



'B' and Office of the Official Secretary to the Governor-General [2011] AICmr 6 (9 August 2011)

Decision and reasons for decision of Freedom of Information Commissioner, Dr James Popple

Applicant:	'B'
Respondent:	Office of the Official Secretary to the Governor-General
Decision date:	9 August 2011
Application number:	MR11/00031
Catchwords:	Freedom of Information — Request for access to documents — Whether document of the Official Secretary to the Governor-General 'relates to matters of an administrative nature' — Documents concerning appointments to the Order of Australia — (CTH) <i>Freedom of Information Act 1982 s 6A</i>

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Summary

1. I affirm the decision of the Office of the Official Secretary to the Governor-General (the **Office**) of 25 February 2011, to refuse the applicant's request for documents. Because of s 6A, the documents sought are not subject to the *Freedom of Information Act 1982* (the **FOI Act**).

Background

2. There has been an Official Secretary to the Governor-General since 1901, but the position was formally established under s 6 of the *Governor-General Act 1974* in 1984.¹ Section 6 was amended in 1999 to establish the Office, which consists of the Official Secretary and staff.² The statutory function of the Office is to assist the Governor-General.³ The *Portfolio Budget Statements 2011–12* say that the planned outcome of the Office is that '[t]he performance of the Governor-General's role is facilitated through organisation and management of official duties, management and maintenance of the official household and property and administration of the Australian Honours and Awards system'.⁴
3. In 2007, and again in 2009, the applicant submitted nominations to the Office for the appointment to the Order of Australia of a member of the community known to the applicant. I understand that that person has not been appointed to the Order of Australia.
4. On 26 January 2011, the applicant sent an FOI request to the Office seeking access to materials relating to her 2007 and 2009 nominations. She sought a copy of the nominations as she had submitted them, a list of documents presented to the Council for the Order of Australia for the purpose of assessing those nominations, and related correspondence. She also requested copies of '[w]orking manuals, policy guidelines and criteria related to the administration of awards within the Order of Australia', and '[d]ocuments relating to review processes i.e. right of appeal in cases of maladministration'.
5. On 25 February 2011, the Deputy Official Secretary to the Governor-General responded to the applicant's FOI request. He indicated that a list did not exist of documents presented to the Council for the Order of Australia, and refused that part of the request under s 24A of the FOI Act. He also refused the entire request on the basis that the documents sought do not relate to 'matters of an administrative nature' and so the FOI Act does not apply to those documents because of s 6A.
6. On 25 February 2011, the applicant sought IC review of this decision under s 54L of the FOI Act.

¹ Section 6 was inserted by s 141 of the *Public Service Reform Act 1984* with effect from 24 December 1984.

² Section 6(2) was inserted by item 496 of Schedule 1 to the *Public Employment (Consequential and Transitional) Amendment Act 1999* with effect from 5 December 1999.

³ *Governor-General Act 1974*, s 6(3).

⁴ Commonwealth, *Portfolio Budget Statements 2011–12, Budget Related Paper No 1.15A, Prime Minister and Cabinet Portfolio*, 5 May 2011, 504.

Decision under review

7. The decision under review is the decision of the Office of 25 February 2011 to refuse the applicant's request.

Status of the Office under the FOI Act

8. The FOI Act applies to the Office because it is a body established for a public purpose by an enactment and, therefore, a 'prescribed authority' as defined in s 4. However, s 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.
9. The status of the Office under the FOI Act is analogous to that of courts and certain tribunals. Under s 5 (for courts) and s 6 (for certain tribunals), the FOI Act does not apply to any request for access to a document of a court/tribunal unless the document relates to matters of an administrative nature.

Documents relating to 'matters of an administrative nature'

10. There has been judicial interpretation of the phrase 'unless the document relates to matters of an administrative nature' in relation to s 5 (about courts).⁵ However, there is no case law examining the meaning of the same words in s 6A.
11. In *Bienstein v Family Court of Australia* (2008) 170 FCR 382; [2008] FCA 1138, the Federal Court, after reviewing the legislative history of s 5, decided that the purpose of that section was to protect judicial independence from the executive arm of government. Gray J said:

... there will be powers and functions exercised and performed within a court, even by the judicial officers of that court, that are of an administrative nature. Some of those powers and functions will be such that, of their very nature, they are so close to the overriding consideration of judicial independence as to be an essential part of the adjudicative function. It follows that the exercise of those functions, although it might be termed 'administrative', ought to be protected from scrutiny by other arms of government, or by members of the public. Not all of the powers and functions properly characterised as being of an administrative nature will be

⁵ For example, *Loughnan v Altman* (1992) 39 FCR 90; [1992] FCA 580; *Bienstein v Family Court of Australia* (2008) 170 FCR 382; [2008] FCA 1138.

so closely related to judicial independence that they need this kind of protection. In some cases, it will be necessary to look at the particular exercise of a power, or the particular act or acts in performance of a function, in their context, to determine whether public or executive scrutiny of them would endanger the necessary independence.⁶

12. The Court decided that it would be necessary, in relation to each document covered by an FOI request, for the decision maker to consider the terms of the request, and the history and content of the document, and to form an opinion on whether disclosure of that document could endanger judicial independence.⁷
13. The precedent of *Bienstein* is of assistance in—though not entirely applicable to—the interpretation of s 6A. The extrinsic material referred to in *Bienstein* is not directly relevant to s 6A.⁸ And the notion of judicial independence is not directly relevant to documents held by, or on behalf of, the Governor-General. However, the test in *Bienstein* can be applied, by analogy, to the vice-regal function instead of the adjudicative function. This will involve looking at a vice-regal function to determine whether it is a function that is to be exercised independently of the regular administration of the office.
14. The Australian Information Commissioner has issued Guidelines under s 93A to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. The Guidelines explain that:

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). 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.

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.⁹

⁶ [2008] FCA 1138 [67].

⁷ [2008] FCA 1138 [78], [81].

⁸ Sections 5 and 6 were part of the *Freedom of Information Act 1982* as originally enacted. Section 6A was inserted by s 154 of the *Public Services Reform Act 1984* with effect from 1 January 1986.

⁹ Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (2010) [2.5]–[2.6].

Documents relating to the administration of the Australian honours system

15. In support of her IC review application, the applicant argued that the documents that she requested are of an administrative nature because they relate to the administration of the Australian honours system. But, I think that ‘matters of an administrative nature’ in s 6A means the clerical and other support functions that allow core vice-regal functions to happen. It cannot mean those core functions themselves.
16. The Order of Australia was established by Letters Patent, published on 14 February 1975.¹⁰ The Letters Patent also established the Council for the Order of Australia, which is responsible for considering nominations and making recommendations to the Governor-General for appointment to the Order and for the award of the Medal of the Order.¹¹ These appointments and awards are made at the Governor-General’s discretion. The Letters Patent expressly do not limit ‘the right of the Governor-General to exercise all powers and authorities of The Sovereign in respect of the Order’.¹² This is a core vice-regal function, which the Governor-General exercises independently.
17. I note that the Office has already provided the applicant, outside the FOI Act, with copies of a number of documents that the applicant submitted as part of her 2007 and 2009 nominations. I commend it for doing so. However, the documents that the applicant has sought that contain detail about specific nominations and how those nominations were processed do not, in my view, relate to matters of an administrative nature for the purposes of s 6A. They relate to a core vice-regal function: deciding whether or not to appoint an individual to the Order of Australia.
18. This is also true of the other documents that the applicant sought: manuals and guidelines relating to the administration of the Australian honours system, and documents relating to review processes. These documents, like the ones relating specifically to the applicant’s nominations, relate to the Governor-General’s discharge of a core function, namely the vice-regal honours function. As explained in the Guidelines, the FOI Act implicitly does not apply to requests for access to such documents.¹³ These documents do not relate to matters of an administrative nature within the meaning of s 6A of the FOI Act.
19. Given the view that I have come to about the nature of the documents sought, there is no need for me to examine the documents to decide this IC review.

¹⁰ ‘Constitution of the Order of Australia—Letters Patent’ in Commonwealth, *Australian Government Gazette: Special*, No S 28, 17 February 1975, s 1.

¹¹ *Ibid*, ss 4 and 5.

¹² *Ibid*, s 10. See also s 9.

¹³ See [14] above.

Findings

20. The documents that the applicant sought do not relate to matters of an administrative nature. Accordingly, because of s 6A, the FOI Act does not apply to those documents. The Office was correct in refusing the applicant's request.

Decision

21. Under s 55K of the FOI Act, I affirm the Office's decision to refuse the applicant's request.

Dr James Popple
Freedom of Information Commissioner
9 August 2011

Review rights

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. 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. The current application fee is \$777, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.