

HIGH COURT OF AUSTRALIA

FRENCH CJ,
CRENNAN, KIEFEL, BELL AND GAGELER JJ

KAREN KLINE

APPELLANT

AND

OFFICIAL SECRETARY TO THE GOVERNOR
GENERAL & ANOR

RESPONDENTS

Kline v Official Secretary to the Governor General
[2013] HCA 52
6 December 2013
B47/2013

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

R Merkel QC with E M Nekvapil for the appellant (instructed by Bartley Cohen Solicitors)

J T Gleeson SC, Solicitor-General of the Commonwealth with N Kidson and C L Lenehan for the first respondent (instructed by Australian Government Solicitor)

Submitting appearance for the second respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Kline v Official Secretary to the Governor General

Administrative law – Freedom of information – Request for access to documents – Section 6A(1) of *Freedom of Information Act* 1982 (Cth) provided that documents held by Official Secretary to the Governor-General were excluded from disclosure unless they related to "matters of an administrative nature" – Whether documents relating to nomination of person to Order of Australia were excluded from disclosure by operation of s 6A(1).

Words and phrases – "matters of an administrative nature".

Freedom of Information Act 1982 (Cth), ss 5, 6, 6A.

1 FRENCH CJ, CRENNAN, KIEFEL AND BELL JJ. The appellant, Ms Kline, made a request under s 15 of the *Freedom of Information Act* 1982 (Cth) ("the FOI Act") for access to certain categories of documents held by the first respondent, the Official Secretary to the Governor-General of the Commonwealth of Australia ("the Official Secretary"). The second respondent, the Administrative Appeals Tribunal ("the Tribunal"), filed an appearance submitting to any order the Court may make save as to costs.

2 The documents in the request related to the Australian system of honours, the Order of Australia. They included two nomination forms for the making of an award and correspondence in relation to those nominations, criteria for making awards, working manuals, policy guidelines, and documents relating to review processes. Subsequently, the appellant expanded her request to include an additional category of documents, being "all file notes from the Secretariat" contained in the nominations, which she made in 2007 and 2009.

3 The decision of the Official Secretary¹, an "agency" subject to the operation of the FOI Act², was conveyed in writing. In that communication it was stated that some of the documents requested by the appellant did not exist. In relation to the balance, it was said that "no documents relating to matters of an administrative nature" had been identified, being the only class of documents of the Official Secretary which are subject to obligations under the FOI Act³. The letter also stated that the appellant would be provided with one copy of each of the two nominations she had made, but as those documents did not relate to matters of an administrative nature, they were not subject to the FOI Act.

4 On review, under s 55K of the FOI Act, the Australian Information Commissioner ("the Commissioner") affirmed the Official Secretary's decision to refuse the appellant access to the documents she had requested. The appellant then appealed to the Tribunal, which affirmed the Official Secretary's decision⁴.

1 Authorised under s 23 of the FOI Act.

2 FOI Act, s 4(1).

3 See FOI Act, s 6A(1).

4 *Kline v Official Secretary to the Governor-General* (2012) 127 ALD 639.

French CJ
Crennan J
Kiefel J
Bell J

2.

On an appeal on a question of law⁵, the Full Court of the Federal Court of Australia⁶ upheld the Tribunal's decision⁷.

This appeal

5 A panel granted special leave to appeal limited to the following grounds:

"That the Federal Court erred:

- (a) in holding that the *Freedom of Information Act 1982* (Cth) ('the FOI Act') did not apply to the [appellant's] requests for access to documents made on 26 and 30 January 2011 by reason of s 6A of that Act;
- (b) in holding that any document that 'relates to [a] substantive power or function' of the Governor General is not a document that 'relates to matters of an administrative nature' within the meaning of s 6A, and is thereby excluded from the coverage of the Act; or
- (c) in characterizing each document the subject of the requests as a document that 'relates to [a] substantive power or function' of the Governor General."

6 The grounds show that the disposition of this appeal depends on the proper construction of s 6A of the FOI Act, set out below.

The Order of Australia

7 The Order of Australia was established by Letters Patent dated 14 February 1975, in which it was recited: "it is desirable that there be established an Australian society of honour for the purpose of according recognition to Australian citizens and other persons for achievement or for meritorious service". Accordingly, the Letters Patent established "a society of honour to be known as the 'Order of Australia'". The Constitution of the Order of Australia⁸ ("the Constitution"), as amended, provides that the Governor-General

5 Under s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth).

6 Sitting pursuant to the *Administrative Appeals Tribunal Act 1975* (Cth), s 44(3)(b).

7 *Kline v Official Secretary to the Governor-General* (2012) 208 FCR 89.

8 Schedule to the Letters Patent.

3.

shall be the Chancellor of the Order and the Principal Companion in the General Division⁹, taking precedence, after the Sovereign, over all other members of the Order¹⁰. The Governor-General "is charged with the administration of the Order"¹¹, a reference to the Governor-General's overall responsibility in respect of the Order. The Order has a General Division, which is relevant to these proceedings, and a Military Division¹².

8 The Constitution also provides for an independent Council for the Order consisting of 19 members¹³ and for the receipt of nominations from individuals or groups in the Australian community by the Secretary of the Order¹⁴, described as appointed by the Governor-General¹⁵. The Council is empowered to consider nominations to the General Division¹⁶, make recommendations to the Governor-General in relation to those nominations, and advise the Governor-General on such matters concerning the Order as the Governor-General may refer to the Council for its consideration¹⁷. It was not contested that research and inquiry carried out in the Office of the Official Secretary formed the basis of the Council's consideration of any nomination. Apart from receiving nominations, the functions of the Secretary of the Order also include maintaining the records of the Order and the Council and performing such other functions in respect of the Order as directed by the

9 The Constitution, s 2(1).

10 The Constitution, s 2A(1).

11 The Constitution, s 3.

12 The Constitution, s 1(1).

13 The Constitution, s 4.

14 The Constitution, s 19.

15 The Constitution, s 6(1).

16 Appointments to the Order and awards of the Medal of the Order in the Military Division are made by the Governor-General on the recommendation of the Minister for Defence.

17 The Constitution, s 5.

French CJ
Crennan J
Kiefel J
Bell J

4.

Governor-General¹⁸. By convention and practice, the Official Secretary is the Secretary of the Order.

9 The procedure in respect of a nomination for an appointment or award in the Order of Australia was summarised by the Full Court¹⁹ and does not need to be repeated here, save to note that the nomination forms contain criteria and state that all nominations are "strictly confidential". Appointments to the Order and awards of the Medal of the Order are made "with the approval of The Sovereign, by Instrument signed by the Governor-General and sealed with the Seal of the Order."²⁰ The features of the Order described above ensure that the grant of honours in the General Division is rendered independent of government and politics.

Relevant legislative provisions

10 This appeal concerns the proper construction of s 6A of the FOI Act. In particular, it concerns the meaning of the phrase "unless the document relates to matters of an administrative nature" in s 6A(1), which identifies the only documents of the Official Secretary which are subject to the operation of the FOI Act. Before turning to the text of s 6A and the statutory scheme of which it is a part, it is convenient to say something more about the Governor-General and the statutory functions of the Official Secretary.

The Governor-General

11 Section 61 in Ch II of the Australian Constitution vests the executive power of the Commonwealth in the Queen and provides that such power is exercisable by her representative in Australia, the Governor-General. The grant of honours, once regarded as part of the prerogative of the Crown²¹, is now encompassed in the executive power conferred by s 61²². These proceedings are

18 The Constitution, s 6(2).

19 *Kline v Official Secretary to the Governor-General* (2012) 208 FCR 89 at 92 [11].

20 The Constitution, s 9.

21 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] QB 365 at 398-399 [44]-[46].

22 *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 226 [86]; [2010] HCA 27; *Williams v Commonwealth* (2012) 86 ALJR 713 at 723 [24] per (Footnote continues on next page)

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not concerned with any of the many powers or functions of the Governor-General which involve acting on the advice of the Executive Council²³. Whilst it is accurate to describe the role of the Governor-General as having evolved since Federation²⁴, Governors-General have exercised a range of constitutional²⁵, statutory, ceremonial and community responsibilities. The Governor-General's role in respect of the Order reflects ceremonial and community responsibilities, as well as the Governor-General's constitutional position as the representative of the Sovereign in Australia.

12 Sections 6 to 19 of the *Governor-General Act 1974* (Cth) make provision for the office and functions of the Official Secretary. Relevantly, s 6 provides:

- "(1) There shall be an Official Secretary, who shall be appointed by the Governor-General.
- (2) The Official Secretary, together with the staff employed under section 13, constitute the Office of Official Secretary to the Governor-General.
- (3) The function of the Office is to assist the Governor-General."

13 Section 13 provides that the Official Secretary may employ a person as "a member of the Governor-General's staff." Section 6A(2) of the FOI Act provides that a document in the possession of a person so employed, by reason of that person's employment, is taken to be in the possession of the Official Secretary for the purposes of the FOI Act. The Official Secretary determines the remuneration of staff²⁶ and may terminate the employment of a member of

French CJ, 747 [123] per Gummow and Bell JJ, 828 [582] per Kiefel J; 288 ALR 410 at 417-418, 450, 559; [2012] HCA 23.

23 As to which see *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 219 per Mason J; [1981] HCA 74; see also *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; [1982] HCA 26.

24 Winterton, "The Evolving Role of the Australian Governor-General", in Groves (ed), *Law and Government in Australia*, (2005) 44; Boyce, *The Queen's Other Realms*, (2008) at 119-121 and 124-138.

25 Constitution, ss 5, 32, 57, 58, 60, 61, 64, 70, 72, 103 and 128.

26 *Governor-General Act 1974* (Cth), s 14.

French CJ
Crennan J
Kiefel J
Bell J

6.

staff²⁷. The Official Secretary is required to prepare and furnish an annual report on the performance of the functions and duties of the Official Secretary, which is ultimately laid before both Houses of Parliament²⁸. The Official Secretary also has statutory responsibilities under the *Financial Management and Accountability Act 1997* (Cth). The evidence showed that 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).

The FOI Act

14 The general objects of the FOI Act are to give the Australian community access to information held by the Commonwealth Government, thereby "promoting better-informed decision-making" and permitting "increasing scrutiny" of the Government's activities²⁹. Those objects are to be achieved by requiring "agencies" which are subject to the operation of the FOI Act³⁰ to "publish ... information" and to "provid[e] ... access to documents."³¹ The powers and functions given by the FOI Act to achieve its objects are to be performed and exercised, as far as possible, promptly and at the lowest reasonable cost³².

15 Relevantly, "agency" is defined to include "a Department" or "a prescribed authority", which latter term is defined, in turn, to include the person

27 *Governor-General Act 1974* (Cth), s 15(1).

28 *Governor-General Act 1974* (Cth), s 19.

29 FOI Act, s 3(2).

30 FOI Act, ss 4 and 7.

31 FOI Act, s 3(1).

32 FOI Act, s 3(4).

7.

holding, or performing the duties of, an office established by an enactment³³. Whilst neither the Governor-General, the Council for the Order, nor the Office of the Official Secretary is "a prescribed authority", the Official Secretary is³⁴, and is therefore an "agency" for the purposes of the FOI Act.

16 The statutory obligations to give access to certain documents³⁵ and to publish certain information³⁶ are then qualified by specified exemptions. Relevantly, courts, specified tribunals and the Official Secretary are excluded from the statutory obligation to grant access to a document "unless the document relates to matters of an administrative nature."³⁷ In addition, a document of a Minister that is not an "official document of a Minister" is exempt from the operation of the FOI Act³⁸.

17 Division 2 of Pt II of the FOI Act³⁹ identifies information which agencies must publish, which includes "operational information"⁴⁰, about which more will be said later. Part III⁴¹ governs the access which must be given to documents. Relevantly, s 11 provides that a person has a legally enforceable right to obtain access to a document of an agency, other than an exempt document. A person seeking access to a document must make a "request"⁴², which may be refused if the document cannot be found or does not exist⁴³ or if the work involved in processing the request would substantially and unreasonably direct the resources

33 FOI Act, s 4(1).

34 FOI Act, s 4(1), par (c) of the definition of "prescribed authority".

35 FOI Act, ss 11 and 11A(3).

36 FOI Act, s 7A.

37 FOI Act, ss 5, 6 and 6A(1).

38 FOI Act, s 4(1), definition of "official document of a Minister" and s 11(1)(b).

39 FOI Act, ss 8-8E.

40 FOI Act, ss 7A and 8A.

41 FOI Act, ss 11-31.

42 FOI Act, ss 11A, 15, 16 and 17.

43 FOI Act, s 24A.

French CJ
Crennan J
Kiefel J
Bell J

8.

of the agency from its other operations⁴⁴. Division 2 of Pt IV⁴⁵ provides for a diverse group of exemptions from the obligations imposed by the FOI Act. Relevantly included as exempt are "[d]ocuments containing material obtained in confidence"⁴⁶. Division 3 of Pt IV⁴⁷ contains a scheme of conditional exemptions, including documents disclosing "deliberative matter"⁴⁸, where there is a public interest to be served by non-disclosure.

18 The crucial provision for the purposes of these proceedings is s 6A⁴⁹, which provides:

- "(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." (emphasis added)

19 It should be noted that the drafting technique emphasised above is used elsewhere in the FOI Act. Sections 5 and 6 deem a federal court⁵⁰ or a specified tribunal, authority or body⁵¹ to be a "prescribed authority". However, the FOI Act does not apply to any request for access to a document of either a court or a

44 FOI Act, ss 24, 24AA and 24AB.

45 FOI Act, ss 33-47A.

46 FOI Act, s 45.

47 FOI Act, ss 47B-47J.

48 FOI Act, s 47C.

49 Introduced in 1984 by the *Public Service Reform Act 1984* (Cth), s 154.

50 See, for example, Constitution, s 71 and *Federal Court of Australia Act 1976* (Cth), s 5.

51 Encompassed by Constitution, Ch II.

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specified tribunal, authority or body "unless the document relates to matters of an administrative nature."

20 It can also be noted that Sched 1 to the FOI Act, entitled "Courts and tribunals exempt in respect of non-administrative matters", exempts three entities from the operation of the Act. Pursuant to s 7, Pt I of Sched 2 lists agencies which are also exempt, and Pt II of Sched 2 lists agencies which are exempt from granting a right of access to particular documents.

The decision of the Tribunal

21 The Tribunal affirmed the decision of the Official Secretary to refuse the appellant access to documents which were the subject of her request. In accordance with an agreement reached between the parties, the Tribunal did not scrutinise the requested documents in detail. The Tribunal noted that if any categories of documents to which the appellant had requested access did not fall within the exception in s 6A(1), it would be necessary to consider at a further hearing whether such documents were exempt from disclosure by reference to some other provision of the FOI Act. The Tribunal found that the Official Secretary held some documents which fell within the categories the appellant had requested.

22 The Tribunal considered that documents generated in connection with the conferral of honours in the Order related to substantive functions of the Governor-General. Accordingly, as the documents requested "squarely relate[d] to the operation of the system of honours"⁵², the Tribunal considered that none of the documents, or categories of documents, related to "matters of an administrative nature" within the meaning of s 6A(1) of the FOI Act. The Tribunal affirmed the decision under review.

The decision of the Full Court

23 The Full Court held that the relevant distinction drawn by s 6A(1) of the FOI Act, between "matters of an administrative nature" and matters which were not of such a nature, reflected a distinction between the substantive powers and functions of the Governor-General and the "apparatus" for the exercise of those powers or functions, which was merely supportive⁵³. The Full Court considered

52 *Kline v Official Secretary to the Governor-General* (2012) 127 ALD 639 at 644-645 [24].

53 *Kline v Official Secretary to the Governor-General* (2012) 208 FCR 89 at 95 [21].

French CJ
Crennan J
Kiefel J
Bell J

10.

that the terms of the appellant's request for documents referred to a substantive power or function, namely the administration of the Order of Australia. In particular, that substantive power or function involved nominations for appointments and awards, and consideration of those nominations, which culminated in a decision of whether or not to appoint or award a particular person. It followed that the appellant's request sought access to documents relating to that substantive power, which were excluded from disclosure under s 6A(1) of the FOI Act.

24 In reviewing the Tribunal's decision and dismissing the appeal before it, the Full Court found that it was sufficient for the Tribunal to determine whether the categories of documents identified in the appellant's request were documents relating to "matters of an administrative nature". It was not necessary, in the Full Court's view, for the Tribunal to examine each document individually as "the character of the documents was apparent from the terms of the request."⁵⁴

Submissions

25 On behalf of the appellant it was contended that the question before the Tribunal was whether the appellant's request for access to documents of the Official Secretary was *capable* of covering documents which related to matters of an administrative nature. If the appellant succeeded on that issue, the exclusion from the operation of the FOI Act, contained in s 6A(1), would not apply to the documents. The matter should then be remitted to the Tribunal to consider whether any (or any part) of some 400 documents (comprising about 1500 pages), which were covered by the appellant's request, were excluded from disclosure by virtue of some provision of the FOI Act other than s 6A(1), such as provisions exempting confidential documents from disclosure. In oral argument, it was further submitted that such inspection might also show that the documents requested did indeed fall within the exclusion provided by s 6A(1), because they disclosed some aspect of the decision-making processes relevant to the Order.

26 Appealing to text, context and legislative history, it was contended for the appellant that the exception in s 6A(1) should be construed widely, such that the only documents of the Official Secretary excluded from the operation of the FOI Act were documents which disclosed any aspect of the decision-making process in respect of a particular nomination for the Order. A correlative submission was that documents unrelated to that decision-making process "prima facie would be administrative and not disclose anything confidential." The distinction between

54 *Kline v Official Secretary to the Governor-General* (2012) 208 FCR 89 at 97 [29].

the two categories was said to identify the boundary between what s 6A(1) excluded and what it included, for the purposes of access to documents under the FOI Act.

27 Contextual matters relied upon by the appellant in support of those submissions included the examples given to illustrate the "operational information" required to be published⁵⁵, as defined under s 8A⁵⁶, and the distinct exemption of agencies such as the Australian Security Intelligence Organisation ("ASIO") from the statutory scheme under the FOI Act, compared with the inclusion of the Official Secretary. The underlying purpose and operation of ss 5 and 6 of the FOI Act were said to be analogous to the underlying purpose and operation of s 6A, elucidated, it was submitted, by *Bienstein v Family Court of Australia*⁵⁷.

28 Relying on some analogy between functions of the Governor-General and judicial officers, as holders of independent office, the appellant identified the public interest underpinning s 6A(1) as the public interest in the independent and impartial discharge of the substantive powers and functions of the Governor-General, *as decision-maker*, and in this case as decision-maker in respect of the Order. That led to a submission that secrecy or confidentiality in respect of the Governor-General's responsibilities concerning the Order was not the dominant public interest protected by s 6A, because that interest was specifically covered by other provisions in the FOI Act.

29 The competing contention of the first respondent was that the exception in s 6A(1) should be construed narrowly. It was submitted that s 6A(1) operates to oblige the Official Secretary only to give access to documents under the FOI Act which involved the management or administration of the Office. That limited purpose was said to be clear from the text of s 6A(1) and its wider context. The wider context included the circumstance that the Governor-General was excluded from all statutory obligations imposed by the FOI Act, and the Official Secretary was only covered by s 6A to the same limited extent as courts and tribunals were covered by ss 5 and 6. The exception in s 6A(1), so construed, was said to

55 FOI Act, s 8(2)(j).

56 These were an agency's rules, guidelines, practices and precedents relating to "decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities)." See FOI Act, s 8A(1).

57 (2008) 170 FCR 382.

French CJ
Crennan J
Kiefel J
Bell J

12.

adequately serve the object of "public scrutiny" of the Government's processes and activities identified in the FOI Act⁵⁸.

30 Further, the purposive construction of the exception in s 6A(1), proffered by the first respondent, was said to be supported by a number of factors: the heterogeneous nature of the Governor-General's substantive powers and functions; the function of the Official Secretary to assist and support the Governor-General in relation to all of those diverse powers and functions; and extrinsic materials containing statements regarding the legislative purpose underpinning ss 5 and 6.

31 Generally, it was submitted that the appellant was not seeking documents which related to the management or administration of the Office, such as the office resources. Rather, the appellant was seeking documents which would elucidate the failure of her two nominations, whilst eschewing any right to be given access to any documents which disclosed the precise reasons for that failure.

"Matters of an administrative nature"

32 The task of construing s 6A(1) of the FOI Act is governed by what has been said in this Court recently about the importance of the text of a statute, the meaning and effect of which are not to be displaced by statements in secondary materials⁵⁹. A purposive construction of s 6A(1) accords with s 15AA of the *Acts Interpretation Act* 1901 (Cth). Further, cognate expressions in a statute should be given the same meaning unless the context requires a different result⁶⁰.

33 A preliminary consideration of considerable contextual significance is that the Governor-General is not subject to the operation of the FOI Act. Stating the same point positively, and utilising the nomenclature of the FOI Act, the Governor-General is exempted from the operation of that Act. The Governor-General does not fall within the definition of an "agency" or

58 FOI Act, s 3(2).

59 *Northern Territory v Collins* (2008) 235 CLR 619 at 642 [99]; [2008] HCA 49; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47 [47]; [2009] HCA 41; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 265 [33]; [2010] HCA 23.

60 *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 per Mason J; [1975] HCA 41.

"prescribed authority" in the FOI Act. The Governor-General is appointed by Letters Patent, pursuant to s 2 of the Australian Constitution, and therefore does not hold office in accordance with the provisions of an enactment of the federal Parliament or an Order-in-Council⁶¹. Similarly, the federal Parliament⁶² and Justices of the High Court of Australia are not subject to the operation of the FOI Act. Further, holders of federal judicial office and holders of office in specified federal tribunals, authorities and bodies are expressly exempted from the operation of the provisions of the FOI Act⁶³. In summary, certain individuals, including the Governor-General, who hold independent offices pursuant to the Australian Constitution or a federal enactment, requiring the impartial discharge of the powers and functions of such office, are not subject to the operation of the FOI Act.

34 Thus the processes and activities of government, which are opened to increased public scrutiny by the operation of the FOI Act, do not include those associated with the exercise of the Governor-General's substantive powers and functions, many (even most) of which are exercised in public. Similarly, the FOI Act does not expose to public scrutiny the discharge of the substantive powers and functions of judicial officers or holders of quasi-judicial office to the extent that they have not been discharged in an open court or a public forum. Independence from government and the public is important in relation to the exercise of the various responsibilities of the Governor-General, including, but not limited to, the making of decisions. Furthermore, freedom from interference or scrutiny by members of the public (or other branches of government) is an essential aspect of the making of decisions in relation to the General Division of the Order.

35 The first matter of textual significance is that the Official Secretary is "a prescribed authority" subject to the operation of the FOI Act as a person holding, or performing, the duties of that office under the *Governor-General Act 1974* (Cth).

36 The next matter of textual significance is that s 6A(1), and ss 5(1) and 6, reveal a plain intention to constrain the extent to which the FOI Act pursues its

61 FOI Act, s 4(1), definition of "prescribed authority".

62 Documents in the possession of a Minister in his or her capacity as a member of Parliament are not subject to the operation of the FOI Act: see FOI Act, s 11(1)(b) and the definition of "official document of a Minister" in s 4(1).

63 FOI Act, ss 5(1)(b) and 6(b).

French CJ
Crennan J
Kiefel J
Bell J

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purposes and objects against persons (or entities) providing administrative support to individuals who hold independent offices and are not subject to the operation of the FOI Act. The Official Secretary, like courts and other bodies governed by the FOI Act, is only required to grant access to a limited class of documents, characterised by a relationship between the document and subject matter of an "administrative nature". The meaning of that statutory characterisation cannot be determined without some reference to the FOI Act as a whole⁶⁴, and the circumstance that the documents to which access must be granted are an exception to the position that the Governor-General is not subject to the operation of the FOI Act.

37 The FOI Act does not pursue its objects, as legislative purposes, at any cost⁶⁵. 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. A clear example is the exemption of ASIO from the operation of the FOI Act.

38 The Governor-General, in common with judges, takes an oath to undertake his or her functions without fear or favour. However, as mentioned, the position of the Governor-General calls for the exercise of a multiplicity of powers and functions, many (but not all) of which are undertaken in public, and some (but few) of which involve making decisions other than on the advice of a Minister or the Executive Council.

39 The responsibility of the Governor-General for the administration of the Order is a *sui generis* role involving processes and decision-making triggered by the nomination of a person for an appointment or award. The proper independent discharge of the Governor-General's responsibility for the administration of the Order requires full and frank assistance to the Governor-General from the Council for the Order. The Council, in turn, requires full and frank assistance

64 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; [1998] HCA 28.

65 *Carr v Western Australia* (2007) 232 CLR 138 at 143 [5]; [2007] HCA 47, cited with approval in *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 87 ALJR 1009 at 1016 [40]-[41]; 300 ALR 460 at 469; [2013] HCA 36.

from the Office of the Official Secretary. The possibilities of giving offence to failed nominees, defamation, or political controversy in the administration of the General Division of the Order are all avoided by the confidentiality of the selection process, which culminates in public announcement, in due course, of appointments and awards in the Order. The Office supports the Council and the Governor-General in completing the selection process.

40 However, the task of statutory construction here is not resolved by asking whether any particular document relates to processes and activities "supporting" the role of the Governor-General, because documents answering that description fall within both the exclusion, and the exception, in s 6A(1).

41 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 above⁶⁶. This is a common enough connotation of the epithet "administrative"⁶⁷. The Full Court apprehended this distinction in s 6A(1) correctly, referring to the latter class of documents as relating to the office "apparatus" which supported the exercise of the Governor-General's substantive powers and functions.

42 The preceding construction of s 6A(1) governs its operation and application in relation to the range of diverse powers and functions of the Governor-General in respect of which the Official Secretary may be called upon to provide assistance and support. The limited construction adopted by the Full Court of the class of documents relating to "matters of an administrative nature" is appropriate because s 6A(1) must apply equally to powers and functions whose exercise is of the greatest sensitivity, requiring high levels of confidentiality, as it must apply to powers and functions of lesser sensitivity. The correctness of the construction of s 6A(1) adopted by the Full Court is illustrated by the specific case of its application in relation to the Order. In that application it strikes a balance between the public interest in maintaining an Australian system of

⁶⁶ See [13].

⁶⁷ *Burns v Australian National University* (1982) 40 ALR 707 at 713-714.

French CJ
Crennan J
Kiefel J
Bell J

16.

honours and the public interest in efficient public administration, which is supported by the scrutiny for which the FOI Act provides.

43 The first public interest or purpose 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.

44 The second public interest and purpose is achieved by exposing to public scrutiny documents of the Official Secretary which fall within the exception. The operation of the exception in relation to the Order must be governed by its general construction in application to that particular case. So applied, the exception can only be read as referring to documents relating to the management and administration of the resources of the Office and is consistent with the general non-application of the FOI Act to requests for access to documents of the Official Secretary.

45 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 review⁶⁸. 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 functions⁶⁹.

46 Similar policy considerations apply in respect of specified tribunals, authorities or bodies. Holders of office in such bodies also exercise authority without fear or favour. Determinations are made in public, but distinct conciliatory functions may depend for their success on confidentiality so as to

⁶⁸ *Fingleton v The Queen* (2005) 227 CLR 166 at 186 [38]-[39] per Gleeson CJ; [2005] HCA 34; *Herijanto v Refugee Review Tribunal* (2000) 74 ALJR 698 at 700-701 [13]-[16] per Gaudron J; 170 ALR 379 at 382-383; [2000] HCA 16.

⁶⁹ *Loughnan v Altman* (1992) 39 FCR 90.

ensure full and frank private discussions designed to effect the settlement of, for example, an industrial dispute.

47 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.

48 Whilst the proper construction of s 6A(1) plainly emerges from a consideration of the textual and contextual matters discussed, that construction is fortified by resort to statements in relevant secondary materials.

49 In brief, s 6A(1) of the FOI Act, which was inserted in 1984, drew upon the language of ss 5(1) and 6, which were included in the FOI Act as originally enacted. In the relevant parliamentary debates, Senator Evans described the operation of ss 5 and 6 and explained their object. He said⁷⁰:

"courts, judicial offices, certain industrial tribunals and their registries ... are not exempt from the operation of the [FOI] Act so far as their administrative procedures, properly so-called, are concerned."

50 The Senator went on to explain that the inclusion of ss 5 and 6 would secure a legitimate public interest in "efficient administration" and was not intended to intrude on the independence of the judiciary⁷¹.

51 In *Bienstein*⁷², the respondent denied the applicant's request for access to all documents relating to the case management of her matters before it. It was decided in *Bienstein* that ss 5 and 6 of the FOI Act were not intended to extend so far as requiring the giving of access to documents that would put judicial independence, or the independence of other institutions, at risk⁷³. However, it was also decided that the verbiage "relates to matters of an administrative nature", as it occurs in s 5 of the FOI Act, can include documents relating to judicial functions and decision-making. The next step in the reasoning was that documents which would not impinge on the independence essential to the

70 Australia, Senate, *Parliamentary Debates* (Hansard), 7 May 1981 at 1768.

71 Australia, Senate, *Parliamentary Debates* (Hansard), 7 May 1981 at 1768.

72 (2008) 170 FCR 382.

73 (2008) 170 FCR 382 at 400 [54].

French CJ
Crennan J
Kiefel J
Bell J

18.

exercise of judicial or decision-making functions were documents relating to matters of an administrative nature⁷⁴. That reasoning was relied on by the appellant to support the proposition that the only documents of the Official Secretary which were excluded from disclosure under s 6A(1) were documents relating to the substantive powers and functions of the Governor-General *as decision-maker*. That aspect of the reasoning in *Bienstein* is erroneous. First, the references in the extrinsic materials to examples of "administrative matters", such as the number of sitting days of a court, were misread in *Bienstein* as suggesting that even documents held by a court which related to individual cases might be characterised as documents "relating to 'matters of an administrative nature'."⁷⁵ Secondly, it was decided that since some powers and functions of a judicial officer were administrative in nature, those administrative powers and functions which were not closely related to judicial independence would not need protection from the operation of the FOI Act⁷⁶. However, that reasoning, deriving from the different factual circumstances in *Fingleton v The Queen*⁷⁷, accords no weight to the circumstance that a judicial officer is not subject to the operation of the FOI Act. Only a registry or office of a court or specified tribunal is subject to the operation of the FOI Act, and then only in respect of documents relating to administrative matters. The approach in *Bienstein*, relied on by the appellant, is not apt for application to s 6A(1). That approach would not accord proper weight to the circumstance that the Governor-General is not subject to the operation of the FOI Act and would result in an impractical and unwieldy approach to the application of s 6A(1), contrary to the provision that public access to information is to be achieved promptly and at the lowest reasonable cost⁷⁸.

Application of s 6A(1) to the appellant's request

Correspondence and file notes relating to nominations

52 Correspondence and file notes relating to the appellant's nominations are directly related to the Governor-General's exercise of substantive powers and

74 (2008) 170 FCR 382 at 399-400 [53]-[54].

75 (2008) 170 FCR 382 at 399 [53].

76 (2008) 170 FCR 382 at 403 [67].

77 (2005) 227 CLR 166.

78 FOI Act, s 3(4).

functions in respect of the Order. These are excluded from disclosure as they do not fall within the exception in s 6A(1) of the FOI Act.

Criteria for making awards

53 Relevant criteria for the making of awards are explained in the nomination form, which is a document that is available to the public.

Working manuals and policy guidelines

54 To 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).

55 It has been mentioned that s 8 of the FOI Act obliges publication of an agency's "operational information", being information held by the agency to assist the agency in "making decisions or recommendations affecting members of the public"⁷⁹. The appellant drew comfort from the circumstance that an agency's "guidelines" and "practices and precedents relating to [the agency's] decisions and recommendations" are cited as examples of the kinds of documents covered by the expression "operational information". However, the Governor-General's information relevant to decisions made in respect of the Order is not subject to the operation of the FOI Act. Further, the Official Secretary does not make decisions or recommendations affecting members of the public; recommendations in respect of the General Division of the Order are made by the Council for the Order and ultimate decisions as to the appointment or the making of awards repose with the Chancellor of the Order, the Governor-General.

Documents relating to review processes

56 No documents relating to review processes are in existence, but the Official Secretary accepted that if such documents were brought into existence, they would be available to the public without recourse to the FOI Act.

79 FOI Act, s 8A.

French CJ
Crennan J
Kiefel J
Bell J

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Conclusion and orders

57 There was no error in the Tribunal's decision. Accordingly, the grounds of appeal in respect of the decision of the Full Court were not made out. The appeal should be dismissed with costs.

GAGELER J.

Introduction

58 The *Freedom of Information Act* 1982 (Cth) ("the FOI Act") confers rights to obtain, on request, access to documents in the possession of "agencies" as well as official documents in the possession of Ministers of State of the Commonwealth. Departments of State of the Commonwealth and "prescribed authorities" are agencies. Most bodies established by Acts of the Commonwealth Parliament are prescribed authorities, as are most persons holding offices established by Acts of the Commonwealth Parliament.

59 Courts (but not judges) are deemed to be prescribed authorities. Specified industrial bodies such as the Australian Industrial Relations Commission (but not their members) are similarly deemed to be prescribed authorities. The Official Secretary to the Governor-General, by virtue of holding an office established by the *Governor-General Act* 1974 (Cth), is also a prescribed authority. The Governor-General is not.

60 The FOI Act is expressed (in ss 5, 6 and 6A respectively) to have no application to a request for access to a document in the possession of a court, a specified industrial body or the Official Secretary "unless the document relates to matters of an administrative nature".

61 The question of statutory construction on which this appeal turns is: when is a document a document that "relates to matters of an administrative nature"?

Legislative history

62 In answering that question, "a page of history is worth a volume of logic"⁸⁰.

63 Sections 5 and 6 were in the FOI Act as originally enacted in 1982. They were inserted into the Bill for the FOI Act by amendment in the Senate in 1981⁸¹. The purpose of the amendment was to give effect to recommendations made by the Senate Standing Committee on Constitutional and Legal Affairs in 1979⁸².

80 Cf *New York Trust Co v Eisner* 256 US 345 at 349 (1921).

81 Australia, Senate, *Parliamentary Debates* (Hansard), 7 May 1981 at 1767-1776.

82 Australia, Senate Standing Committee on Constitutional and Legal Affairs, *Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978*, (1979) at 158 [12.29]-[12.30], 159-160 [12.33]-[12.34].

64 The Senate Standing Committee had recommended amending what had been proposed in the original form of the Bill as a wholesale exemption of courts and industrial bodies from the FOI Act so as to limit the exemption in respect of courts "to documents of a non-administrative character"⁸³ and in respect of industrial bodies to "their non-administrative functions only"⁸⁴. Explaining the reasons for its recommendation to limit the exemption in respect of courts, the Senate Standing Committee said⁸⁵:

"There is obviously very good reason for governments not imposing requirements which would interfere with the independence of the judiciary and the proper administration of justice. It would not be appropriate for freedom of information legislation to be the vehicle for obtaining access, where this was otherwise unavailable, to court documents filed by parties to litigation. Nor would it be appropriate for this legislation to operate in any way as a substitute or supplement for discovery procedures presently administered by the courts."

The Senate Standing Committee continued⁸⁶:

"However, there are other documents of a more clearly administrative character associated with the functioning of registries and collection of statistics on a host of matters associated with judicial administration which, equally clearly, should be opened up to public gaze. These would include such matters as the number of sitting days, the number of cases determined, the number of cases withdrawn, the cases which were

83 Australia, Senate Standing Committee on Constitutional and Legal Affairs, *Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978*, (1979) at 158 [12.30].

84 Australia, Senate Standing Committee on Constitutional and Legal Affairs, *Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978*, (1979) at 160 [12.34].

85 Australia, Senate Standing Committee on Constitutional and Legal Affairs, *Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978*, (1979) at 158 [12.29].

86 Australia, Senate Standing Committee on Constitutional and Legal Affairs, *Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978*, (1979) at 158 [12.29].

subsequently appealed and the occasions on which bail was awarded. The very existence within the Commonwealth Attorney-General's Department of a Division of Judicial Administration is testimony to the ability to distinguish between the judicial and administrative aspects of the operation of the courts."

65 What was the Division of Judicial Administration within the Attorney-General's Department doing in 1979 to allow its "very existence" to be "testimony to the ability to distinguish between the judicial and administrative aspects of the operation of the courts"? The answer was apparent from the Annual Report of the Attorney-General's Department⁸⁷. In anticipation of the enactment of the *High Court of Australia Act 1979* (Cth), the Division was providing "administrative assistance in the development of an independent system of judicial administration" as well as providing "assistance in the detailed planning, furnishing and the general fitting out of the High Court building in Canberra and in matters associated with the move of the High Court to Canberra"⁸⁸. The Attorney-General's Department was in the meantime providing staff and "management services" for the Sydney and Melbourne registries of the High Court as well as "registry services", in addition to providing ongoing "management services and general administrative assistance" to the Federal Court as well as staffing and maintaining registries of the Family Court⁸⁹.

66 With the commencement of the *High Court of Australia Act 1979* (Cth) in 1980, it became the responsibility of the High Court itself to "administer its own affairs"⁹⁰ and for that purpose the High Court was given power "to do all things ... necessary or convenient to be done for or in connection with the administration of its affairs" including, without limitation, power to: enter into contracts; acquire, hold and dispose of property; take on hire, exchange, and accept on deposit or loan, library material and also furnishings, equipment and goods needed for the purposes of the Court; and control and manage any land or building occupied by the Court and any adjacent land or building that is part of the precincts of the Court⁹¹.

87 Australia, Attorney-General's Department, *Annual Report 1978-1979*, (1979).

88 Australia, Attorney-General's Department, *Annual Report 1978-1979*, (1979) at 43.

89 Australia, Attorney-General's Department, *Annual Report 1978-1979*, (1979) at 44.

90 Section 17(1).

91 Section 17(2).

67 Speaking in favour of the relevant amendment to the Bill for the FOI Act in the Senate in 1981, Senator Evans drew attention to the then recent enactment of the *High Court of Australia Act 1979* (Cth) when he said⁹²:

"The utility, or indeed the necessity, for an exemption for administrative questions of this kind is in fact made more obvious by the recent change in the legislation governing the High Court of Australia. These sorts of administrative questions are now clearly within the Court's jurisdiction, whereas previously the majority of administrative matters of this kind were performed by or through the Attorney-General's Department and as such were the subject of ordinary access procedures so far as information was concerned."

68 The word "administrative" was obviously being used by the Senate Standing Committee in 1979 and by Senator Evans in 1981 in a sense narrower and more specific than the same word had earlier been used in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) as part of the definition of a decision to which that Act was to apply. The focus of the amendment to the Bill for the FOI Act recommended in 1979 and implemented in 1981 was not on the separation of judicial power from executive power – after all, the same distinction between "administrative" and "non-administrative" was being employed in respect of industrial bodies which did not exercise judicial power. The focus was more prosaically on ensuring inclusion within the scope of the FOI Act of documents in the possession of courts and industrial bodies which related to matters of organisation and management of the kind which in 1979 were still being provided to the High Court by the Division of Judicial Administration within the Attorney-General's Department and of the kind which by 1981 had been taken over by the High Court itself with the commencement of the *High Court of Australia Act 1979* (Cth) in 1980.

69 Section 6A was then inserted into the FOI Act two years later by the *Public Service Reform Act 1984* (Cth)⁹³. Its insertion was contemporaneous with, and consequential upon, the amendment by the *Public Service Reform Act 1984* (Cth) of the *Governor-General Act 1974* (Cth) which created the statutory office of Official Secretary⁹⁴. Immediately before those amendments in 1984, the Official Secretary had been an officer of the Australian Public Service

92 Australia, Senate, *Parliamentary Debates* (Hansard), 7 May 1981 at 1768.

93 Section 154 of the *Public Service Reform Act 1984* (Cth).

94 Section 141 of the *Public Service Reform Act 1984* (Cth), inserting s 6 of the *Governor-General Act 1974* (Cth).

seconded to the Governor-General's staff from the Department of the Prime Minister and Cabinet⁹⁵.

70 The identity of the language used in s 6A of the FOI Act and the language used in ss 5 and 6 of the FOI Act suggests that the same distinction was being drawn in 1984 to govern inclusion within the scope of the FOI Act of documents in the possession of the Official Secretary as had earlier been drawn to govern inclusion within the scope of the FOI Act of documents in the possession of a court or industrial body.

Construction

71 The Full Court of the Federal Court, in the decision under appeal, held the distinction drawn by s 6A of the FOI Act to be between "substantive powers and functions" and the "apparatus" supporting the exercise or performance of those substantive powers and functions⁹⁶.

72 The legislative history compels the conclusion that that is not only a correct distillation of the distinction drawn by s 6A of the FOI Act, but also a correct distillation of the distinction drawn by ss 5 and 6 of the FOI Act. *Bienstein v Family Court of Australia*⁹⁷, which reached a different conclusion in relation to s 5 of the FOI Act, was wrongly decided.

73 Sections 5, 6 and 6A of the FOI Act draw a dichotomy between documents which relate to "administrative matters" and those which do not. The word "administrative" is used in each of those sections in the primary sense of "[p]ertaining to, or dealing with, the conduct or management of affairs"⁹⁸.

74 The relevant affairs, or "matters", to which each of ss 5, 6 and 6A of the FOI Act refers, 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.

75 The distinction sought to be drawn by the appellant between documents which "relate to administrative tasks ... to support or assist the exercise of ...

95 Australia, Senate, Public Service Reform Bill 1984, Explanatory Memorandum at 47.

96 *Kline v Official Secretary to the Governor-General* (2012) 208 FCR 89 at 95 [21].

97 (2008) 170 FCR 382.

98 *Oxford English Dictionary*, 2nd ed (1989), vol 1 at 163.

powers or the [performance] of ... functions", on the one hand, and documents which answer that description but which would "disclose the decision-making process involved in the exercise of those powers or performance of those functions in a particular matter or context", on the other, is too fine to be sustained. The true distinction is more robust and more practical.

76 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.

77 The Governor-General has many functions, some of which are ceremonial. Were, for example, the Governor-General to travel to a remote location to attend a ceremony in her official capacity, documents relating to travel by and accommodation for the Governor-General and her entourage would relate to matters of an administrative nature within the meaning of s 6A and would therefore fall within the scope of the FOI Act. Documents relating to the Governor-General's participation in the ceremony, whether generic or specific and whether prepared or received by the Governor-General or by the Official Secretary before or after the Governor-General's participation in the particular ceremony, would not relate to matters of an administrative nature within the meaning of s 6A and would therefore fall outside the scope of the FOI Act.

Application

78 To the extent that they remain material to this appeal, the categories of documents in the possession of the Official Secretary to which the appellant sought access comprised: correspondence held by the Official Secretary in relation to the appellant's nominations of a named person for an Order of Australia; working manuals, policy guidelines and criteria related to the administration of the Order of Australia; documents relating to review processes; and "file notes from the Secretariat" (being in fact the Office of Official Secretary) concerning the nominations.

79 All of those categories on their face relate to the exercise of the substantive function which the Governor-General performs as Chancellor of the Order of Australia pursuant to Letters Patent issued by the Queen⁹⁹. All relate to the "administration" of the Order of Australia within the meaning of the Letters Patent¹⁰⁰, but none relates to matters of an "administrative nature" within the meaning of s 6A of the FOI Act. None, therefore, falls within the scope of the FOI Act.

⁹⁹ Constitution of the Order of Australia.

¹⁰⁰ Section 3 of the Constitution of the Order of Australia.

27.

80 The Full Court of the Federal Court rightly held that the Administrative Appeals Tribunal was correct in law in so finding.

Conclusion

81 For these reasons, the appeal should be dismissed.