[2012] AATA 247

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2011/3732 |
| Re | Karen Kline |
|  | APPLICANT |
| And | Official Secretary to the Governor-General |
|  | RESPONDENT |

# Decision

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| Tribunal | **Deputy President P E Hack SC** |
| Date | **30 April 2012**  |
| Place | **Brisbane** |

The decision is affirmed.

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**Deputy President P E Hack SC**

## *Catchwords*

FREEDOM OF INFORMATION – Official Secretary to the Governor-General – documents concerning the award of the Order of Australia – whether documents relate to matters of an administrative nature – documents not covered by the Act – decision affirmed.

## *Legislation*

*Freedom of Information Act 1982* s 6A, s 6A(1)

## *Cases*

*Bienstein v Family Court of Australia* [2008] FCA 1138; (2008) 170 FCR 382

*Burns v Australian National University* (1982) 40 ALR 707

# REASONS FOR DECISION

**Deputy President P E Hack SC**

**30 April 2012**

## Introduction

1. Ms Karen Kline has applied under the *Freedom of Information Act 1982* (Cth) (the FOI Act) for access to a number of documents held by the respondent, the Official Secretary to the Governor-General. The documents in question relate to the Australian system of honours which is managed by the Official Secretary. The Official Secretary decided, and the Information Commissioner on review agreed, that the Act does not apply to those documents by reason of s 6A of the Act. That provision says that the FOI Act does not operate with respect to documents held by the Official Secretary unless they relate to “matters of an administrative nature”.
2. The issue for determination is the width of that expression.
3. It was agreed between the parties that I would not need to scrutinise the documents in detail; it would be enough if I determined whether the categories of documents identified in Ms Kline’s request were documents that related to “matters of an administrative nature”. If the documents do not answer that description, that will be an end to the matter and the decision will be affirmed. But if the exemption in s 6A(1) does not extend to a document or documents, it will be necessary to consider at a further hearing whether those documents are exempt from production by virtue of some other provision of the Act.
4. For the reasons that follow, I consider that none of the documents, or categories of documents, relate to matters of an administrative nature.

**Background to the dispute**

1. The Order of Australia is this country’s premier order of merit. The operation of the Order is explained in the constitution of the Order which appears in a schedule to the Letters Patent that established the Order in 1975. Her Majesty the Queen is the Sovereign of the Order and the Governor-General is its Chancellor. The Governor-General is charged with the administration of the Order. There is a Council of the Order that meets regularly to consider nominations for appointment, including nominations received from the public. The Council’s recommendations are passed to the Governor-General who makes appointments. The process is intended to be independent of political interference. There is no right to review the merits of recommendations of the Council or the decisions of the Governor-General before a body like the Administrative Appeals Tribunal.
2. The constitution of the Order authorises the Governor-General to appoint a secretary to the Council. In practice, the Governor-General appoints the Official Secretary to the Governor-General to serve as Secretary to the Council. There is, as well, the Australian Honours and Awards Secretariat, established in 1975, and located within the office of the Official Secretary to assist the Governor-General in the running of the Order. Members of the Secretariat carry out research and prepare information for the Council to assist it in its deliberations. I accept the documents in their possession in connection with those functions are documents in the possession of the Official Secretary[[1]](#footnote-2).
3. Ms Kline nominated a person for appointment to the Order in 2007 and 2009. Her nomination was unsuccessful in the sense that the nominee was not appointed to the Order. On 26 January 2011, she lodged a request with Official Secretary under the Act seeking access to documents answering the following description:
4. My nomination dated 31 March 2007 of [the nominee] for an Order of Australia. This includes the nomination form and all accompanying material i.e. testimonial, newspaper articles and referee details. A list of which of my nomination documents were presented to Council [in] August 2008.
5. My 2009 nomination of [the nominee] for an Order of Australia. This includes nomination forms and accompanying material sent in 2009 and 2010 i.e. journal articles, referee reports, submissions and updates. All correspondence held by the Official Secretary in relation to this nomination. A list of which of my nomination documents were presented to Council [in] August 2010.
6. Working manuals, policy guidelines and criteria related to the administration of awards within The Order of Australia.
7. Documents relating to review processes i.e. right of appeal in cases of maladministration.
8. On 30 January 2011 the applicant wrote a further letter to the Official Secretary in which she sought to enlarge the scope of her request to include “All file notes from the Secretariat contained in my nominations of 2007 and 2009.”
9. The Official Secretary’s decision in response to the application is contained in a letter dated 25 February 2011. The Official Secretary includes his understanding of the scope of the request made by the applicant. He said some of the documents requested by the applicant (specifically the lists of documents that were provided to the Council) did not exist. In relation to the balance of the applicant’s request, he explained “I have identified no documents relating to matters of an administrative nature”. The Information Commissioner agreed with the Official Secretary’s view of the operation of s 6A of the FOI Act and affirmed the decision pursuant to s 55K of the FOI Act[[2]](#footnote-3).

**The legislation**

1. Section 6A(1) provides:
2. 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.
3. The limitation in s 6A(1) has an analogue in the provision which defines the application of the FOI Act to courts and judicial officers. While acknowledging that courts (but not judicial officers) are “prescribed authorities” for the purposes of the Act, s 5 confirms that the Act does not apply to any request for access to documents “unless the document relates to matters of an administrative nature”.
4. And, because the proceedings involve a review of a decision in relation to a request, s 61 of the FOI Act places an onus on the respondent to establish that the decision was justified.

## Consideration

1. What does the expression “matters of an administrative nature” mean in the context of s 6A? Each side presented able and sophisticated arguments. I was referred to a number of dictionary definitions of the word “administrative”. I was also referred to the decision of Ellicott J in *Burns v Australian National University*[[3]](#footnote-4) which dealt with the question of whether a decision could be said to be of an “administrative **character**” (emphasis added) for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act). His Honour said[[4]](#footnote-5) that the word “administrative” suggested “managing”, “executing” or “carrying into effect”. His Honour went on to explain:

The administration of an enterprise or undertaking, whether a business, a government department, a statutory authority or educational institution such as a University, inevitably involves decisions as to the appointment or dismissal of officers and other employees. Such decisions are, in my view, administrative in character. They are an essential part of managing, running or administering the enterprise or undertaking.

1. The decision in *Burns* suggests the expression “administrative character” ought to be given a very wide meaning. Mr Tom Brennan of counsel, who appeared for Ms Kline, submitted that there is no reason to doubt the same approach should be used in relation to the similar form of words used in the FOI Act. But while there is little enough difference between the words “character” (as in “administrative character”, the expression used in the ADJR Act) and “nature” (as in “administrative nature”, the formulation in ss 5 and 6A of the FOI Act), one must be careful to consider the context of the FOI Act.
2. Despite the sophistication of the arguments it seems to me that the question posed is capable of simple answer. At one level, everything the Governor-General does could be said to bear an *administrative character* or have an *administrative nature*. That much is obvious from the Commonwealth Constitution, which refers (at s 4) to the Governor-General or a person acting in his or her place being appointed “to *administer* the Government of the Commonwealth”. The reference in ss 5 and 6A of the FOI Act to matters of an “administrative nature” suggests the Act is talking about a narrower concept of administration when it refers to the Official Secretary’s office. The use of the expression “matters of an administrative nature” is presumably intended to exclude matters that are not of an administrative nature but which nonetheless fall within the broad sweep of the Official Secretary’s role in support of the Governor-General as she exercises her functions and powers.
3. Ms Kline accepts that some of the Governor-General’s activities are not of “an administrative nature” – but she says in her statement of facts, issues and contentions that the Governor-General’s functions and powers that were not administrative were narrow and readily identifiable from a reading of the Constitution. They included “core” functions, such as appointing ministers, commanding the naval and military forces of the Commonwealth, and summoning or proroguing parliament. On that approach, it was said, a document held by the Official Secretary referring to what might be characterised as a “non-core” function – such as the operation of the honours’ system – was potentially related to “matters of an administrative nature”.
4. The role and functions of the Governor-General (and, by extension, the role of the Official Secretary) should not be viewed in that way for the purposes of s 6A. The Governor-General sits at the very heart of the Australian system of government. She fulfils a range of functions as Her Majesty’s representative. Not all of those functions are set out in the Constitution; some of those roles and powers are exercised by convention. Some of them are conferred by Letters Patent, as in this case. The award of honours is one of the functions traditionally regarded as part of the prerogative of the sovereign. The Governor-General acts as the Chancellor of the Order by virtue of her office, and the Official Secretary supports the Governor-General in the Official Secretary’s role as Secretary to the Order – a role he holds (in practice, if not formally) by virtue of his office.
5. It follows that documents generated in connection with the conferral of honours do not ordinarily relate to matters of an administrative nature. They relate to substantive functions of the Governor-General. While it is possible to conceive of exceptions to this general proposition (correspondence with the supplier of medals and insignia, or with a caterer providing refreshments at the awards ceremony come to mind), the documents in question do not relate to this sort of matter. If the Act was intended to apply to documents generated in connection with a wider view of the Governor-General’s functions, it would have done so using clear words.
6. I am comforted in this view by my reading of the decision of Gray J in *Bienstein v Family Court of Australia*[[5]](#footnote-6). In that case, the applicant had sought access to documents held by the Family Court. The Court relied on the limitation in s 5 (equivalent to the limitation in s 6A) which said the Act applied to documents held by a court but only if the documents “related to matters of an administrative nature”. His Honour accepted[[6]](#footnote-7) that many documents held by a Chapter III court might have an administrative character. But his Honour went on to explain that one should recall the need to protect the independence and integrity of the court when considering the correct interpretation of s 5. Gray J went on to identify the proposition that,

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 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.

1. In *Bienstein*, Gray J referred to extrinsic material including Hansard records of the parliamentary debates in relation to the amendments that introduced s 5 of the FOI Act. His Honour explained[[7]](#footnote-8):

In providing for the making available of any document that "relates to matters of an administrative nature", Parliament was intending to draw a distinction, within the overall category of documents relating to the exercise of the judicial function, between those that were part of the exercise of that function, or so closely related to it that their confidentiality is essential to the exercise of the judicial function, and other documents held by a court.

1. The applicant in this case points out that the independence of the judiciary is not at stake. But the decision in *Bienstein* stands for a principle of more general application. One must ask whether particular documents held by the Official Secretary relate to matters that are connected with the exercise of the Governor-General’s function in circumstances where the proper exercise of that function would be hampered or compromised by disclosure.
2. It is possible to conceive of a system of honours that is more open to public scrutiny, but that is not the way our system has been structured. The Order of Australia is not an entitlement to be handed out simply on the basis of desserts, and nominators have no particular interest in the outcome of a nomination that requires vindication. It is in the nature of the Order that relatively few nominees are likely to be recognised, even though there may be many worthy candidates. Choices have to be made between the nominees, and unsuccessful nominees may be upset when they are overlooked. Making those choices is akin to a judicial function that involves the exercise of delicate judgement. The Governor-General has the benefit of the advice of the Council of the Order when making her decisions; the Council is comprised of independent persons who bring a range of experiences and perspectives to bear on their work. That frank advice is essential to the process. While judges give reasons for their opinions, the decision in *Bienstein* confirms the courts are not expected to expose internal documents that might compromise the integrity of the process in the public mind, if only because they could be misunderstood or muddy the waters. That approach applies equally to documents held by the Official Secretary in relation to the system of honours.
3. The award of honours remains part of the Governor-General’s function, and – like a good deal of the work of the Governor-General – that process has occurred behind closed doors for good reason.
4. I indicated at the outset of these reasons that a small number of documents held by the Official Secretary fall within the categories identified by Ms Kline and at issue in this case. The documents in question squarely relate to the operation of the system of honours. I do not accept those documents, or any part of them, answer the description of a “document [that] relates to matters of an administrative nature” within the meaning of s 6A. I would then affirm the decision under review.

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| I certify that the preceding 24 (twenty four) paragraphs are a true copy of the reasons for the decision herein of Deputy President P E Hack SC. |

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Dated 30 April 2012

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| Date(s) of hearing | **27 February 2012** |
| Counsel for the Applicant | **Mr T Brennan** |
| Solicitors for the Applicant | **Holding Redlich** |
| Counsel for the Respondent | **Mr PJ Flanagan SC and Ms N Kidson** |
| Solicitors for the Respondent | **Australian Government Solicitor** |

1. See s 6A(2), FOI Act. [↑](#footnote-ref-2)
2. See B and Office of the Official Secretary to the Governor-General [2011] AICmr 6 (9 August 2011). [↑](#footnote-ref-3)
3. (1982) 40 ALR 707. [↑](#footnote-ref-4)
4. At 713-4. [↑](#footnote-ref-5)
5. [2008] FCA 1138; (2008) 170 FCR 382. [↑](#footnote-ref-6)
6. At [67]. [↑](#footnote-ref-7)
7. At [80]. [↑](#footnote-ref-8)