affidavit. In the light of that evidence a further document has been prepared by DFAT and is to be provided by DFAT to the applicant upon the publication of these reasons. It no longer forms part of this review. The preparation of the document in this case, and the similar document in LHTT, which concerns the Bangladesh report and its drafts, occasioned much delay in the provision of these reasons. I mention that in another case, that kind of delay may justify a practical refusal reason to justify a refusal to provide such documents.

ASSOCIATED DOCUMENTS, INCLUDING DOCUMENTS COMMENTING ON DRAFT REPORTS

63. For the most part these documents bear a relationship to the drafts, including commentary by various persons. Where I have found that s.47E(d) applies to documents in this group and stated that it is not in the public interest for them to be disclosed, my reasons for the finding as to the public interest are the same as I have given above in relation to the drafts.

64. Exemption for documents 101-104 is claimed under s.47E(d) and s.33(a)(iii).The reviewable decision describes the exemptions for these documents in paragraphs 79-81 as follows:

> *Unofficial translations*
>
> *79. The documents also include some unofficial translations of Chinese documents (for example, legislation or policy). Such documents are not a definitive record and are not prepared for public distribution. This information is also referred to in Departmental reporting (for example, in a cable) that refers to the government document but based on the unofficial translation. These documents, by nature of their significance to protection visa concerns, involve sensitive issues where unintended harm to Australia's international relationships may flow from an incorrect interpretation, particularly if the context is not understood.*
>
> *Section 33*
>
> *80. I consider disclosure of such material would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth of Australia by impeding the ability to maintain good working relations with the Chinese Government and international organisations. I have therefore decided this material is exempt under s 33(a)(iii) of the FOI Act.*
>
> *Section 47E(d)*
>
> *81. I also consider that disclosure of this material risks sources being identified, and would therefore hamper the Department's ability to obtain this information in the future. Disclosure may also lead to different views about the accuracy of the translation, which could be used to challenge a country information report and undermine the intended operation under the Ministerial Direction. This would in turn, have a substantial adverse effect on the Department's proper and efficient conduct of its operations in sourcing information from other countries. I therefore consider this material is conditionally exempt under s 47E(d) of the FOI Act. I accept public interest factors from*

disclosure include that disclosure would promote the objects of the FOI Act and inform the community of the Government's operations. However, I give greater weight to not damaging Australia's international relations or impeding the future flow of such information.

65. Those remarks are cast at a general level. I have received confidential evidence from Ms Lawson on the subject-matter of the documents with greater particularity and have examined them. Ms Lawson's evidence satisfies me that the documents are exempt under s.47E(d). For reasons also appearing from the confidential evidence of Ms Lawson, it is not, on balance, in the public interest for the documents to be released. Ms Lawson's evidence also satisfies me that at least in part the documents are also exempt under s.33(a)(iii) but it is not necessary further to discuss that matter.

66. Document 105 is a set of notes. They are deliberations associated with the draft country information reports, and are claimed to be exempt under s.47C and s.47E(d). As to s.47C they are opinions, or advice prepared in the course of deliberative processes. Their release would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of DFAT, in the same way and for the same reasons as documents 1-100, 195 and 196. I make the public interest finding.

NAMES OF OFFICERS AND SOURCES

67. As mentioned earlier, the applicant stated that names of junior officers and names of sources are not sought. As to the names of Commonwealth officers, in my opinion, they are all exempt. Section 47F provides for a conditional exemption if disclosure of personal information about any person is unreasonable, and for the most parts the documents in question are exempt and the public interest does not favour their release. It is unreasonable to reveal the names of officers who authored the documents or who are mentioned in them. It follows from the fact that some of the documents themselves will not be released that there is no public interest in revealing the names of Commonwealth officers who were their authors. The applicant in paragraphs 6 and 7 of the FOI request in effect seeks to interrogate the respondent about the names of senior officers involved in sign-off. Some information has in fact been led by Dr Lee to the effect that the Head of

Mission has a sign-off role and that he himself has a role in the matter. The FOI Act is concerned with documents not interrogatories. Exhibit A does not include any sign-off documents and nor does the FOI request. As to sources, not only should their names be released but the sources may be evident from the nature of the information in question, and the sources from a country may be at risk if their identity is revealed directly or indirectly. Moreover the implicit or explicit confidentiality agreed to by DFAT is a sufficient reason to keep such details secret.

SOURCE DOCUMENTS AND COMMENTARY DOCUMENTS

68. These documents fall within a number of categories. Insofar as the redactions exclude names of junior personnel or sources, the applicant does not oppose any such redaction, which therefore will pass without mention. For reasons just mentioned, I would reject access to the names of more senior officers.

69. Documents 101-104 are source documents, for which exemption is claimed under s.47E(d) and s.33(a)(iii). The confidential evidence of Ms Lawson satisfies me that they are exempt on both bases. Since s.33(a)(iii) is not a conditional exemption it is not necessary to make public interest findings.

70. Document 105 is in a similar category to the draft reports in that it constitutes a set of notes on the subject matter of draft country reports and is claimed to be exempt under s.47C and s.47E(d). Those sections are engaged, and it is not, on balance, in the public interest that they be disclosed for substantially the same reasons as apply to the draft country reports. I will summarise this finding below as the public interest finding, which also incorporates, where relevant, a finding that it is contrary to the public interest for the identity of a source providing information in confidence to DFAT to be publicly released.

71. Document 106 is an email chain claimed to be exempt in full on various grounds. Some of it is irrelevant to the FOI request and is therefore exempt under s.22 of the FOI Act. Some of it is unconditionally exempt under s.7(2A) of the Act. The main purpose of the email chain is to attach and discuss the contents of draft report 33. It attracts s.47C and s.47E(d). I also make the public interest finding.

72. Document 107 is a commentary document discussing issues dealt with in the draft reports which is exempt under s.47C and 47E(d). I make the public interest finding.

73. Documents 108 and 109 are notes of meetings with sources in China, and are in my opinion wholly exempt under s.33(a)(iii) in that their disclosure would or could reasonably be expected to cause damage to the international relations of the Commonwealth, for reasons given in the confidential evidence of Ms Lawson. Redactions of names would not avoid identification of sources because of the content of the information.

74. Parts of the email exchange in document 110 are irrelevant. Other parts are asserted to be conditionally exempt under s.47E(d), and s.47C. Those parts of the email chain which are not irrelevant are conditionally exempt under those sections. I make the public interest finding.

75. Document 111 is an email chain which attracts an unconditional exemption under s.7(2A) of the FOI Act in part. As to the balance of it, discusses a draft report and is exempt under s.47E(d). I make the public interest finding.

76. The email exchanges in documents 112 and 113 contain emails commenting or quoting comments made by others about draft country reports. They are, like the drafts, conditionally exempt under s.47E(d) and s.47C of the Act. I make the public interest finding. To a minor extent, there is also matter within the emails which is irrelevant to the FOI request.

77. Document 114 is an email exchange with a source, exempt under s.47F(1) and s.47E(d), on a subject matter dealt with in draft reports. The implicit confidentiality of the emails is clear and disclosure of the exchange would breach such confidentiality, to the detriment of the conduct of the operations of DFAT, because persons who communicate on such a basis with DFAT expect their communications to remain private. For that reason it is on balance, contrary to the public interest for the exchange to be publicly released.

78. Document 115 consists of internal commentary on a draft report which is exempt under s.47E(d). I make the public interest finding.

79. Document 116 is exempt under s.7(2A) of the FOI Act.

80. Document 117 is an email exchange with a source exempt under s.47F(1) and s.47E(d). I make the public interest finding.

81. Document 118 is wholly exempt under s.7(2A) of the Act.

82. Document 119 consists of internal commentary within DFAT upon drafts which is exempt under s.47E(d). I make the public interest finding.

83. Document 120 contains commentary on a draft report which is exempt under s.47E(d). I make the public interest finding.

84. Document 121 makes comment upon or alterations to a draft and is exempt under s.47E(d). I make the public interest finding.

85. Document 122 is a map which is, for reasons explained in the confidential affidavit of Ms Lawson, matter exempt under s.33(a)(iii) of the Act.

86. Documents 123-125 are proved to be exempt at the present time under s.33(a)(iii) in the confidential evidence of Ms Lawson, which I accept.

FRAMEWORK DOCUMENTS

87. Documents 126-130 are within the categories discussed in the evidence of Mr Luke Mansfield, First Assistant Secretary of the Refugee, Humanitarian and Settlement Division within the Department of Home Affairs. In paragraphs 28-34 of his affidavit, Mr Mansfield expressed concerns about the release of those documents which indicate knowledge gaps within the Department of Home Affairs. Such information is not revealed publicly by the Department in the detail contained in the Framework Documents which are documents 126A, 126B, 127 and 128. Exemption is claimed for those documents under s.47E(d) amongst others. Mr Mansfield said that if the documents were released publicly, it is unlikely that the Department would provide information in this format to DFAT in the future, specifically information relating to issues, gaps, risks and sensibilities, which would in turn limit DFAT's ability to gather relevant information for country information for protection status determinations. He said the harm arising from the public release of this information would be too significant.

88. Mr Mansfield's position makes him well-placed to express those views and I accept them. His cross-examination by Mr Mostafa extended to the concern expressed by Mr Mansfield that non-genuine applicants might seek to exploit gaps in the knowledge of the Department of Home Affairs in claims that they were entitled to protection. Mr Mansfield expressed in the witness box a similar concern about knowledge gaps becoming known to criminal syndicates and people smugglers. He was asked why that remark was not made in his affidavit and said that he had been reflecting on the matter since he affirmed his affidavit.

89. Mr Mansfield also expressed concern that the Framework documents might reveal information about small cohorts of protection status claimants.

90. The exemptions claimed for the Framework Documents based upon s.47E(d) appear to me to be correct both in relation to the Department of Home Affairs and in relation to DFAT, and their public release would, on balance be contrary to the public interest for reasons given in Mr Mansfield's evidence to which I have referred.

91. The confidential evidence of Ms Lawson also satisfies me that documents 126A-128 are exempt under s.33(a)(iii) of the Act.

92. Document 129 is a draft cable, information about which appears in document 130. It appears to contain deliberative matter within s.47C of the Act, and to reveal knowledge gaps within Home Affairs, so as to be within the scope of Mr Mansfield's expressed concerns and therefore to be a document which is not in the public interest to disclose.

93. Document 130 is related. To the extent to which it contains relevant matter, it is exempt on a number of bases, including s.47E(d) and because it reveals knowledge gaps on the part of Home Affairs, it is contrary to the public interest to release it for reasons given in Mr Mansfield's evidence.

DOCUMENTS 152, 154, 156, 157 AND 159

94. Document 152 and document 154 redact references to documents 101-104 which I have found to be exempt and not in the public interest to disclose. Those redactions are consequential upon the exemptions allowed above.

95. Document 156 redacts the caseload numbers in the MRD of the AAT which is exempt under s.33(a)(iii) for reasons given in Ms Lawson's evidence concerning document 177.

96. Document 157 redacts those parts of an email chain consisting of communications with a source, exempt under s.33(b) and s.33(a)(iii) and conditionally exempt under s.47E(d).

97. Document 159 redacts another email with a source, also exempt under s.33(a)(iii) and conditionally exempt under s.47E(d). Document 159 is a communication impliedly in confidence from an international organisation to a person receiving the communication on behalf of the respondent and is therefore within the unconditional exemption set out in s.33(b) of the FOI Act. As to the question of the communication being impliedly in confidence, I have relied upon paragraph 46 of Dr Lee's affidavit of 31 October 2019 and certain of the contents of the document and its predecessor email.

DOCUMENTS 161-163

98. The redactions from document 161 and 162 are, in the light of the confidential evidence of Ms Lawson, clearly exempt under s.33(a)(iii) of the Act. Portions of the communications are irrelevant to the request.

99. Most of the redactions from document 163 are similarly exempt under s.33(a)(iii) of the Act, as explained in Ms Lawson's confidential evidence. A small portion of the document is exempt under s.47E(d) and it is not in the public interest for it to be disclosed for reasons which appear from Mr Mansfield's evidence.

DOCUMENTS 167 AND 168

100. The redaction from document 167 engages the exemption contained in s.47E(d) of the Act and it is not in the public interest to disclose it for reasons explained in paragraph 64 of Ms Lawson's confidential affidavit.

101. The redactions from document 168 engage s.47F(1) of the Act and it is not in the public interest to disclose those passages for reasons explained in paragraph 64 of Ms Lawson's confidential affidavit.

DOCUMENTS 172, 173, 174, 176-178, 180 AND 182

102. Document 172 is properly redacted as to matter which is irrelevant to the FOI request.

103. From document 173 a name is redacted and the applicant does not press for release of the name. Matter is also redacted from an email forming part of the document which is properly redacted on the ground of irrelevance to the request.

104. The same applies to document 174, which redacts a name, to which the applicant does not seek access, and also redacts matter irrelevant to the request.

105. Document 176 is an email from Home Affairs asserting that in a published country report, errors were made. Submissions made by the respondent after the hearing copied to the applicant indicate that the redacted parts of the document are in the category of commentary and deliberations upon a future country report correcting the then existing country report. The redacted portions of document 176 are exempt for the same reasons as commentary upon a draft country report is exempt. I make the public interest finding.

106. The confidential evidence of Ms Lawson satisfies me that those parts of documents 177 and 178 redacted are exempt under s.33(a)(iii) of the FOI Act.

107. Document 180 redacts names not pressed by the applicant, matter which is irrelevant to the request, deliberative matter which is conditionally exempt under s.47C, and for which I make the public interest finding. It also contains matter which is exempt under s.33(a)(iii) for reasons mentioned in the confidential parts of Ms Lawson's affidavit. The document also contains matter which is exempt under s.47E(d) for reasons explained in paragraphs 28-34 of Mr Mansfield's affidavit which also show why it would be contrary to the public interest to disclose the redacted portions.

108. The exchange of emails in document 182 has been released in part and the parts released show the applicant the subject of the chain. The parts redacted are claimed to be exempt under s.47E(d) and s.47C and in one case also under s.33(a)(iii). The communications were between DFAT and the COISS section of the Department of Home Affairs, the function of which is to provide decision-makers with up to date open source country of origin information as a supplement to DFAT's country information reports. The parts redacted from the documents released include discussion of matters not cleared for publication by senior management within DFAT, and which touch upon sensitive issues

such as human rights, dealt with in final country information reports where they are fully researched and DFAT is satisfied that it can defend the text if China may express concern about, or disagreement with, matter in the (final) country reports. The evidence before the Tribunal suggests that while accuracy is not sacrificed, care is taken with the language in which sensitive matters are discussed in the final reports. That care is not necessary to be taken with drafts or the remarks redacted from document 182, and recommendations and opinions by individuals, whether from Home Affairs or DFAT, about future country reports and the language in which they might be expressed are very similar to draft country reports which I have found it, on balance, not to be in the public interest to release under the Act. Because I find that it is not in the public interest to release the redacted portions of document 182 it is not necessary to decide whether release of portions of the document are in any event exempt under s.33(a)(iii).

DOCUMENTS 188 AND 189

109. These documents have been released in part and the redacted portions are said to be exempt under s.47E(d), upon the ground that their release would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency, namely Home Affairs. Framework documents issued by Home Affairs are exempt for reasons explained in the affidavit of Luke Mansfield of 29 October 2019 at paragraphs 28-34. Caseload information, provided by the former Refugee Review Tribunal falls into a similar category. The redacted portions of documents 188 and 189 are exempt for reasons specified in correspondence after the hearing by the respondent copied to the applicant. I make the public interest finding.

CONCLUSION

110. For all of those reasons the reviewable decision will be affirmed.

I certify that the preceding 110 (one hundred and ten) paragraphs are a true copy of the reasons for the decision herein of Deputy President B W Rayment OAM QC

....................[sgd]..

Associate

Dated: 2 March 2022

Date(s) of hearing:	**17, 18, 19 February 2020**
Date final submissions received:	**14 February 2022**
Counsel for the Applicant:	**Mr B Mostafa**
Solicitors for the Applicant:	**Varess**
Counsel for the Respondent:	**Mr J Davidson**
Solicitors for the Respondent:	**Australian Government Solicitor**

Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Raiz and Professional Services Review [2021] AATA 4360 (25 November 2021)

Division:	FREEDOM OF INFORMATION DIVISION
File Number:	**2020/1115**
Re:	**Danny Raiz**
	APPLICANT
And	**Professional Services Review**
	RESPONDENT

DECISION

Tribunal:	**Deputy President Britten-Jones**
Date:	**25 November 2021**
Place:	**Melbourne**

The Tribunal notes that on 2 July 2021 the decision dated 5 July 2019 was partially set aside and substituted. With respect to the remaining documents in dispute, the Tribunal affirms the decision of 5 July 2019.

....

Deputy President Britten-Jones

Catchwords

FREEDOM OF INFORMATION – review of decision of Professional Services Review that documents are partially or wholly exempt – documents relate to investigations of Professional Services Review into applicant's possible inappropriate medical practice – documents conditionally exempt under sections 47C and 47E(d) of the Freedom of Information Act 1982 – documents exempt under s 42 of the Freedom – consideration of immunity provisions – disclosure of documents would be against the public interest – the decision under review is affirmed

Legislation

Freedom of Information Act 1982 (Cth)

Health Insurance Act 1973 (Cth)

Cases

Dreyfus and Secretary Attorney-General's Department [2015] AATA 962

Dr Pradhan v Holmes (in his capacity as the Director of Professional Services Review) [2001] FCA 1560; (2001) 125 FCR 280

Esso Australia Resources Ltd v Commissioner for Taxation [1999] HCA 67; (1999) 201 CLR 49

Herijanto v Refugee Review Tribunal [2000] HCA 21; (2000) 170 ALR 575

Kline v Official Secretary to the Governor-General [2013] HCA 52; (2013) 249 CLR 645

Muin v Refugee Review Tribunal [2002] HCA 30; (2002) 190 ALR 601

Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development and Training Centre Pty Ltd [2001] FCA 1375; (2001) 114 FCR 301.

Secondary Materials

The FOI Guidelines under s 93A of the Freedom of Information Act 1982

REASONS FOR DECISION

Deputy President Britten-Jones

25 November 2021

INTRODUCTION

1. This is an application for review of a decision made by the Professional Services Review (**PSR**) on 5 July 2019 to refuse access to certain parts of documents under the *Freedom of Information Act 1982* (Cth) (**the Act**).[1] The respondent (the PSR) decided to provide to the applicant (Dr Raiz) some of the requested documents, in whole or in part, and found that other documents were exempt from disclosure.

2. The documents were created in the context of the Professional Services Review Scheme (**PSR Scheme**) established by Part VAA of the *Health Insurance Act 1973* (Cth) (**HI Act**). This is a scheme that reviews and investigates instances where a Medicare, dental or pharmaceutical benefit has been claimed by practitioners for the provision of services and there is suspected 'inappropriate practice'.

3. On 7 August 2019, Dr Raiz applied to the Australian Information Commissioner for review of the decision of 5 July 2019. A delegate of the Australian Information Commissioner decided not to undertake a review of the decision in accordance with s 54W of the Act.

4. On 27 February 2020, Dr Raiz applied to the Tribunal for review of the decision of 5 July 2019. Since Dr Raiz filed his application, the PSR has further reviewed the documents in dispute and has either wholly or partially released additional documents.

Freedom of Information Requests

5. On 7 May 2019, Dr Raiz made a freedom of information (**FOI**) request to the PSR for documents relating to the PSR Scheme investigation into his provision of services for suspected 'inappropriate practice'. Dr Raiz requested the following documents:

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[1] All references to legislation are to the *Freedom of Information Act 1982* (Cth) unless otherwise stated.

(a) copies of all internal correspondence of the PSR relating to PSR Committee No.1095 from 1 January 2014 to the date of the request;

(b) to the extent not covered in (a), any other internal correspondence of the PSR relating to Dr Danny Raiz including to or from the Director of the PSR from 1 January 2014 to the date of the request;

(c) copies of correspondence between any third party and any representative of the PSR relating to Dr Danny Raiz or PSR Committee No 1095 (excluding correspondence from Collins & Collins lawyers) from 1 January 2014 to the date of the request;

(d) copies of instruments of appointment of the members of the PSR Committee No. 1095, including ministerial delegations and the specific appointments by the date of the request;

(e) documents setting out policy guidance for reviews of inappropriate practice under section 82 of the *Health Insurance Act 1973*; and

(f) documents setting out KPIs, financial targets or projected estimates for recovery of funds by the PSR for the financial years to present.

6. The PSR provided a schedule of documents on 17 June 2020 that outlined the documents for which the claim for exemption related and the provisions of the Act that they relied upon for the exemption.

7. Some documents were exempted because they contained personal information including mobile phone numbers, passwords, names and identifying details of the consultants to the Director. On 2 July 2021, the Tribunal directed by consent of the parties that certain documents be released to the applicant with personal information redacted. The respondent filed an amended schedule (**Schedule**) on 28 June 2021 (exhibit 3) that outlines the documents that remain in dispute. This Schedule, although prepared by the respondent, was based on [18] of the Application and Outline of Submissions filed by Dr Raiz on 1 June 2021. At the hearing on 30 June 2021, counsel for Dr Raiz confirmed that information about third parties was not being pursued. After the hearing, the respondent provided terms of an agreed order to reflect the final position of the parties. On 2 July 2021 the Tribunal made the directions, the terms of which the parties had agreed. The

respondent then provided the Tribunal with an email of the disputed documents with shading to reflect those parts of the documents in dispute.

STATUTORY FRAMEWORK

Freedom of Information Act 1982

8. The High Court considered the legislative framework of the Act in *Kline v Official Secretary to the Governor-General*: [2]

> *… The statutory scheme is complex in achieving a balance between the exposure of some government processes and activities to increased public participation and scrutiny, by making information freely available to persons on request, and exempting other government processes and activities from public participation and scrutiny, in order to secure a competing or conflicting public interest in non-disclosure.*

9. The general objects of the Act are set out in s 3 as follows:

> *(1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth, by:*
>
> *(a) requiring agencies to publish the information; and*
>
> *(b) providing for a right of access to documents.*
>
> *(2) The Parliament intends, by these objects, to promote Australia's representative democracy by contributing towards the following:*
>
> *(a) increasing public participation in Government processes, with a view to promoting better-informed decision-making;*
>
> *(b) increasing scrutiny, discussion, comment and review of the Government's activities.*
>
> *(3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.*
>
> *(4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.*

10. To promote the objects in s 3(1)(b), s 11(1) provides that:

> *Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:*

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[2] [2013] HCA 52; (2013) 249 CLR 645, 661 at [37].

(a) a document of an agency, other than an exempt document; or

(b) an official document of a Minister, other than an exempt document.

11. Section 11A(3) provides that where a person makes a request in accordance with s 15(2) to an agency or Minister for access to a document and pays the required charge, the agency or Minister must give the person access to the document in accordance with the Act 'subject to this section'.

12. Section 11A(4) provides that the agency or Minister is not required to give the person access to the document if the document is an exempt document.

13. The term 'exempt document' is defined in s 4(1) to include: 'a document that is exempt for the purposes of Part IV (exempt documents) (see section 31B)'. Section 31B provides that:

A document is exempt for the purposes of this Part if:

(a) it is an exempt document under Division 2; or

(b) it is conditionally exempt under Division 3, and access to the document would, on balance, be contrary to the public interest for the purposes of subsection 11A(5)

14. If a document is exempt, the agency is not required to provide the document.

Public interest test

15. Section 11A(5) provides the following:

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 public interest.

16. Section 11B(3) outlines the public interest factors in favour of granting access to the document including whether the grant would:

(a) promote the objects of the Act (including all the matters set out in ss 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.

17. Under s 11B(4), a decision maker must not take the following factors into account when determining whether the release of a document would be contrary to the public interest:

(a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;

(b) access to the document could result in any person misinterpreting or misunderstanding the document;

(c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;

(d) access to the document could result in confusion or unnecessary debate.

FOI Guidelines: Public Interest

18. Section 93A requires the Tribunal to have regard to any guidelines issued by the Information Commissioner. Paragraphs 6.5 and 6.6. of the Freedom of Information Guidelines (**Guidelines**) set out the general principles regarding what is in the public interest:

- 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 (because what constitutes the public interest depends on the particular facts of the matter and the context in which it is being considered); and
- it is not necessary for a matter to be in the interest of the public as a whole. It may be sufficient that the matter is in the interest of a section of the public bounded by geography or another characteristic that depends on the particular situation. A matter of particular interest or benefit to an individual or small group of people may also be a matter of general public interest.

19. Paragraph 6.19 of the Guidelines provides examples of factors under s11B(3) that would favour disclosure including if disclosure would:

- Promote the objects of the FOI Act such as:
  - inform the community of the Government's operations;
  - reveal the reason for a Government decision and any background or contextual information that informed the decision; and/or
  - enhance the scrutiny of Government decision-making;
- Inform debate on a matter of public importance, including to:
  - allow or assist inquiry into possible deficiencies in the conduct of an agency or official; and/or
  - reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct.

20. Paragraph 6.22 of the Guidelines provides examples of factors against disclosure including:

- whether disclosure could reasonably be expected to prejudice an agency's ability to obtain similar information in the future;
- whether disclosure could reasonably be expected to prejudice the management function of an agency.

Professional Services Review Scheme

21. The documents the subject of this review are related to the Professional Services Review Scheme (**Scheme**) that was established by Part VAA of the *Health Insurance Act 1973* (Cth) (**HI Act**). This is a scheme for reviewing and investigating suspected 'inappropriate practice' by a person in the provision of services where a Medicare, dental or pharmaceutical benefit has been claimed.

22. The object of the Scheme is set out at s 79A of the HI Act:

> *The object of this Part is to protect the integrity of the Commonwealth medicare benefits, dental benefits and pharmaceutical benefits programs and, in doing so:*
>
> *(a) protect patients and the community in general from the risks associated with inappropriate practice; and*

> *(b) protect the Commonwealth from having to meet the cost of services provided as a result of inappropriate practice.*

23. The first stage of the PSR process is triggered when a Delegate of the Chief Executive Medicare requests the Director of the PSR (**Director**) to review the services rendered by a practitioner. At the conclusion of the review, the Director may decide to take no further action or to refer the person under review to a Professional Services Review Committee (**Committee**) for further investigation under s 93 of the HI Act.

24. The second stage of the process involves a review by the Committee to investigate whether a practitioner has engaged in inappropriate practice. The Committee is made up of members that belong to the profession or speciality of the person under review pursuant to s 95 of the HI Act.

25. Under s 101 of the HI Act, the Committee may hold hearings and require the person under review to give evidence. They may also require production of documents (s 105A of the HI Act). Section 106KD requires that the Committee produce a draft report that contains its findings to the person under review, giving them the opportunity to respond to any adverse findings, before producing a final report with the outcome.

26. If a Committee finds that a person has engaged in inappropriate practice, they will report this finding to the Determining Authority (ss 106G(2) and 106GL(3) of the HI Act). This is third and final stage of the PSR process, after which the Determining Authority decides on the best course of action.

27. There are several safeguards throughout the process to ensure that the person under review has opportunity to state their case and respond to possible adverse findings.

Protected Information

28. Section 106F(1) of the HI Act protects Committee members from disclosure of deliberations:

> *A Committee member has, in the performance of his or her duties, the same protection and immunity as a Justice of the High Court.*

29. The HI Act further prohibits the disclosure of certain information relating to PSR investigations. Section 106ZR of the HI Act creates a criminal offence for disclosure of information relevant to a PSR investigation, except in specified circumstances:

> *(1) A person must not disclose to another person:*
>
> > *(a) any of the deliberations or findings of a Committee; or*
> >
> > *(b) any information or evidence given to the Committee in the course of its deliberations;*
>
> *unless the disclosure is required or permitted under this Act or the Dental Benefits Act 2008 or is necessary in connection with the performance of the first-mentioned person's functions or duties under this Act or the Dental Benefits Act 2008.*
>
> *Penalty: Imprisonment for 12 months.*
>
> *(3) This section does not prevent a person from making a disclosure:*
>
> > *(a) to a lawyer for the purpose of obtaining legal advice or representation relating to a matter involving the deliberations or findings of the Committee; or*
> >
> > *(b) if the person is a lawyer—for the purpose of complying with a legal duty of disclosure arising from his or her professional relationship with a client.*

30. Section 130 of the HI Act creates a criminal offence for unlawful disclosure of information a person acquires through the performance of their duties, or in the exercise of their powers or functions under the HI Act.

Background

31. Dr Raiz is an anaesthetist based in Canberra, Australian Capital Territory.

32. On 3 March 2017, a delegate of the Chief Executive Medicare, acting under s 89 of the HI Act, requested that the Director review services rendered by Dr Raiz between 1 August 2015 and 31 July 2016 (**review period**).

33. On 6 April 2017, the Director decided, pursuant to s 88A of the HI Act to undertake a review of Dr Raiz's services for which he claimed Medicare rebates.

34. On 21 December 2017, the Director provided a signed report to Dr Raiz pursuant to s 89C of the HI Act with reasons stating that she had not made a decision under s 91 of the HI Act to take no further action in relation to the referral.

35. On 9 March 2018, the Director established a Professional Services Review Committee pursuant to s 93 of the HI Act. The Committee was charged to investigate whether Dr Raiz had engaged in inappropriate practice in providing certain services billed under the Medicare Benefits Scheme. The Director appointed three members to the Committee pursuant to s 95(1) of the HI Act. The referral and report were provided to Dr Raiz on the same day.

36. Staff of the PSR were then allocated to assist the Committee in accordance with s 106ZPL(1) of the HI Act.

37. On 22 March 2018, the Director varied the referral to the PSR Committee by deleting some of the Medicare Benefits Scheme items and including others (**Amending Instrument**) to be investigated. On 22 April 2018, Dr Raiz commenced proceedings in the Federal Court for judicial review of the Director's decision to vary the referral. The investigation by the Committee was put on hold until the outcome of the court proceedings. On 4 December 2018, the Court ordered by consent that the Amending Instrument be set aside and the Committee's investigation subsequently resumed.

38. The Committee proceedings are still on foot. There have already been some hearings, however, Dr Raiz has indicated that he still intends to provide further evidence and final submissions. Therefore, the Committee may hold further hearings in the future and they have not yet provided a draft report of their findings under s 106KD of the HI Act.

ISSUES

39. The issues before the Tribunal are whether:

(a) each document that the PSR has identified in the Schedule, is exempt, in full or part, or conditionally exempt from disclosure under the provisions of the Act; and

(b) for documents that are conditionally exempt, disclosure would be contrary to the public interest.

EVIDENCE

40. The sole witness for the PSR was Bruce Neville Topperwein who is the Executive Officer and General Counsel of the PSR. He reports to the Director of the PSR who is a medical practitioner. Mr Topperwein gave evidence by affidavit explaining the process of referring, reviewing and investigating practitioners under the PSR scheme and the particular events in Dr Raiz's review. He also provided evidence as to the likely outcomes for the PSR's functions if the information requested were released. I accept the evidence of Mr Topperwein, which Dr Raiz did not challenge.

Interlocutory decision regarding the evidence of the applicant

41. When this matter was first listed for a hearing, Dr Raiz did not seek to provide any evidence. He lodged his Statement of Facts, Issues and Contentions on 1 September 2020 and did not seek to adduce any of his own evidence. However, on 31 May 2021, Dr Raiz made a late application to rely on an affidavit in his name dated 31 May 2021 (**affidavit**). On 3 June 2021, I ruled that the affidavit could not be relied upon at the hearing. I will set out my reasons for this decision below.

42. At a directions hearing on 20 May 2021, Counsel for Dr Raiz raised for the first time the matters that became the subject of the affidavit. Counsel explained that he sought to adduce this new evidence to respond to a submission of the respondent in their Statement of Facts, Issue and Contentions dated 17 June 2020 that none of the public interest factors favouring disclosure were relevant to Dr Raiz's application.

43. Counsel for Dr Raiz submitted, by way of explanation for the delay of almost a year to provide this evidence, that he identified the issue that required the further evidence when he was briefed shortly after the date of the first vacated hearing in February 2021. He explained that he delayed bringing this matter to the Tribunal or respondent's attention until May 2021 because it was a lengthy process to review all the relevant documentation.

44. I consider that the delay from February 2021 until May 2021 was excessive. However, even if that that was an appropriate length of time to process the documentation, there is no explanation for the initial delay in failing to file this evidence at any point after 17 June 2020 when the respondent first made submissions. Dr Raiz has had the same instructing solicitors since the beginning of this matter and those instructing solicitors filed a Statement of Facts, Issues and Contentions on his behalf on 1 September 2020 where they did not raise the issues referred to in the affidavit. Therefore, Dr Raiz made a

decision at or around 1 September 2020, when he submitted his Statement of Facts, Issues and Contentions, that he would not file any evidence, despite having all the documents that the respondent intended to rely upon. I find that there is no adequate explanation for the failure to provide the material earlier, particularly as the matter was ready for a hearing in February and April 2021.

45. Further, some of the matters within the affidavit had been outlined in previous solicitor correspondence from Moray & Agnew, including letters in June 2019 and August 2018. This suggests that Dr Raiz had access to the material for a lengthy period and made a forensic decision not to rely upon it.

46. In any event, I find that the material within the affidavit is not probative of the issues that need to be resolved with respect to the FOI application.

47. The affidavit contains statements of conclusion for which there is no evidentiary support. Dr Raiz expresses concerns and apprehensions said to be based upon material within the affidavit. However, the material that Dr Raiz deposes to as the basis of those statements of concern or apprehension do not provide any evidentiary support. Hence the conclusions are not based on objective evidence. Further, the concerns, apprehensions and beliefs of the deponent are not relevant to the issues that are raised in the FOI application.

48. The affidavit contains material that is hearsay in the sense of not being direct evidence from the person who is said to have made the statement. Those statements are then later relied upon to underpin some of the beliefs or apprehensions of Dr Raiz, which I discuss above.

49. The affidavit contains scandalous allegations which would impact upon the personal and professional reputation of third parties in circumstances where it is hard to see the relevance of those matters to the issues in the FOI application.

50. The affidavit contains material that goes back to 1987 and 1988 which, if allowed, would put the respondent in a difficult situation to attempt to respond to matters from many years ago at a late stage of the proceedings. The respondent should not be put to the expense of trying to deal with factual matters that go back to the late 1980s and matters that

appear to involve people with only a peripheral connection to the primary actors in this litigation. Many of the persons deposed to in the affidavit are strangers to the litigation.

51. If Dr Raiz was given leave to rely upon the affidavit then the hearing listed to commence on 30 June 2021 would likely have had to be vacated.

52. This is a matter in which the respondent provided its evidence and Statement of Facts, Issues and Contentions on 17 June 2020. Dr Raiz was given the opportunity to file evidence but he decided not to. He has had the benefit of being legally represented since bringing his application for review on 27 February 2020. His Statement of Facts, Issues and Contentions was lodged on 1 September 2020 and the matter was listed for a hearing to commence on 11 February 2021. The date for that hearing was vacated because the representative of Dr Raiz was unwell. The hearing was re-listed to commence on 28 April 2021 but that hearing was vacated at the request of Dr Raiz and with the consent of the PSR. Throughout this period there was no indication from Dr Raiz that he wished to rely upon further evidence. That indication first came on 20 May 2021 during a telephone directions hearing. As set out above, the evidence sought to be adduced in the form of the affidavit contains scandalous and irrelevant material and would cause further delay. I took the view that the affidavit would not assist me in determining the issues on the application because it contains no probative material.

53. For these reasons, I disallowed Dr Raiz to tender the affidavit as evidence. Dr Raiz did not seek to tender any other evidence and did not give oral evidence at the hearing.

CONSIDERATION

Documents relating to the Director's review

54. The PSR has claimed the exemption under s 47C for documents 24, 65, 85, 86, 90 and 91 which relate to the Director's review of Dr Raiz.

55. Section 47C provides that documents disclosing deliberative matter are conditionally exempt:

> ***47C Public interest conditional exemptions—deliberative processes***
>
> *General rule*

> *(1) 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.*
>
> *Exceptions*
>
> *(2) Deliberative matter does not include either of the following:*
>
> > *(a) operational information (see section 8A);*
> >
> > *(b) purely factual material.*
>
> *Note: An agency must publish its operational information (see section 8).*
>
> *(3) This section does not apply to any of the following:*
>
> > *(a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;*
> >
> > *(b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;*
> >
> > *(c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.*
>
> *Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A)*

56. In *Dreyfus and Secretary Attorney-General's Department* [2015] AATA 962 at [18], Bennett J explained that 'purely factual material' does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in, or intertwined with, the deliberative content such that it is impractical to excise it.

57. Paragraph 6.61 of the Guidelines states that a deliberative process includes the recording or exchange of a collection of facts or opinions, including the pattern of facts or opinions considered, and interim decisions or deliberations. Further, paragraph 6.67 provides that deliberative matter includes materials gathered for deliberative purposes.

58. Paragraph 6.68 of the Guidelines provides that a consultation undertaken for the purposes of, or in the course of, a deliberative process includes any discussion between the agency, minister or government and another person in relation to the decision that is the object of the deliberative process.

59. Section 47C applies, not only to documents that disclose matter 'in the nature of' opinion, advice, recommendation, consultation or deliberation, but also to documents that disclose matter 'relating to' opinion, advice or recommendation or consultation or deliberation that has taken place.[3] This is relevant for documents in this matter that were prepared by staff of the PSR and contain information recording or discussing the deliberations of the Committee.

60. Document 24 is partially redacted to remove advice and recommendations from a PSR lawyer to other staff regarding Dr Raiz's request that the members of the Committee were not ACT-based. The PSR submits that this information is exempt from disclosure under s 47C because it would reveal advice provided for the purposes of deliberations of the agency. The emails between the Principal Legal Officer and the Special Counsel of the PSR Agency contain legal advice and deliberative matter under s 47C. The email from Russell Ball of Ball & Ball Partners to the PSR Agency has been disclosed.

61. Document 65 is an email from the Director to PSR's Special Counsel. One paragraph has been redacted where the Director expresses her opinion about certain issues relevant to the review and provides directions to the Special Counsel in relation to that matter. The PSR submits that this information is exempt from disclosure under s 47C as the information would disclose an opinion recorded, and consultation between the Director and her staff member, in the course of, or for the purposes of, the deliberative processes of the Director during her review.

62. Document 85 includes redacted material in an email dated 21 March 2018 from the Principal Legal Officer to the Special Counsel and Case Manager of the PSR Agency about preparing documentation to set up the Committee and requesting legal advice from the PSR's Special Counsel. The names of other persons under review have also been redacted. The penultimate paragraph (which is duplicated in documents 86, 90 and 91) has been redacted because it contains an opinion on a matter relevant to preparing the documentation and for which legal advice was sought. Therefore, the PSR submits that this paragraph contains a deliberative matter as it relates to an opinion about a matter relevant to the Director's review.

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[3] *Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development and Training Centre Pty Ltd* [2001] FCA 1375; (2001) 114 FCR 301.

63. Document 86 is a communication between the Principal Legal Officer and the Case Manager of the PSR Agency providing advice in the course of the review. Therefore, the PSR submits that this contains deliberative matter as it relates to an opinion about a matter relevant to the Director's review.

64. Document 90 includes document 85 (the 21 March 2018 email) and subsequent email communications of the same nature between the Principal Legal Officer and the Case Manager of the PSR Agency.

65. Document 91 includes document 85 (the 21 March 2018 email) and subsequent email communications of the same nature between the Principal Legal Officer and the Case Manager of the PSR Agency.

66. At the hearing, Dr Raiz's Counsel requested that I review these documents to confirm that they would, in fact, disclose deliberative processes. He submitted that the PSR had adopted too wide a definition of deliberations and that some of the redacted documents were simply factual material. Having reviewed the redacted information, I confirm that the documents listed above contain advice or consultations intended to assist the Director's deliberations, or directly reveal the Director's deliberations so that they may be labelled as deliberative material. Therefore, I accept the respondent's submissions that the redacted information relates to deliberative matter during the Director's review.

Public Interest Test for Director's review documents

67. Section 47C provides a conditional exemption, therefore the PSR must further satisfy me that on balance, it would be contrary to the public interest for the documents relating to the Director's review to be released. I accept Dr Raiz's submission that the respondent has the onus to show that there is public interest in non-disclosure as the objects of the Act favour disclosure of government-held information.

68. In relation to the information in each of the documents relating to the Director's review, Mr Topperwein deposed to the harm that would be caused if the information were disclosed:

> *The Director is expressly excluded by the HI Act from having any further involvement with Dr Raiz's matter, including providing, or disclosing, any additional information gained or considered during her review to the Committee. Disclosure*

of the information referred to above, revealing issues deliberated on by the Director, and opinions formed at particular stages of the review, matters which may or may not be in her referral report would interfere with that important statutory requirement. It may be that in time, when Dr Raiz's matter is concluded through the investigation and, if required, the Determining Authority phases, there would be no reason not to disclose the document, but that is not the case now while Dr Raiz's matter is still active.

69. The PSR submits that the further information about the Director's deliberations which was not included in the referral report to the Committee would interfere with the statutory requirement that the Director is excluded from the deliberations of the Committee after providing the referral and the reasons for referral under s 93 of the HI Act. This is because these documents would disclose further considerations that go behind the report provided to the Committee. Under s 106H(1) of the HI Act, the Committee is to make findings only in respect of referred services. Section 81 of the HI Act provides that 'referred services' are the services specified in the referral made to the Committee under s 93.

70. In *Dr Pradhan v Holmes (in his capacity as the Director of Professional Services Review)* [2001] FCA 1560; (2001) 125 FCR 280, 286-287 at [30], the Court confirmed that s 106H of the HI Act (this provision has been amended since, however the meaning remains) limits the involvement of the Director beyond making findings in the referral report:

> *First, unlike with an investigative referral, the services to be examined by the Committee are limited to those specified in the adjudicative referral itself: s93(7) and s81 "referred services". The obvious contemplation of the scheme in this is that the Director will winnow out of all of the services referred to him or her in the investigative referral: s86(4)(a); the rendering or initiating of which is considered not to warrant reference to the Committee for the purposes of its inquiry. This limitation on the scope of the Committee's function is made explicit in s106H(1) which provides that: "The Committee is to make findings only in respect of services (the specified services) particulars of which are contained in the adjudicative referral."*

71. The intention that the Committee's investigation be limited to the matters set out in the referral report is further evinced by the fact that the Committee must refer the matter back to the Director to make additional findings if they wish to investigate any other matters of inappropriate practice outside of the referral.[4] Therefore, the PSR submits that as the Committee investigation is ongoing, it would be inappropriate to disclose the Director's deliberations beyond her referral report.

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[4] *Health Insurance Act 1973* s 106J(1).

72. Dr Raiz submits that it is not relevant that the PSR Committee proceedings are ongoing because the Committee may inform itself on any matter in any way it sees fit, [5] and therefore could, itself, seek out this further information regarding the Director's review. I do not find this compelling as the Committee may only inform in any manner 'for the purposes of its inquiry into the provision of services specified in the referral'.[6] Therefore, the Committee is confined to make findings only in relation to the referred services within the Director's report and it would be outside the scope of s 98(3) of the HI Act for it to seek information considering matters beyond the referral.

73. Dr Raiz further submits that disclosure of the information about the Director's review would promote the objects of the Act to inform the community of the government's operations and provide the reasons for government decisions including background and contextual information. I accept that, in a broad sense, disclosure of this information adds to further government transparency (there are few cases where disclosure does not promote the broad objects of the Act) [7] however I do not consider that there is anything particular to this case that calls for additional transparency.

74. The PSR submits that the factors against disclosure outweigh those in favour of disclosure. If the information about the Director's review is revealed it could reasonably be expected to impede on the Committee review process which is structured to exclude involvement from the Director. This allows the PSR Committee to come to an independent decision, free from any ongoing influence from the Director. Further, it ensures that the matters under review are limited to those deemed serious enough for referral by the Director so that the review remains appropriately confined.

75. I consider that none of the public interest factors in favour of disclosure apply beyond general principles of government transparency. There is no reasonable suggestion that the Director has engaged in any misconduct in her review that would require further consideration of her deliberations. In these circumstances, the factors against disclosure, including that disclosure would impede on the carefully formulated process that separates the stages of the PSR investigation, outweigh those in favour of disclosure.

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[5] *Health Insurance Act* s 106(2).

[6] *Health Insurance Act* s 98(3).

[7] See paragraph 6.18 of the FOI Guidelines.

76. I find that the documents relating to the Director's review and the spending proposal are deliberative matter and further, that it would be against the public interest to disclose this information. These documents are exempt from disclosure under s 47C.

Committee Investigation (s 47C and s 47E(d))

77. The PSR claims immunity under s 47C and s 47E(d) in respect of documents that contain information relating to the deliberations of the Committee in its investigation into the services provided by Dr Raiz during the review period. The documents in dispute in this category are 82 to 84, 92 to 96, 98, 99, 105 to 107, 112, 114, 115, 134, 175 to 178, 243 to 245, 249, 250, 258 to 269, 276, 282 and 307 in the Schedule.

78. Section 47E(d) provides:

> ***47E Public interest conditional exemptions—certain operations of agencies***
>
> *A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:*
>
> *…*
>
> *(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

79. The Guidelines provide guidance on the interpretation of the words 'would' and 'could' in s 47E(d) at paragraph 5.17:

> *The use of the word 'could' in this qualification is less stringent than 'would', and requires analysis of the reasonable expectation rather than certainty of an event effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.*

80. The Guidelines further advise on the meaning of 'substantial adverse effect' at paragraph 5.20:

> *The term 'substantial adverse effect' broadly means 'an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person' [see Re Thies and Department of Aviation [1986] AATA 141 [24]). The word 'substantial', taken in the context of substantial loss or damage, has been interpreted as 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal' [Tillmanns Butcheries Pty Ltd v Australasian Meat Employees Union & Ors (1979) 27 ALR 367 383].*

81. The phrase 'could reasonably be expected' requires more than a mere assumption or allegation that damage may occur. The Guidelines provide at paragraph 6.103:

> *The particulars of the predicted effect should be identified during the decision making process, including whether the effect could reasonably be expected to occur. Where the conditional exemption is relied upon, the relevant particulars and reasons should form part of the decision maker's statement of reasons, if they can be included without disclosing exempt material…*

82. The PSR describes each of the documents to which they claim s 47C and s 47E(d) exemptions in the Schedule as documents containing information that records, or is in relation to, the Committee's deliberations.

83. Upon Dr Raiz's review application, the PSR further reviewed the documents related to the Committee investigations and provided to Dr Raiz additional information that they deemed merely administrative in nature.

84. The PSR submits that disclosure of the documents relating to the Committee investigation would disclose 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 of the Committee's function of investigating Dr Raiz. They further submit that the documents were created for or by the Committee for its sole function to investigate whether Dr Raiz had engaged in inappropriate practice. They submit that none of the redacted information is 'purely factual matter' as any factual material that has been redacted is integral to the deliberative content and purpose of the documents such that it is impractical to excise it.[8]

85. Some of the documents relate to requests by the Committee for data related to the Medical Benefits Scheme (**MBS**). Mr Topperwein provides an explanation of these data requests as follows:

> *As part of their investigation, PSR Committees need to consider relevant MBS data and make decisions on what MBS items to investigate. A Committee can choose to investigate a random sample of services which then enables it to apply the sampling methodology under s 106K of the HI Act.*
>
> *It is usual practice for a Committee to instruct PSR staff at a Committee meeting regarding which items it wants to consider. PSR staff are then responsible for taking all the steps required to enable such consideration and deliberation to occur, including obtaining on behalf of the Committee additional data where required by the Committee.*

---

[8] *Dreyfus and Secretary Attorney-General's Department* [2015] AATA 962 at [18].

> *The staff of the Committee, and the Committee, may have questions about the particular data from the 'owner' of the data (the Department of Health and previously the Department of Human Services). If so the staff of the Committee are tasked with dealing with the issues on behalf of the Committee.*
>
> *To undertake its investigation following the Raiz referral, the Committee, in accordance with usual practice, required data about the MBS items specified in the referral from the Director. The Committee directed staff at a Committee meeting to obtain the data in accordance with its decisions. Staff took the necessary steps to obtain and collate the data, on behalf of the Committee.*

86. Dr Raiz submits that requests for data are not inherently deliberative as they do not involve a process of weighing up or considering competing arguments. Therefore, he argues that the MBS data is best categorised as 'purely factual material' and not conditionally exempt. Further, Dr Raiz argues that instructions to staff about which MBS data to review occurs after a deliberative process but is a purely administrative matter in itself. Similarly, Dr Raiz submits that questions from the staff to the 'owners' of the data do not involve a deliberative process.

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

88. In any event, the PSR submits that the information relating to the Committee investigations is also conditionally exempt under s 47E(d) because disclosure of the documents would, or could, reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the PSR.

89. The PSR contends that ss 106ZR and 106F of the HI Act which protect against disclosure of Committee deliberations evince parliament's intention that information related to Committee investigations are protected from public disclosure. The PSR submits that if

information that reveals Committee deliberations could be uncovered through the FOI process, this would defeat the purpose of these protections.

90. The PSR submits that this would have a substantial adverse effect on Committee operations as it would limit freedom of thought and independence of judgement which is the purpose of such an immunity provision.

91. Mr Topperwein deposes to the potential harm to the agency's operations if the documents regarding the Committee's deliberations were disclosed:

> *I am concerned, as the Executive Officer of the PSR, that members of a Committee would be severely inhibited in their task if the correspondence on issues about the data that the Committee has requested as part of their deliberative processes were disclosed to the PUR, and that is particularly the case in Dr Raiz's matter as the Committee's investigation is ongoing.*
>
> *Disclosure of the documents dealing with collection and interpretation of data by PSR staff to ensure the Committee has relevant and correct data for the purposes of its investigation would disclose matters relating to deliberation that has taken place by PSR staff discussed with the Committee in the course of and for the purposes of the deliberative processes of the Committee.*

92. In *Herijanto v Refugee Review Tribunal* [2000] HCA 21; (2000) 170 ALR 575 at 577 [9]-[11], Gaudron J considered the immunity provision that applied to members of the Migration Review Tribunal which was in the same terms as s 106F(1) of the HI Act:

> *…The protection afforded to individual members of the Tribunal by s 435(1) of the Act would be illusory if, although they could not be compelled to disclose their decision-making processes, those processes could be revealed by analysis of computer records.*
>
> *In my view, the protection and privilege conferred by s 435(1) of the Act extends not merely to disclosure by the individual member concerned, but the revelation, by whatever means, of any aspect of his or her decision-making process*
>
> *...*
>
> *Whether or not the privilege conferred by s 435(1) of the Act extends to the revelation, by whatever means, of the decision-making processes of individual members of the Tribunal, it would not be right, in my view, to order discovery to enable the plaintiffs to do indirectly what they cannot do directly.*

93. Dr Raiz argues that the PSR employs too wide a definition of ss 106F(1) and 106ZR of the HI Act and that requests for data and other information regarding the Committee process do not reveal deliberations that attract immunity. I reject these arguments for the reasons identified above that the redacted information does reveal deliberations for which s 106ZR of the HI Act specifically protects.

94. There is no general rule that information is not disclosable under the Act if it is attached to an immunity provision in a particular statute. However, if the immunity provision is necessary for the proper functioning of the agency and for decision makers to freely make decisions, there may be a substantial adverse effect if the expected immunity is not upheld.

95. I accept the PSR's argument that there could be a serious and material negative impact on the PSR's operations if the deliberations of the Committee were disclosed to Dr Raiz. Sections 106F(1) and 106ZR of the HI Act evince parliament's intention that the protections in the PSR Scheme allow Committee members to openly discuss and consider whether a practitioner has engaged in inappropriate practice. If Committee members know that their private deliberations would be available to the person under review, even whilst a review process was ongoing, I consider that this could severely limit their willingness to openly engage in the review process and deliberate on sensitive and controversial matters.

96. Therefore, the materials related to the Committee investigations are conditionally exempt under ss 47C and 47E(d).

Public Interest Test

97. The main factor in favour of disclosing the materials relating to the Committee investigations is promoting the Act by revealing the reasons for the agency's decisions and enhancing scrutiny of the PSR's operations.[9]

98. Dr Raiz further submits that disclosure would inform debate on a matter of public importance and allow access to his personal information.

99. I have reviewed the documents and I find that although the Committee investigation documents may incidentally contain some of Dr Raiz's personal information, they are predominantly documents of the Committee, dealing with its investigation. I also do not accept that disclosure would inform public debate in any meaningful sense. The documents relate specifically to Dr Raiz's investigation and they do not reveal any matters

[9] Paragraph 6.19 of the FOI Guidelines.

that would be of serious concern to a substantial section of the public or raise any issues of public interest about the functions of the PSR scheme. Therefore, I find that the only factor in favour of disclosure is to promote the objects of the Act including by increasing scrutiny of the government's activities and transparency.

100. The PSR argues that disclosure is against the public interest. They submit that s 106ZR of the HI Act that makes it a criminal offence to disclose deliberations of the Committee is evidence of the legislature's intent that disclosure of information about Committee investigations is against the public interest.

101. In *Muin v Refugee Review Tribunal* [2002] HCA 30; (2002) 190 ALR 601, Callinan J discussed the equivalent immunity provision for Members of the Refugee Review Tribunal at 669, [299]:

> *The entire, general, protective immunity of a Justice of the High Court is conferred on the member of the [Migration Review] Tribunal by s 435 of the Act [163]. The rationale for immunity from compulsory disclosure is the assurance that judges should be free in thought and independent in judgment. That rationale naturally extends to an immunity from disclosing any or all aspects of the decision-making process itself.*

102. Dr Raiz submits that disclosing information about the Committee investigation would not affect the free thought and independence of the Committee although he did not provide clear submissions as to why he held this view.

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

104. At this time, with the review ongoing, I consider it against the best interest of the public for the Committee investigation documents to be disclosed. The Act's general principles of transparency that favour disclosure are outweighed by the real possibility that Committee

members will not be able to fully investigate persons under review if they can no longer rely on the confidentiality of their deliberative materials. This would have negative effects on the PSR process and may impede on the agency's important function to protect the public from inappropriate use of public Medicare funding.

105. I conclude that the materials related to the Committee investigations are exempt from disclosure under ss 47C and 47E(d).

Consultant's names

106. The names and identifying details of consultant are no longer within the scope of the request pursuant to the Tribunal's direction made by consent on 2 July 2021. It is appropriate for the names of consultants to be exempt from disclosure for the following reasons.

107. The Director may engage a consultant who belongs to the same profession as the person under review to provide expert advice when they are considering a referral to a Committee. In this matter, the Director spoke to potential consultants and directed staff to make the necessary arrangements to engage them.

108. The PSR claimed that the names of the consultants are exempt from disclosure under s 47E(d) and s 47F.

109. The PSR argued that it is necessary to keep the names of Consultants confidential otherwise consultants would be reluctant to assist the Director as it involves providing advice about another practitioner in their field. They contended that this would have a substantial adverse impact on the ability of the PSR to conduct its reviews and therefore qualifies as conditionally exempt information under s 47E(d).

110. The PSR has instituted a policy not to reveal the name of consultants to combat the reluctance of consultants to assist the Director if the person under review is aware that they are helping. Therefore, as is their usual practice, the PSR informed the consultants contacted to assist the Director in Dr Raiz's review that their names and personal information would remain confidential.

111. Mr Topperwein provided the following evidence as to the likely consequences of breaching this confidentiality policy:

> *Based on my experience working at PSR and as Executive Officer, , I am of the view that there is a serious risk that if consultants' names were to be routinely released under the FOI Act, this could reasonably be expected to reinforce the reluctance of practitioners to act as consultants advising the Director in a review of one of their colleagues. This is a particularly sensitive issue where the relevant profession or specialty is a relatively small one. If consultants are reluctant to assist the Director, this would seriously affect the Director's ability to access a vital source of advice to assist in her review.*
>
> *…*
>
> *If the Director is unable, or hampered in her ability, to engage the services of experienced practitioners in the same profession or specialty as the PUR, this could, or would, reasonably be expected to have a substantial adverse effect on the proper and efficient function of the operations of the PSR. This is because the Director would have to perform her functions without expert advice on the particular services she is reviewing and whether the PUR may have engaged in conduct that would be unacceptable to the general body of the relevant profession or specialty. This in turn would undermine the objects of the Scheme to protect patients and the community in general from the risks associated with inappropriate practice and to protect the Commonwealth from having to meet the cost of services provided as a result of inappropriate practice.*

112. Dr Raiz stated that the PSR has made a ‘mere assumption or allegation’ that disclosure of the names of consultants would seriously impact the Director’s ability to access consultants to assist the Director in her review. However, I have no reason to doubt Mr Topperwein’s evidence based on his extensive experience that consultants often seek confirmation that they will be anonymous as a condition of offering their services. I note that the applicant did not require Mr Topperwein for cross-examination therefore I have no basis to challenge his evidence. Furthermore, it is understandable that in small professions where practitioners are likely to know one another, that one would not wish to engage in a review of their colleague without anonymity.

113. Therefore, I find that if the names of consultants could be released through an FOI process, this would, or could, have the substantial adverse impact of limiting the number of consultants willing to assist the Director. If the Director no longer has access to a wide pool of consultants, this would significantly prejudice her ability to make informed decisions in the initial referral stage and would therefore fetter the functions of the PSR scheme.

114. Therefore, I considered that this information relating to the Consultant's names is conditionally exempt under s 47E(d).

115. I will not consider whether the names of the consultants are exempt from disclosure under s 47F as I have already found them exempt under s 47E(d).

Public Interest Test

116. The only public interest in releasing the names of consultants would be to promote the objectives of the Act of transparency and accountability. Dr Raiz argued that releasing the names of the consultants may substantiate any possible claim he wishes to make that the PSR acted improperly during his investigation. However, there is no evidence of impropriety or basis for this claim.

117. The PSR submitted that there are significant factors against disclosure of the consultants' names. As discussed earlier, such disclosure would disincentivise consultants to assist the Director in investigating matters. The PSR argues that it is in the public interest that the Director have a broad selection of consultants so that she is guided by the most appropriate experts to reach her views as to whether a practitioner should be investigated for malpractice.

118. If the Director is fettered in her ability to make decisions at to which matters to refer, this could have a significant negative impact on the public. It would impede the efficacy of the PSR Scheme in protecting the public from both the risks of inappropriate practice and the risks of the Commonwealth having to meet the costs associated with Medicare-related malpractice.

119. Dr Raiz submitted that as the HI Act never submitted that the names of consultants are confidential, the PSR should never have promised confidentiality. He further argued that the PSR's motivation to keep the consultants' names confidential is that the PSR will risk embarrassment if consultants discover that the Director made a baseless promise of confidentiality. Under paragraph 6.24 of the Guidelines, the decision maker must not take into account whether access to a document could result in embarrassment to the Commonwealth Government or a loss of confidence in the Commonwealth Government.

Therefore, any embarrassment to the Director if the names of consultants were released against the PSR's stated policy is not relevant to my decision.

120. However, without considering this irrelevant factor of the PSR's reputation, there are significant factors contrary to the public interest if consultants' names could be released through FOI requests. There would be a substantial risk that many consultants would be reluctant to assist the Director in the future which would impede the effectiveness of the Director's investigation. There are few compelling reasons to disclose the information except that increased government transparency is generally a favourable outcome.

121. In these circumstances, the public interest factors against disclosure of the consultants' names outweigh the public interest factors in favour of disclosure of their names. Therefore, this information is conditionally exempt under s 47E(d).

Legal advice

122. The PSR has withheld certain documents as exempt due to a claim of legal professional privilege. Section 42 provides:

> **Documents subject to legal professional privilege**
>
> *(1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.*
>
> *(2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.*
>
> *(3) A document is not an exempt document under subsection (1) by reason only that:*
>
> > *(a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and*
> >
> > *(b) the information is operational information of an agency.*

123. Operational information is information held by the agency to assist the agency to perform or exercise its functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities).[10]

---

[10] *Freedom of Information Act 1982* (Cth) s 8A.

124. The PSR has set out the documents that they claim attract legal professional privilege in the Schedule. Broadly these documents relate to:

(a) The judicial review litigation brought by Dr Raiz in the Federal Court including documents 129 and 172; and

(b) The PSR's investigation of Dr Raiz including communications regarding the Committee Review.

125. The Guidelines explain at paragraph 5.131 that communications from in-house lawyers are not always privileged. Factors that assist to determine whether a legal adviser-client relationship exists include whether a legal advisor is acting in their capacity as a professional legal advisor, whether the advice is independent, whether the dominant purpose test applies and whether the information is treated as confidential.

126. The dominant purpose test provides that legal professional privilege only attaches to documents that were brought into existence for the dominant purpose of giving or receiving legal advice or for use in actual or anticipated litigation.[11] Dr Raiz has queried whether all the documents that the PSR has claimed privilege comply with the dominant purpose test.

127. Mr Topperwein provides the following evidence:

> *Many of the documents to which legal professional privilege applies are emails between PSR's legal advisers, including myself, who were responsible for managing the litigation brought by Dr Raiz. These documents are identified in the Schedule with the lawyers involved also identified in the description of particular documents.*
>
> *…*
>
> *PSR's lawyers are often called on to undertake tasks that do not involve giving legal advice or to managing litigation. This is because PSR is a small agency and at times work is required to be done by whomever has availability at the time and where a senior person is required to undertake a task that work often falls on the senior lawyers.*
>
> *Given that practice within PSR, and because I have a dual role as Executive Officer and lawyer, I have carefully reviewed each of the internal documents to ascertain that legal professional privilege applies to the document.*

---

[11] FOI Guidelines, paragraph 5.136; *Esso Australia Resources Ltd v Commissioner for Taxation* [1999] HCA 67; (1999) 201 CLR 49.

> *I confirm that legal professional privilege has been claimed only for documents that contain communications between a PSR lawyer, acting in his or her capacity as an in-house legal adviser to the PSR, either to the Director, a Committee or a staff member performing administrative or secretarial roles in assisting the Committee, and where I have confirmed that the communication is for the dominant purpose of seeking or providing legal advice, or for use in connection with the judicial proceedings brought by Dr Raiz in respect of the Amending Instrument.*

128. Mr Topperwein confirms that the documents are held in a secure password protected system and treated confidentially.

129. Having reviewed the documents in dispute, I confirm that these documents attract legal professional privilege and are for the dominant purpose of providing legal advice. I am guided by Mr Topperwein's knowledge of the legal matters and roles of lawyers in the PSR in his position as General Counsel of the PSR. I note that upon Dr Raiz's FOI request, Mr Topperwein reviewed all the documents that the PSR had claimed privilege over and released further documents where he determined that staff were not acting in their capacities as legal advisors. I am satisfied that the remainder of documents that the PSR have claimed privilege involve documents for use in the judicial review proceedings brought by Dr Raiz or to provide legal advice about the PSR's review of Dr Raiz's medical practices. These communications are confidential and relate to independent legal advice provided by the in-house lawyers at the PSR.

130. Therefore, I find that the documents relating to legal advice are exempt from disclosure under s 42.

CONCLUSION

131. The Tribunal notes that on 2 July 2021 the decision dated 5 July 2019 was partially set aside and substituted. With respect to the remaining documents in dispute, the Tribunal affirms the decision of 5 July 2019.

I certify that the preceding one hundred and thirty-one (131) are a true copy of the reasons for the decision herein of Deputy President Britten-Jones.

..**[SGD]**……………………………….

Associate

Dated: 25 November 2021

Date of hearing:	**30 June 2021**
Counsel for the Applicant:	**A. Anforth**
Solicitors for the Applicant:	**Collins & Collins**
Counsel for the Respondent:	**R. Walsh**
Solicitors for the Respondent:	**Maddocks**

From:	s22
To:	s22 DL_OAIC_Intake and Eligibility; DL_OAIC_FOI Case Management
Cc:	TYDD,Liz; PIRANI,Toni; OAIC - ACFOI; OAIC - Legal; OAIC - Media
Subject:	Case summary: 'ATS' and Federal Circuit and Family Court of Australia [2025] AICmr 20 (24 January 2025) [SEC=OFFICIAL]
Date:	Tuesday, 28 January 2025 10:49:47 AM
Attachments:	2025-AICmr20.rtf

Good morning,

Please find attached and enclosed the decision of the Freedom of Information Commissioner in *'ATS' and Federal Circuit and Family Court of Australia* [2025] AICmr 20 (24 January 2025): D2025/001038. I am sending this out on the Commissioner's behalf.

OAIC Ref: MR21/00221

Decision: Affirm

Key points: This decision discusses the application of s 5 of the FOI Act to a request for documents to the Court. It finds the requested documents do not relate to matters of an administrative nature and are therefore outside the scope of the FOI Act. It finds that correspondence and other documents to or from judges and their associates – even if they discuss the administration of the judgment – are not subject to the FOI Act because they relate to the Court's conduct of proceedings in particular litigation matters and are part of the Court's judicial functions.

Catchwords: Freedom of Information — Whether documents relate to matters of administrative nature — (CTH) Freedom of Information Act 1982 — s 5(1)

Thank you to @s22 for case managing this file. No updates to the FOI Guidelines are required.

Kind regards,

OAIC

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The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

Subscribe to Information Matters

'ATS' and Federal Circuit and Family Court of Australia [2025] AICmr 20 (24 January 2025)

Decision and reasons for decision of
Freedom of Information Commissioner, Toni Pirani

Applicant	'ATS'
Respondent	Federal Circuit and Family Court of Australia
Decision date	24 January 2025
Application number	MR21/00221
Catchwords	Freedom of Information — Whether documents relate to matters of administrative nature — (CTH) *Freedom of Information Act 1982* — s 5(1)

Decision

1. Under s 55K of the *Freedom of Information Act 1982* (the FOI Act), I affirm the decision of the Federal Circuit and Family Court of Australia (the Court) of 25 February 2021.

Key points

2. This decision discusses the application of s 5 of the FOI Act to a request for documents to the Court. It finds the requested documents do not relate to matters of an administrative nature and are therefore outside the scope of the FOI Act. It finds that correspondence and other documents to or from judges and their associates – even if they discuss the administration of the judgment – are not subject to the FOI Act because they relate to the Court's conduct of proceedings in particular litigation matters and are part of the Court's judicial functions.

Reasons for decision

Scope of IC review

3. On 26 January 2021, the applicant applied to the Court for access to:

   - All administrative documents, including those stored on the left-hand side of any appeal file folder, any communications to or from Strickland J and his associates in relation to the following matters:

- …
- In any reference to the Applicant or to and from [named individual legal practitioners and judges] in the FCC or their associates or any other third parties.

4. On 25 February 2021, the Court refused the applicant's request on the basis that the documents requested are outside the scope of the FOI Act, as none of the documents requested are, or relate to, matters of an administrative nature within the meaning of s 5 of the FOI Act. The applicant disputes the Court's decision.

5. The issue to be decided in this Information Commissioner review (IC review) is whether the documents relate to matters of an administrative nature.

6. In making my decision, I have had regard to the following:
   - the Court's decision and reasons for decision
   - the FOI Act[1]
   - the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act[2] to which agencies must have regard in performing a function or exercising a power under the FOI Act,[3] and
   - the parties' submissions.

Application of the FOI Act to courts (s 5)

7. The FOI Act has a restricted application to courts, judges and court registries. Specifically, s 5 provides the FOI Act does not apply 'unless the document relates to matters of an administrative nature'.

8. In summary, the applicant submitted:
   - the Court has sought to apply s 5 to the documents in a blanket way instead of considering its application to individual documents
   - the applicant is seeking documents located in the pockets of the files she saw during court proceedings. When she applied for access to her case file under the court rules, the Court told her that the documents cannot be produced to her as they were administrative documents and should be sought via the FOI Act
   - when she applied for access to those documents under the FOI Act, access was refused as they are deemed not to be documents of an administrative nature, and
   - the applicant alleges there had been bias on the part of court officers and that there had been a "cover-up" to deny access to the documents.

9. In its reasons for its decision, the Court said:

   > The phrase 'matters of an administrative nature' was clarified by the High Court in *Kline* at [47]. In the joint judgment of the High Court, the phrase 'matters of an administrative nature' was described as documents which concern the management and administration of office resources, such as financial and human resources and information technology. That judgment also makes it clear

[1] Section 5 set out in Annexure A.

[2] See, Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (FOI Guidelines).

[3] Set out in Annexure A.

that, in the view of those judges, documents held by a federal court relating to individual cases can never be characterised as documents "relating to 'matters of an administrative nature'".

I am satisfied that in light of section 5 of the FOI Act and the clarification provided by the High Court in *Kline*, your request concerns documents of the Court that are not documents related to 'matters of an administrative nature' within the meaning of *Kline*. I am satisfied that there were no documents relating to the management and administration of registry and office resources falling within the scope of your request.

10. The phrase 'matters of an administrative nature' is not defined in the FOI Act. However, in *Kline v Official Secretary to the Governor General* [2013] HCA 52, the High Court of Australia considered the meaning of that phrase with respect to s 6A of the FOI Act and documents of the Official Secretary of the Governor-General. The High Court said:

> The 'non-application' of the FOI Act to requests for access to documents of the Official Secretary, as stated in s 6A(1), inevitably refers to a class of documents relating to matters which are not 'of an administrative nature'. In conformity with the exclusion of the Governor-General from the operation of the FOI Act, those documents relate to the discharge of the Governor-General's substantive powers and functions. By contrast, 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 [such as financial and human resources and information technology]. This is a common enough connotation of the epithet 'administrative'.
>
> ...
>
> The analogous exclusion of federal courts and specified tribunals, authorities and bodies from the general operation of the FOI Act, except for documents which relate to matters of an administrative nature, also involves a balance of conflicting public interests. There is a long-recognised public interest in the protection of judicial independence to enable holders of judicial office to exercise authority without fear or favour—judges work in public, are obliged to give reasons, and are subject to appellate review. However, not every action undertaken by a judge in the discharge of the substantive powers and functions of adjudication is undertaken in public. For example, revision of an unrevised transcript of proceedings heard in open court may occur in chambers. That task is referable to the exercise of judicial, rather than administrative, powers and functions.
>
> …
>
> 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]

11. In *'BY' and High Court of Australia* [2014] AICmr 51, the former Freedom of Information Commissioner, Dr James Popple, considered a request for a range of documents that related to the applicant in that matter, including internal communications.[5] In applying *'Kline'* to decide that the documents were not of an administrative nature, former Commissioner Popple said:

---

4 *Kline v Official Secretary to the Governor General* [2013] HCA 52 at [41], [45] – [47] (French CJ, Crennan, Kiefel, and Bell JJ).

5 *'BY' and High Court of Australia* [2014] AICmr 51.

> In making a decision on this IC review, I must be independently satisfied that none of the documents relates to matters of an administrative nature: that none of the documents relates to 'the management and administration of registry and office resources'.[6]

12. It is apparent from the wording of the request that the applicant seeks documents related to litigation matters which include communications to or from a particular judge and their associates, as well as communications involving other lawyers, judges and their associates.

13. The Court described the documents in its submissions as consisting of:

    - correspondence comprising emails to parties and internal correspondence regarding the filing of court materials, court events and the conduct of proceedings[7]
    - court orders and reasons for judgment
    - transcripts of proceedings
    - bench sheets and appearance sheets[8]
    - distribution of judgment checklist[9]
    - finalised appeal checklists,[10] and
    - records of inspection.[11]

14. As *Kline* and the FOI Guidelines explain, documents of a judicial officer and documents relating to the exercise of judicial functions are excluded from the operation of the FOI Act, as are documents about tasks that a referrable to the exercise of the Courts judicial function. Taking into account the subject matter of the request and the Court's description of the documents, I consider that the requested documents are associated with the conduct of proceedings in particular litigation matters and are part of the Court's judicial functions. Accordingly, I am satisfied that the documents sought are about tasks that are referrable to the exercise of the Court's judicial function, and not the administration of the Court. I am similarly satisfied that the documents are not documents that relate to the management and administration of office resources, which is described in *Kline* as relating to the management of financial and human resources and information technology.[12]

15. With reference to the scope of the applicant's request discussed above, I consider that correspondence and other documents to or from judges and their associates – even if

---

[6] *'BY'* at [11].

[7] The Court advised this correspondence includes internal correspondence between registrars and judges' chambers and the registry, as well as correspondence between the Courts and parties in relation to court events, court orders, court directions and documents filed or attempted to be filed. 'Correspondence' forms the bulk of the left-hand side of the above mentioned files.

[8] The Court advised these documents record the names of parties appearing at court events (including legal representatives), start and end times, the manner in which the event was conducted (for example, in person, in chambers, or by telephone or other electronic means), and the recording of orders.

[9] The Court advised this is an internal document that is used by the registry following the delivery of reasons for judgment.

[10] The Court advised this is an internal document that is used by the registry following the conclusion of an appeal.

[11] The Court advised this is an internal document recording details of when a party to proceedings inspects a file, including the name, date and time of inspection.

[12] *Kline* at [13].

they discuss the administration of the judgment – are not subject to the FOI Act because as the High Court determined in *Kline*, even if some of the powers and functions of a judicial officer could be considered 'administrative' in nature, as a judicial officer he or she would still not be subject to the operation of the FOI Act. [13]

16. Similar to another IC review decision involving the Court,[14] it is apparent that the requested documents relate to particular litigation matters. In these circumstances I consider they relate to the exercise of the Court's substantive adjudicative functions and powers and not to matters of an administrative nature.

17. Accordingly, I am satisfied that the documents sought by the applicant in this case do not relate to matters of an administrative nature. Therefore s 5 of the FOI Act applies to these documents to exclude them from the operation of the FOI Act.

Toni Pirani
Freedom of Information Commissioner

24 January 2025

[14] *Lilo Hana von Schoeler and Federal Circuit Court of Australia* [2021] AICmr 16 (4 June 2021) at [18].

Annexure A

Relevant provisions of the FOI Act, FOI Guidelines, and decisions

Section 5(1) of the FOI Act provides:

Act to apply to courts in respect of administrative matters

Courts other than courts of Norfolk Island—general

(1) 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 FOI Guidelines relevantly explain:

The FOI Act has a restricted application to courts, court registries and the Official Secretary to the Governor-General. Specifically, the Act does not apply to a request for access to documents of a court or registry or the Official Secretary 'unless the document relates to matters of an administrative nature' (ss 5, 6A). The Act does not apply to the holder of a judicial office (5(1)(b)), nor to the Governor-General

...

As to courts, the Court observed that the Act applies only to documents relating to the management and administration of registry and office resources, and not to documents relating to the discharge of the substantive powers and functions of adjudication or tasks that are referable to the exercise of judicial, rather than administrative powers and functions.[15]

[15] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* [2.8] and [2.11].

Review rights

Review by the Administrative Review Tribunal

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Review Tribunal (ART). The ART provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the ART must be made within 28 days of the day on which the applicant is given the IC review decision (see s 18(1) of the *Administrative Review Tribunal Act 2024* and rule 5(3) of the *Administrative Review Tribunal Rules 2024).* An application fee may be payable when lodging an application for review to the ART. Further information is available on the ART's website (www.art.gov.au) or by telephoning 1800 228 333.

Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at http://www.ombudsman.gov.au.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the **Access our information** page on our website.

From: s22
To: s22; DL_OAIC FOI Branch; PIRANI,Toni; TYDD,Liz; OAIC - FOI Commissioner; OAIC - Legal; OAIC - Media; AGO,Rocelle
Subject: RE: [Case Summary] 'ANS' and Office of the Official Secretary to the Governor-General (Freedom of information) [2024] AICmr 200 (18 September 2024) [SEC=OFFICIAL]
Date: Wednesday, 18 September 2024 3:04:56 PM

Apologies all,

I have omitted a somewhat crucial negative, just in the 'key points' of the circulated case summary (corrected below in bold):

> It finds that the access request does **not** relate to 'matters of an administrative nature' within the meaning of s 6A(1) and is therefore outside the scope of the FOI Act.

Regards

s22

s22
Senior Advisor IC Reviews
Freedom of Information Branch
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From: s22@oaic.gov.au>
Sent: Wednesday, September 18, 2024 12:30 PM
To: DL_OAIC FOI Branch <DL_OAIC_FOI_Branch@external.dese.gov.au>; PIRANI,Toni <Toni.Pirani@oaic.gov.au>; TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>; OAIC - FOI Commissioner <FOICommissioner@oaic.gov.au>; OAIC - Legal <legal@oaic.gov.au>; OAIC - Media <media@oaic.gov.au>; AGO,Rocelle <Rocelle.Ago@oaic.gov.au>
Subject: [Case Summary] 'ANS' and Office of the Official Secretary to the Governor-General (Freedom of information) [2024] AICmr 200 (18 September 2024) [SEC=OFFICIAL]

Dear all,

I am sending this case summary on behalf of @s22, please see the TRIM link for the decision of the Commissioner, Freedom of Information in *'ANS' and Office of the Official Secretary to the Governor-General (Freedom of information)* [2024] AICmr 200 (18 September 2024): D2024/027407

I have also attached a copy.

Catchwords:

Freedom of Information — Whether access request to Office of the Official Secretary to the Governor-General 'relates to matters of an administrative nature' — (CTH) *Freedom of Information Act 1982* s 6A

Key points:
This decision discusses the application of s 6A of the FOI Act, relevant case law (in particular *Kline v Official Secretary to the Governor-General* [2013] HCA 52) and FOI Guidelines) to the applicant's access request related to Australia Day honours. It finds that the access request does relate to 'matters of an administrative nature' within the meaning of s 6A(1) and is therefore outside the scope of the FOI Act.

Decision: Affirm

No changes to the FOI Guidelines are required.

Congratulations to s22 for making the 200th decision of this calendar year in the FOI branch!

Kind Regards,

OAIC

s22 (she/her)
Assistant Review Advisor, FOI Branch
Office of the Australian Information Commissioner
Sydney | GPO Box 5288 Sydney NSW 2001

From:	s22
To:	DL_OAIC FOI Branch; PIRANI,Toni; TYDD,Liz; OAIC - FOI Commissioner; OAIC - Legal; OAIC - Media; AGO,Rocelle
Subject:	[Case Summary] 'ANS' and Office of the Official Secretary to the Governor-General (Freedom of information) [2024] AICmr 200 (18 September 2024) [SEC=OFFICIAL]
Date:	Wednesday, 18 September 2024 12:29:59 PM
Attachments:	[2024] AICmr 200.rtf

Dear all,

I am sending this case summary on behalf of @s22, please see the TRIM link for the decision of the Commissioner, Freedom of Information in *'ANS' and Office of the Official Secretary to the Governor-General (Freedom of information)* [2024] AICmr 200 (18 September 2024): D2024/027407

I have also attached a copy.

Catchwords:
Freedom of Information — Whether access request to Office of the Official Secretary to the Governor-General 'relates to matters of an administrative nature' — (CTH) *Freedom of Information Act 1982* s 6A

Key points:
This decision discusses the application of s 6A of the FOI Act, relevant case law (in particular *Kline v Official Secretary to the Governor-General* [2013] HCA 52) and FOI Guidelines) to the applicant's access request related to Australia Day honours. It finds that the access request does relate to 'matters of an administrative nature' within the meaning of s 6A(1) and is therefore outside the scope of the FOI Act.

Decision: Affirm

No changes to the FOI Guidelines are required.

Congratulations to s22 for making the 200th decision of this calendar year in the FOI branch!

Kind Regards,

s22 (she/her)
Assistant Review Advisor, FOI Branch
Office of the Australian Information Commissioner
Sydney | GPO Box 5288 Sydney NSW 2001

The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

Australian Government
Office of the Australian Information Commissioner

'ANS' and Office of the Official Secretary to the Governor-General (Freedom of information) [2024] AICmr 200 (18 September 2024)

Decision and reasons for decision of
Freedom of Information Commissioner, Toni Pirani

Applicant	'ANS'
Respondent	Office of the Official Secretary to the Governor-General
Decision date	18 September 2024
Application number	MR20/01087
Catchwords	Freedom of Information — Whether document of the Office of the Official Secretary to the Governor-General 'relates to matters of an administrative nature' — (CTH) *Freedom of Information Act 1982* s 6A

Decision

1. I affirm the decision of the Office of the Official Secretary to the Governor-General ('the Official Secretary'). The applicant's request is not for a *document* [that] *relates to matters of an administrative nature* within the meaning of s 6A(1) of the *Freedom of Information Act 1982* ('the FOI Act'). The FOI Act therefore does not apply to the access request.

Key Points

2. This Information Commissioner review ('IC review') decision discusses the application of s 6A of the FOI Act, relevant case law and the FOI Guidelines[1] to the applicant's request to the Official Secretary. It finds that the FOI Act does not apply to the request because it does not seek access to a document of an administrative nature within the meaning of s 6A(1) of the FOI Act.

[1] The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard in performing a function or exercising a power under the FOI Act.

Reasons for decision

Scope of IC review

3. On 8 September 2020, after some preliminary correspondence with the Official Secretary, the applicant made a request to the Official Secretary against the following background and in the following terms:

> I have been frequent reviewer for the order of Australia giving over many years and produced very high-quality report … In 2019, I have been subjected to a sever (sic) racial discrimination incident by [an identifiable person] … I am now contacting those organisations with which I dealt in the past asking if they have requested during 2019 any reference or info on my behalf from my employer [an identified institution]. It is likely that false info was given by [the identifiable person] and I have interest in reviewing this info and correct … Under the Privacy and Freedom of Information Act (ACT and Federal) … I am seeking access to all info/correspondences with any other party where my name has been mentioned or referred to. I am particularly interested to those documents dated 2019 and 2020 in possession of the Office of the Official Secretary to the Governor-General.

4. On 27 November 2020, the Official Secretary (citing the High Court's decision in *Kline v Official Secretary to the Governor General* [2013] HCA 52 ('Kline')) responded to the applicant's request with the following decision ('the decision'):

> As I understand your request and previous correspondence, you are seeking documents related to the administration of the Australian Honours and awards system. Such documents are not within the restricted application of the FOI Act. Any documents that may exist within the scope of your request would not relate to matters of administrative nature, as that term has been interpreted by the High Court [in *Kline*].

5. On 15 December 2020, the applicant requested an IC review of the decision, contending as follows:

> I want to get access to my personal information … and request that to be corrected if inaccurate. I am not seeking info about order of Australia but info about myself ... In Kline v Official Secretary to the Governor-General and Anor [2012] FCAFC 184 the Full Court of the Federal Court confirmed that documents about the Australian system of honours are not documents that relate to matters of an administrative nature and are not subject to s 6A of the Freedom of Information Act 1982 (Cth) (FOI Act) … I am not seeking "documents about the Australian system of honours" but info about myself and I am not a recipient or nominee for the order of Australia. I was working for them as reviewer and have been subjected to severe discrimination by [an identifiable person] in my work who may have submitted incorrect info to them. Therefore, I want to ensure that the info they are holding about me is correct and given the chance to amend if not correct.

6. The threshold issue to be decided in this IC review is whether the access request falls within the exception provided by s 6A(1) of the FOI Act, as interpreted by the High Court in *Kline*; that is, whether the applicant's request is for a *document* [of the Official Secretary that] *relates to matters of an administrative nature*. If the applicant's request does not fall within the exception, s 6A(1) provides that the FOI Act has no application to the access request.

7. In making my decision, I have had regard to the following:

   - the applicant's FOI request
   - the Official Secretary's decision and reasons for the decision
   - the FOI Act, in particular s 6A as set out in **Annexure A**

- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard in performing a function or exercising a power under the FOI Act, as set out in **Annexure A**
- relevant case law, and
- the parties' submissions.

Section 6A

8. Section 6A(1) of the FOI Act provides that the FOI Act 'does not apply to any request for access to a document of the Official Secretary **unless the document relates to matters of an administrative nature**' [emphasis added].

9. I have considered the Official Secretary's reasons for the decision set out at [4] above and the applicant's request and contentions set out respectively at [3] and [5] above. I consider that the application of *Kline* to the present matter conclusively determines the issue set out at [6] above. In this regard, the High Court observed:

> … the Governor-General is assisted and supported by the Office of the Official Secretary in two ways. First, the Office assists and supports the Governor-General in respect of all aspects of the Governor-General's role, which includes assisting and supporting the Governor-General's discharge of substantive powers and functions in respect of the Order. Secondly, the Governor-General is assisted and supported by the management and administration of office resources, such as financial and human resources and information technology. The distinction between the two forms of support will need to be borne in mind when approaching the task of construing s 6A(1).[2]

10. The High Court in *Kline* additionally concluded that:

> … [t]he public interest or purpose [of s 6A of the FOI Act] is achieved by the exclusion from disclosure of documents relating to non-administrative matters. In relation to the Order, these must include all unpublished documents associated with the administration (that is, the operation) of the Order, involving, as it does, a confidential selection process in respect of all nominations received within a particular period'[3].

11. In this context, the access request relates to the applicant's 'working for [the Official Secretary] as reviewer' in relation to the Order - a matter which is connected to the Governor-General's discharge of substantive powers and functions in respect of the Order. In this light, I consider the applicant's access request is a request for a document in relation to the Official Secretary's function of assisting the Governor-General in respect of the Order and is therefore not related to matters of an administrative nature within the meaning of s 6A(1).

Finding

12. For the reasons set out above, I am satisfied that the applicant's request is not for a document that relates to matters of an administrative nature within the meaning of s 6A(1) and is therefore outside the scope of the FOI Act.

Toni Pirani
Freedom of Information Commissioner

18 September 2024

---

[2] *Kline* at [13].
[3] ibid at [43].

Annexure A

Relevant provisions of the FOI Act and FOI Guidelines

Section 6A of the FOI Act provides:

> **6A Official Secretary to the Governor-General**
>
> (1) This Act does not apply to any request for access to a document of the Official Secretary to the Governor-General unless the document relates to matters of an administrative nature.
>
> (2) For the purposes of this Act, a document in the possession of a person employed under section 13 of the *Governor-General Act 1974* that is in his or her possession by reason of his or her employment under that section shall be taken to be in the possession of the Official Secretary to the Governor-General.

The FOI Guidelines[4] explain the exception provided under s 6A(1) to the general exclusion of documents of the Official Secretary to the Governor-General from the operation of the FOI Act, as follows:

> The phrase, 'matters of an administrative nature', is not defined in the FOI Act … In *Kline v Official Secretary to the Governor General,* the High Court held that the phrase refers to documents that concern 'the management and administration of office resources, such as financial and human resources and information technology'. By contrast, the phrase does not apply to documents that relate to the discharge of … the Governor- General's 'substantive powers and functions'. The Court approved a … distinction … between the substantive functions or powers of … the Governor-General, and the office 'apparatus' supporting the exercise or performance of those substantive powers and functions.

Review rights

Review by the Administrative Appeals Tribunal

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal (AAT). The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975).* An application fee may be payable when lodging an application for review to the AAT. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.

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If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more

[4] FOI Guidelines at [2.8] and [2.9] (footnotes omitted).

information on 1300 362 072 or visit the Commonwealth Ombudsman's website at http://www.ombudsman.gov.au.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the **Access our information** page on our website.

From:	s22
To:	DL_OAIC FOI Branch
Cc:	FALK,Angelene; TYDD,Liz; DL_OAIC FOI Branch; PIRANI,Toni; OAIC - Legal; OAIC - Media; OAIC - FOI Commissioner
Subject:	Case summary: Josh Taylor and Office of the Official Secretary to the Governor-General (Freedom of information) [2024] AICmr 151 (30 July 2024) [SEC=OFFICIAL]
Date:	Wednesday, 31 July 2024 4:29:00 PM
Attachments:	[2024]-AICmr 151.pdf

Dear all

Please find the TRIM links to the Special Adviser, FOI Decisions, decision in *Josh Taylor and Office of the Official Secretary to the Governor-General (Freedom of information)* [2024] AICmr 151 (30 July 2024)

Word: D2024/023533
PDF: D2024/023531
RTF: D2024/023534

I have also attached a copy of the decision.

Key points:
This decision discusses the application of s 6A of the FOI Act, relevant case law (in particular *Kline v Official Secretary to the Governor-General* [2013] HCA 52) and FOI Guidelines to the applicant's request for documents relating to complaints about Australia Day honours. It finds that such documents are not documents that relate to 'matters of an administrative nature' and accordingly are not subject to the FOI Act.

Catchwords:
Freedom of Information — Whether document of the Office of the Official Secretary to the Governor-General 'relates to matters of an administrative nature' — (CTH) *Freedom of Information Act 1982* s 6A

Decision: Vary

No changes to the FOI Guidelines are required.

Regards

OAIC

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Senior Advisor IC Reviews
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Office of the Australian Information Commissioner
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Josh Taylor and Office of the Official Secretary to the Governor-General (Freedom of information) [2024] AICmr 151 (30 July 2024)

Decision and reasons for decision of Special Adviser, Freedom of Information Decisions, Toni Pirani
Delegate of the Australian Information Commissioner for the purposes of s 55K of the *Freedom of Information Act 1982*

Applicant	Josh Taylor
Respondent	Office of the Official Secretary to the Governor-General
Decision date	30 July 2024
Application number	MR20/00338
Catchwords	Freedom of Information — Whether document of the Office of the Official Secretary to the Governor-General 'relates to matters of an administrative nature' — (CTH) *Freedom of Information Act 1982* s 6A

Decision

1. I vary the internal review decision of the Office of the Official Secretary to the Governor-General ('the Official Secretary'). The documents requested by the applicant are not *documents relating to matters of an administrative nature* within the meaning of s 6A of the *Freedom of Information Act 1982* ('the FOI Act').

Key Points

2. This decision discusses the application of s 6A of the FOI Act, relevant case law and the FOI Guidelines[1] to the applicant's request for documents relating to complaints about Australia Day honours. It finds that such documents are not documents of an administrative nature and accordingly are not subject to the FOI Act.

[1] The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard in performing a function or exercising a power under the FOI Act.

Reasons for decision

Scope of IC review

3. On 28 January 2020, the applicant made a request under the FOI Act to the Official Secretary for 'copies of all documents associated with the decision to give [named person] an Australia Day honour'. On 24 February 2020, the Official Secretary decided that '[i]n relation to your request for documents I have identified no documents relating to matters of an administrative nature [in terms of s 6A of the FOI Act], so accordingly I refuse your request under Section 24A of this Act' ('the first decision').

4. The applicant revised the access request on 25 February 2020 ('the revised request') as follows:

> … I request copies of all administrative documents and correspondence with government pertaining to how the office should handle any complaints about the latest round of honours.

5. On 10 March 2020, the Office of the Official Secretary responded to applicant's request as follows ('the second decision'):

> I have identified that there are no documents or correspondence relating to your request for information that are not exempt from the FOI Act. Accordingly, I advise that I must reject your request under Section 24A of this Act.

6. On 12 March 2020, the applicant requested an internal review of the second decision, contending that the Office of the Official Secretary had 'misunderstood the definition of administrative and I believe documents exist that would fall under this definition and should have been provided'.

7. The Official Secretary replied to the applicant on 20 April 2020, as follows ('the internal review decision'):

> I affirm this Office's earlier decision that we have not identified any documents covering your request that are subject to the operation of the FOI Act. Accordingly, I advise that I reject your request under Section 24 of this Act.
>
> In explanation, documents of the kind you request (and subsequently directed us to in your request for internal review) do not relate to matters of an administrative nature within the meaning prescribed by Section 6A of the FOI Act.
>
> The particular documents to which you refer are either not in the possession of the Agency or are not documents that relate to matters of an administrative nature.

8. On 3 April 2020, the applicant requested an IC review of this decision.

9. The threshold issue to be decided in this IC review is whether the access request falls within the exception (as interpreted by the High Court in *Kline v Official Secretary to the Governor-General* [2013] HCA 52 ('*Kline*')) provided by s 6A(1) of the FOI Act; that is, whether the applicant's request is for *documents* [of the Official Secretary] *relating to matters of an administrative nature*. If the applicant's request does not fall within the exception, s 6A(1) provides that the FOI Act has no application to the access request.

10. In making my decision, I have had regard to the following:

    - the Official Secretary's second decision and internal review decision, and reasons for those decisions

- the FOI Act, in particular s 6A as set out in **Annexure A**
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard in performing a function or exercising a power under the FOI Act, as set out in **Annexure A**
- relevant case law and IC review decisions, and
- the parties' submissions.

Section 6A

11. Section 6A(1) of the FOI Act provides that the FOI Act 'does not apply to any request for access to a document of the Official Secretary **unless the document relates to matters of an administrative nature**' [emphasis added].

12. The Official Secretary submits the following:

    > [The applicant's] request is for documents pertaining to handling 'complaints about the latest round of honours'. It is apparent from the terms of the request that these are not documents relating to the management and administration of office resources. Rather, Mr Taylor is seeking "unpublished documents associated with the administration (that is, the operation) of the Order", which the High Court in *Kline* makes clear are documents relating to the discharge of the Governor-General's substantive powers and functions and not documents relating to matters of an administrative nature within the meaning of s 6A.[2]

13. I have considered the submission of the Official Secretary and the applicant's contention set out at [12] and [6] above, respectively. I consider that the application of *Kline* to the present matter conclusively determines the issue outlined at [9] above. In this regard, the High Court observed:

    > … the Governor-General is assisted and supported by the Office of the Official Secretary in two ways. First, the Office assists and supports the Governor-General in respect of all aspects of the Governor-General's role, which includes assisting and supporting the Governor-General's discharge of substantive powers and functions in respect of the Order. Secondly, the Governor-General is assisted and supported by the management and administration of office resources, such as financial and human resources and information technology. The distinction between the two forms of support will need to be borne in mind when approaching the task of construing s 6A(1).[3]

14. The High Court in *Kline* concluded that 'correspondence and file notes relating to the appellant's nominations are directly related to the Governor-General's exercise of substantive powers and functions in respect of the Order [and] are excluded from disclosure as they do not fall within the exception in s 6A(1) of the FOI Act'[4]. The High Court additionally held that:

    > [t]o the extent that relevant criteria are further explained in working manuals or policy guidelines, the evidence showed that those documents were used in processes and activities concerned with the Governor-General's exercise of substantive powers and functions in respect of the Order. Those are excluded from disclosure, as they do not fall within the exception in s 6A(1).[5]

15. In my view the revised request can reasonably be interpreted as a request for policy documents or office manuals/procedures (howsoever described) of the Official

---

[2] Official Secretary's submission dated 18 June 2020.
[3] *Kline* at [13].
[4] ibid at [52].
[5] ibid at [54].

Secretary that deal with complaint handling in relation to the Official Secretary's function of assisting the Governor-General in respect of the Australian system of honours. In this regard I consider the documents sought in the revised request to be entirely analogous to the documents requested by the appellant in *Kline* (that is, 'working manuals, policy guidelines, and documents relating to [the Australian system of honours] review processes'[6]) and accordingly not to relate to matters of an administrative nature within the meaning of s 6A(1).

Finding

16. For the reasons set out above, I am satisfied that the documents requested by the applicant do not relate to matters of an administrative nature and therefore are outside the scope of the FOI Act.

Toni Pirani

Special Adviser, Freedom of Information Decisions

30 July 2024

Annexure A

Relevant provisions of the FOI Act and FOI Guidelines

Section 6A of the FOI Act provides:

> **6A Official Secretary to the Governor-General**
>
> (1) This Act does not apply to any request for access to a document of the Official Secretary to the Governor-General unless the document relates to matters of an administrative nature.
>
> (2) For the purposes of this Act, a document in the possession of a person employed under section 13 of the *Governor-General Act 1974* that is in his or her possession by reason of his or her employment under that section shall be taken to be in the possession of the Official Secretary to the Governor-General.

The FOI Guidelines[7] explain the exception provided under s 6A(1) to the general exclusion of documents of the Official Secretary to the Governor-General from the operation of the FOI Act, as follows:

> The phrase, 'matters of an administrative nature', is not defined in the FOI Act … In *Kline v Official Secretary to the Governor General,* the High Court held that the phrase refers to documents that concern 'the management and administration of office resources, such as financial and human resources and information technology'. By contrast, the phrase does not apply to documents that relate to the discharge of … the Governor- General's 'substantive powers and functions'. The Court approved a … distinction … between the substantive functions or powers of … the Governor-General, and the office 'apparatus' supporting the exercise or performance of those substantive powers and functions.

[6] ibid at [2].

[7] FOI Guidelines at [2.8] and [2.9] (footnotes omitted).

Review rights

Review by the Administrative Appeals Tribunal

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal (AAT). The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975).* An application fee may be payable when lodging an application for review to the AAT. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.

Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at http://www.ombudsman.gov.au.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the **Access our information** page on our website.

to documents that relate to the judicial or adjudicative functions of those bodies. For example, the FOI Act does not apply to documents relating to the proceedings or decision of a court, nor to the exercise of the court's judicial functions by an officer such as the registrar.

2.6 The FOI Act provides in similar terms that it only applies to the Official Secretary to the Governor-General in respect of requests for access to documents that relate to 'matters of an administrative nature' (s 6A). Implicitly, the Act does not apply to requests for access to documents that relate to the Governor-General's discharge of official functions conferred by the Constitution or an enactment.[3]

2.7 There is no similar exclusion from the Act applying to tribunals, such as the AAT, Migration Review Tribunal, Refugee Review Tribunal, Social Security Appeals Tribunal and Veterans' Review Board. The Act applies to those tribunals in the same manner as it applies to other agencies.

Exemption of certain persons and bodies

2.8 Sections 7(1) and 7(1A) (supplemented by Schedule 2, Part 1) designate other bodies that are not agencies for the purposes of the FOI Act:

- Aboriginal Land Councils and Land Trusts
- Auditor-General
- Australian Government Solicitor
- Australian Industry Development Corporation
- Australian Secret Intelligence Service (ASIS)
- Australian Security Intelligence Organisation (ASIO)
- Inspector-General of Intelligence and Security (IGIS)
- National Workplace Relations Consultative Council
- Office of National Assessments (ONA)

and the following defence intelligence agencies:

- Defence Imagery and Geospatial Organisation (DIGO)
- Defence Intelligence Organisation (DIO)
- Defence Signals Directorate (DSD).

[3] Documents such as manuals and guidelines relating to the administration of the Australian honours system, documents relating to review processes documents and specific nominations and how they are processed relate to the Governor-General's discharge of a vice-regal function and do not relate to matters of an administrative nature within the meaning of s 6A: *'B' and Office of the Official Secretary to the Governor-General* [2011] AICmr 6.

Courts, tribunals and the Office of the Governor-General

2.6 The FOI Act has a restricted application to courts, the Australian Industrial Relations Commission, the Australian Fair Pay Commission, and the Industrial Registrar and Deputy Industrial Registrars (ss 5, 6).[2] Specifically, the Act only applies in respect of those bodies to requests for access to documents that relate to 'matters of an administrative nature', a phrase that is not defined in the Act. It is implicit in that phrase that the Act does not apply to documents that relate to the judicial or adjudicative functions of those bodies. For example, the FOI Act does not apply to documents relating to the proceedings or decision of a court, nor to the exercise of the court's judicial functions by an officer such as the registrar.

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- Auditor-General
- Australian Government Solicitor
- Australian Industry Development Corporation
- Australian Secret Intelligence Service (ASIS)
- Australian Security Intelligence Organisation (ASIO)

[2] Fair Work Australia has assumed the functions of the Australian Industrial Relations Commission and some of the responsibilities of the Australian Fair Pay Commission, which ceased operations on 31 July 2009.

[3] Documents such as manuals and guidelines relating to the administration of the Australian honours system, documents relating to review processes documents and specific nominations and how they are processed relate to the Governor-General's discharge of a vice-regal function and do not relate to matters of an administrative nature within the meaning of s 6A: *'B' and Office of the Official Secretary to the Governor-General* [2011] AICmr 6.

[4] *Kline v Official Secretary to the Governor-General* [2012] FCAFC 184 [21], on appeal from Kline and Official Secretary to the Governor-General [2012] AATA 247, which was an AAT review of *B and Office of the Official Secretary to the Governor-General* (footnote 3 above).

Courts, tribunals and the Office of the Governor-General

2.6 The FOI Act has a restricted application to courts, the Australian Industrial Relations Commission, the Australian Fair Pay Commission, and the Industrial Registrar and Deputy Industrial Registrars (ss 5, 6).[2] Specifically, the Act only applies in respect of those bodies to requests for access to documents that relate to ‘matters of an administrative nature’, a phrase that is not defined in the Act. It is implicit in that phrase that the Act does not apply to documents that relate to the judicial or adjudicative functions of those bodies. For example, the FOI Act does not apply to documents relating to the proceedings or decision of a court, nor to the exercise of the court’s judicial functions by an officer such as the registrar.

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2.8 There is no similar exclusion from the Act applying to tribunals, such as the AAT, Migration Review Tribunal, Refugee Review Tribunal, Social Security Appeals Tribunal and Veterans’ Review Board. The Act applies to those tribunals in the same manner as it applies to other agencies.

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[4] *Kline v Official Secretary to the Governor-General* [2012] FCAFC 184, [21], on appeal from *Kline and Official Secretary to the Governor-General* [2012] AATA 247, which was an appeal from ~~an AAT review of~~ *‘B’ and Office of the Official Secretary to the Governor-General* (footnote 3 above).

authorities under s 7(1) and Division 1 of Part I of Schedule 2 of the FOI Act (see paragraph [2.9]).

Courts, tribunals and the Office of the Governor-General

2.6 The FOI Act has a restricted application to courts, the Australian Industrial Relations Commission, the Australian Fair Pay Commission, and the Industrial Registrar and Deputy Industrial Registrars (ss 5, 6).[3] Specifically, the Act only applies in respect of those bodies to requests for access to documents that relate to 'matters of an administrative nature', a phrase that is not defined in the Act. It is implicit in that phrase that the Act does not apply to documents that relate to the judicial or adjudicative functions of those bodies. For example, the FOI Act does not apply to documents relating to the proceedings or decision of a court, nor to the exercise of the court's judicial functions by an officer such as the registrar. In addition, ss 5(1A)–(1C) of the FOI Act provide that the Act does not apply to certain documents of the Federal Court, the Family Court and the Federal Circuit Court of Australia that relate to handling complaints about judicial officers.

2.7 The FOI Act provides in similar terms that it only applies to the Official Secretary to the Governor-General in respect of requests for access to documents that relate to 'matters of an administrative nature' (s 6A). Implicitly, the Act does not apply to requests for access to documents that relate to the Governor-General's discharge of official functions conferred by the Constitution or an enactment. The Full Federal Court of Australia has confirmed this distinction: 'In our view the relevant distinction being drawn by s 6A is between the substantive powers and functions of the Governor-General, on the one hand, and the apparatus for the exercise of that power or function, matters merely supportive of that power or function, on the other.'[4] The High Court of Australia also confirmed this distinction, stating that matters of an administrative nature 'are distinct from, but incidental to, the exercise or performance of substantive powers or functions in the sense of providing logistical support (or infrastructure or physical necessities or resources or platform) for the exercise or performance of those substantive powers or functions to be able to occur.'[5] The Court further stated that '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.'[6]

2.8 There is no similar exclusion from the Act applying to tribunals, such as the AAT, Migration Review Tribunal, Refugee Review Tribunal, Social Security Appeals Tribunal and Veterans' Review Board. The Act applies to those tribunals in the same manner as it applies to other agencies.

[3] The Fair Work Commission (previously Fair Work Australia) has assumed the functions of the Australian Industrial Relations Commission and some of the responsibilities of the Australian Fair Pay Commission, which ceased operations on 31 July 2009.

[4] *Kline v Official Secretary to the Governor-General* [2012] FCAFC 184 [21], on appeal from *Kline and Official Secretary to the Governor-General* [2012] AATA 247, which was an appeal from *'B' and Office of the Official Secretary to the Governor-General* [2011] AICmr 6.

[5] *Kline v Official Secretary to the Governor General* [2013] HCA 52 [74].

[6] *Kline v Official Secretary to the Governor General* [2013] HCA 52 [76].

authorities under s 7(1) and Division 1 of Part I of Schedule 2 of the FOI Act (see paragraph [2.9]).

Courts, tribunals and the Office of the Governor-General

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2.7 The FOI Act provides in similar terms that it only applies to the Official Secretary to the Governor-General in respect of requests for access to documents that relate to 'matters of an administrative nature' (s 6A). Implicitly, the Act does not apply to requests for access to documents that relate to the Governor-General's discharge of official functions conferred by the Constitution or an enactment. The Full Federal Court of Australia has confirmed this distinction: 'In our view the relevant distinction being drawn by s 6A is between the substantive powers and functions of the Governor-General, on the one hand, and the apparatus for the exercise of that power or function, matters merely supportive of that power or function, on the other.'[4] The High Court of Australia also confirmed this distinction, stating that matters of an administrative nature 'are distinct from, but incidental to, the exercise or performance of substantive powers or functions in the sense of providing logistical support (or infrastructure or physical necessities or resources or platform) for the exercise or performance of those substantive powers or functions to be able to occur.'[5] The Court ~~further~~also stated that '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.'[6]

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[3] The Fair Work Commission (previously Fair Work Australia) has assumed the functions of the Australian Industrial Relations Commission and some of the responsibilities of the Australian Fair Pay Commission, which ceased operations on 31 July 2009.

[4] *Kline v Official Secretary to the Governor-General* [2012] FCAFC 184 [21], on appeal from *Kline and Official Secretary to the Governor-General* [2012] AATA 247, which was an appeal from *'B' and Office of the Official Secretary to the Governor-General* [2011] AICmr 6.

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2.9

~~2.6 , a phrase that is not defined in the Act. It is implicit in that phrase that the Act does not apply to documents that relate to the judicial or adjudicative functions of those bodies. For example, the FOI Act does not apply to documents relating to the proceedings or decision of a court, nor to the exercise of the court's judicial functions by an officer such as the registrar. In addition, ss 5(1A)–(1C) of the FOI Act provide that the Act does not apply to certain documents of the Federal Court, the Family Court and the Federal Circuit Court of Australia that relate to handling complaints about judicial officers.~~

~~2.7~~2.10 ~~The FOI Act provides in similar terms that it only applies to the Official Secretary to the Governor-General in respect of requests for access to documents that relate to 'matters of an administrative nature' (s 6A). Implicitly, the Act does not apply to requests for access to documents that relate to the Governor-General's discharge of official functions conferred by the Constitution or an enactment. The Full Federal Court of Australia has confirmed this distinction: 'In our view the relevant distinction being drawn by s 6A is between the substantive powers and functions of the Governor-General, on the one hand, and the apparatus for the exercise of that power or function, matters merely supportive of that power or function, on the other.'~~[9] The High Court of Australia also confirmed this distinction, stating that matters of an administrative nature 'are distinct from, but incidental to, the exercise or performance of substantive powers or functions in the sense of providing logistical support (or infrastructure or physical necessities or resources or platform) for the exercise or performance of those substantive powers or functions to be able to occur.'[10] The Court ~~further~~also stated that '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.'[11]

~~2.8~~2.11 There is no similar exclusion from the Act applying to tribunals, such as the AAT, Migration Review Tribunal, Refugee Review Tribunal, Social Security Appeals Tribunal and Veterans' Review Board. The Act applies to those tribunals in the same manner as it applies to other agencies.

Exemption of certain persons and bodies

~~2.9~~2.12 Under s 7(1), the following bodies specified in Schedule 2, Part I, Division 1 are not agencies for the purposes of the FOI Act:

- Aboriginal Land Councils and Land Trusts
- Auditor-General
- Australian Government Solicitor
- Australian Industry Development Corporation

~~[9] *Kline v Official Secretary to the Governor-General* [2012] FCAFC 184 [21], on appeal from *Kline and Official Secretary to the Governor-General* [2012] AATA 247, which was an appeal from *'B' and Office of the Official Secretary to the Governor-General* [2011] AICmr 6.~~

[10] *Kline v Official Secretary to the Governor-General* [2013] HCA 52 [74].

[11] *Kline v Official Secretary to the Governor-General* [2013] HCA 52 [76].

- Australian Secret Intelligence Service
- Australian Security Intelligence Organisation (ASIO)
- Inspector-General of Intelligence and Security
- National Workplace Relations Consultative Council
- Office of National Assessments (ONA)
- Parliamentary Budget Office
- Parliamentary Budget Officer.

~~2.10~~2.13 Under s 7(1A), the following parts of the Department of Defence specified in Schedule 2, Part I, Division 2 are taken not to be part of the Department of Defence nor agencies in their own right for the purposes of the FOI Act:

- Australian Geospatial-Intelligence Organisation~~Defence Imagery and Geospatial Organisation~~
- Defence Intelligence Organisation
- ~~Defence~~ Australian Signals Directorate.

Exemptions applying to commercial activities, security and defence intelligence documents, and other matters

~~2.11~~2.14 Section 7(2) (supplemented by Schedule 2, Part II) lists agencies that are exempt from the operation of the FOI Act in relation to particular types of documents. The list includes: the Australian Broadcasting Corporation and Special Broadcasting Service in relation to program material and datacasting content;[12] the Reserve Bank of Australia in relation to its banking operations and exchange control matters; the Australian Statistician, in relation to documents containing information collected under the *Census and Statistics Act 1905*; and various bodies (such as Australia Post, Comcare, Commonwealth Scientific and Industrial Research Organisation (CSIRO), NBN Co Ltd and Medicare) in relation to documents in respect of commercial activities. Except when used in relation to NBN Co Ltd, the term 'commercial activities' is defined as meaning the current or proposed commercial activities of a body that are carried on in competition with persons other than government agencies (s 7(3)). When used in relation to NBN Co Ltd, the term 'commercial activities' is defined as meaning the current or proposed commercial activities of NBN Co Ltd (s 7(3A)).[13] For a complete list of bodies exempt under s 7(2), see Schedule 2, Part II.

~~2.12~~2.15 All Australian Government agencies are exempt from the operation of the Act in relation to 'intelligence agency documents' (for example, a document that originated with or was received from ASIO or ONA) (s 7(2A)) and 'defence intelligence documents' (for example, a document that originated with or was received from the Department of Defence

[12] For examples of the application of this exemption and the meaning of 'program material', see *Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited and Anor* [2012] AATA 914 on appeal from *Herald and Weekly Times Pty Ltd and Australian Broadcasting Corporation* [2012] AICmr 7 and *'F' and Australian Broadcasting Corporation* [2012] AICmr 8.

[13] See *Internode Pty Ltd and NBN Co Ltd* [2012] AICmr 4 and *Battersby and NBN Co Ltd* [2013] AICmr 61.