IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **NO B 47 OF 2013**

On Appeal from
the Full Court of the Federal Court of Australia

BETWEEN: **KAREN KLINE**
Appellant

AND: **OFFICIAL SECRETARY TO THE GOVERNOR-GENERAL**
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

SUBMISSIONS OF THE FIRST RESPONDENT

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PART I FORM OF SUBMISSIONS

1. This submission is in a form suitable for publication on the internet.

PART II ISSUES

2. The issues to be determined in the appeal are whether the Full Court erred in:

   2.1. the proper construction of s 6A of the *Freedom of Information Act* 1982 (Cth) (**FOI Act**); and

   2.2. the application of s 6A to the Appellant's requests for access to documents in the possession of the First Respondent.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. The First Respondent has issued notices pursuant to s 78B of the *Judiciary Act 1903* (Cth). It does not consider that any further notice is required.

PART IV FACTS

4. Subject to the following clarifications and additions, the factual background set out in Part V of the Appellant's submissions (**AS**) is not disputed.

The Official Secretary to the Governor-General (Official Secretary)

5. The Office of the Official Secretary (the **Office**) is constituted by the Official Secretary and staff employed under s 13 of the *Governor-General Act 1974* (Cth) (**Governor-General Act**). It provides support to the Governor-General in the conduct of her official duties; manages and maintains the official household and property; and administers the Australian honours system (which includes, but is not limited to, the Order of Australia).[1]

6. The Official Secretary is assisted by a Deputy Official Secretary, and there is also a Chief Finance Officer. The structure of the Office is set out in the affidavit of Mark Fraser affirmed on 19 January 2012 (**Fraser**) at [5]. As to AS [9], the statutory function of assisting the Governor-General is not conferred upon the Official Secretary; it is rather a function conferred upon the Office. The Official Secretary has additional functions under the Governor-General Act, which are discussed at [11] – [13].

The Order of Australia

7. The central philosophy underpinning the Order of Australia is that membership is independently assessed and free of political interference. This is sought to

[1] Affidavit of Mark Fraser affirmed 19 January 2012 (**Fraser**) at [4].

be achieved by three distinct features of the Australian honours system:

7.1. *The nomination process.* The Order of Australia relies entirely upon community initiative for submission of nominations. Politicians may do no more than any other Australian citizen, that is, submit nominations to the Secretary of the Order. However, in keeping with the apolitical nature of the awards system, by convention, neither the Prime Minister nor State Premiers put forward nominations or influence the process. Similarly, the Council does not itself generate nominations.[2]

7.2. *The selection process.* All nominations are placed before the Council, and it is the Council (as an independent advisory committee) that makes recommendations to the Governor-General. All Council members are appointed by the Governor-General as Chancellor of the Order. The Council convenes twice a year. At each meeting, it considers nominations and assesses statements provided by the nominator and referees. The eminence, degree and value of the contribution is the primary focus of the Council's consideration.[3]

7.3. *The administration of the system.* As Chancellor of the Order, the Governor-General is vested with responsibility for the independent administration of the Order of Australia. In that regard, the Australian Honours Secretariat (now called the Australian Honours and Awards Secretariat) was established in 1975 and has, since its inception, been located within the Office. This has enabled the Official Secretary (in his or her capacity as Secretary of the Order) and the Secretariat to provide necessary independent support and advice to the Governor-General, free of responsibility of answering to a departmental head or Government Minister, so as to avoid any perception of political interference.[4]

PART V LEGISLATIVE PROVISIONS

8. The First Respondent agrees with the Appellant's references to applicable legislation.

PART VI ARGUMENT

Introduction

9. The proper construction of s 6A reflects Parliament's intention that the Governor-General should be immune from the operation of the FOI Act. Consistent with that legislative intention, s 6A is to be construed such that documents of the Official Secretary are prima facie immune from access. The prima facie immunity is only displaced if the document or class of documents to which access is sought can be characterised as having the requisite

[2] Fraser, MTF-1 at pp.6-7.
[3] Fraser at [14], MTF-1 at p.8.
[4] Fraser at [5.3], MTF-1 at pp.8-9.

relationship to "matters of an administrative nature". A document will not possess that character unless a matter can be identified that involves, and only involves, the management or administration of the Office and not its function of assisting the Governor-General.

10. The First Respondent advances four propositions in support of that construction of s 6A:

    10.1. The operation of s 6A of the FOI Act is understood by considering the function and roles of the Office and the Governor-General and the ability to request and obtain documents under the FOI Act.

    10.2. The question posed by s 6A of the FOI Act is whether there is a relevant relationship between the requested document and matters properly described as being "of an administrative nature". Documents will not possess that character unless a matter can be identified that involves solely the management or administration of the Office.

    10.3. The outcome reached by the Full Court was correct and the reasons were correct although they may be more fully expressed as is submitted below.

    10.4. The First Respondent's approach applies equally to courts where there is a similar open public function that is balanced with the need to ensure the institution's role is not undermined by evidence being obtained of incomplete deliberations and speculation as to potential reasons for decisions or other actions.

The Governor-General and the Office of the Official Secretary

11. There has been an Official Secretary to the Governor-General since 1901, but legislative amendments to the Governor-General Act in 1984 established the position as a statutory office and provided for the employment of persons as members of the Governor-General's staff: see the *Public Service Reform Act 1984* (Cth).[5] Further amendments in 1999 created the Office: see the *Public Employment (Consequential and Transitional) Amendment Act 1999* (Cth). The organisational structure of the Office is set out in Fraser at [5].

12. The statutory scheme reflects the legislatively prescribed relationship between the Official Secretary and his or her Office and the Governor-General. The Official Secretary, and the Office, together "assist" the Governor-General: Governor-General Act, s 6(3). That is, the Official Secretary and his or her staff provide the Governor-General with the necessary support to enable the Governor-General to carry out the diverse range of governmental, ceremonial and community functions as required by their position recognised under the Constitution and sourced under statute.[6] For convenience, these submissions

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5 The *Public Service Reform Act 1984* (Cth) introduced new ss 2A and 6-20 into the Governor-General Act.

6 See G Winterton "The Evolving Role of the Australian Governor-General" in M Groves (Ed), *Law and Government in Australia,* Federation Press (2005) Chapter 3 (**Winterton**), preferring "governmental"

refer compendiously to those aspects of the functions of the Official Secretary and the Office as the "**support function**".

13. The Governor-General Act also specifically confers additional functions on the Official Secretary: employing staff (s 13); determining the remuneration of staff (s 14); terminating the employment of staff (s 15); and preparing and furnishing an annual report "on the performance of the functions and duties of the Official Secretary during that year" (s 19). Thus, the statutory duties of the Official Secretary are comprised of the support function, as well as management of the infrastructure (the Office) that is necessary for but incidental to performance of the support function.

14. The governmental, ceremonial and community functions carried out by the Governor-General include:

    14.1. the so called "reserve powers" which may, at least in exceptional circumstances, be exercised without or contrary to Ministerial advice.[7] Those powers are generally understood to include:[8] the powers to appoint the Prime Minister; dismiss the Prime Minister and therefore the Government; and dissolve or refuse to dissolve the House of Representatives or both Houses under s 57 of the Constitution;

    14.2. the other constitutional and statutory powers that the Governor-General exercises upon the advice of Ministers;[9] and

    14.3. the grant of honours traditionally regarded as the prerogative of the Crown,[10] but which now are recognised as forming part of the executive power conferred by s 61 of the Constitution.[11]

    These functions carried out by the Governor-General have implications for the application of the FOI Act to the Official Secretary and the Office when undertaking their support function.

The Governor-General and the FOI Act

15. The Governor-General is not a "prescribed authority" and does not otherwise fall within the meaning of "agency" for the purposes of the FOI Act. That is

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over "constitutional" to denote the fact that those functions are conferred by statute as well as the Constitution.

7 *New South Wales v Commonwealth* (1975) 135 CLR 337 at 364-5 per Barwick CJ and *Greiner v ICAC* (1992) 28 NSWLR 125 at 144A-B per Gleeson CJ (cf the more equivocal statement of Mason J in *FAI Insurance Ltd v Winneke* (1982) 151 CLR 342 at 365: "in general" the Governor-General acts on the advice of her or his Ministers).

8 Republican Advisory Committee, *An Australian Republic* (**RAC Report**) *Volume II: The Appendices*, Commonwealth Govt Printer (1993), Appendix 6 – The reserve powers of the Governor-General, pp 241-273 and see ss 5, 28, 57 and 64 of the Constitution.

9 As to those conferred by the Constitution, see table 6.1 in the RAC Report, Volume II, p 273.

10 See eg *Council of Civil Services Union v Minister for Civil Service* (1985) AC 374 at 418 per Lord Roskill.

11 See eg *Cadia Holdings Pty Limited v New South Wales* (2010) 242 CLR 195 at 226 [86] per Gummow, Hayne, Heydon and Crennan JJ and *Williams v Commonwealth* (2012) 86 ALJR 713 at 723 [24] per French CJ, 747 [123] per Gummow and Bell JJ and 828 [582] per Kiefel J.

because the Governor-General is appointed by the Queen under s 2 of the Constitution and does not in those circumstances hold, or perform the duties of, an office established by an "enactment" within the meaning of paragraph (c) of the definition of a "prescribed authority" in s 4. "Enactment", in that context, refers to an enactment of the Commonwealth Parliament.[12] For similar reasons, the Commonwealth Parliament does not fall within paragraph (a) of the definition of "prescribed authority" and High Court justices do not fall within paragraph (c).[13] Consequently the Governor-General is not, and has never been, subject to any aspect of the FOI Act.

16. Although the Official Secretary is a "prescribed agency"[14], the starting position under the FOI Act is that a document of the Official Secretary is prima facie excluded from the reach of the Act: "This Act does not apply to any request for access to a document of the Official Secretary to the Governor-General unless..." (FOI Act, s 6A(1)).

17. The policy basis (or public interest rationale) for the Governor-General sitting wholly outside the scheme of information publication and access to documents established by the FOI Act is to be understood as recognising the special role of the Governor-General within the Constitution. When a statute selects a Minister as the repository of power, the place of that person in the system of responsible government may be important in determining the breadth of considerations to which they may have regard under a particular statutory power and the other constraints to which its exercise is subject.[15] Equally, the place of the Governor-General within that constitutional scheme (and the intertwined nature of the functions of the Official Secretary and his or her Office) explains why Parliament has displayed a degree of particularity in carving out a narrow strip of potential application for the FOI Act through s 6A.

18. The functions and powers exercisable by the Governor-General range from the anodyne to those where agreed conventions fail to supply an answer to a situation which threatens the system of government.[16] A further layer of complexity is added by the notion that there exists within the Australian constitutional framework of responsible government a "right" for the Governor-General to be consulted, to encourage and to warn.[17] However, irrespective of that diversity (which is, at least at a level of generality, akin to the diverse range of powers exercised by courts), the text of the Act reflects Parliament's judgment that all of the powers, functions and corresponding rights of the Governor-General are to be secured by placing the Governor-General outside the scheme of the FOI Act and by providing only limited access to the

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12 See, as regards the meaning of the word "Act", s 38(1) of the *Acts Interpretation Act 1901* (Cth).

13 See ss 7, 24 and 71 of the Constitution.

14 The Official Secretary is an office established by s 6(1) of the Governor-General Act and thus comes within subparagraph (c) of the definition of "prescribed authority" in s 4 of the FOI Act.

15 See eg *Hot Holdings Pty Limited v Creasy* (2002) 210 CLR 438 at 455 [50] per Gaudron, Gummow and Hayne JJ; *State of South Australia v O'Shea* (1987) 163 CLR 378 at 411 per Brennan J.

16 RAC Report, Volume II, p 246.

17 See eg *FAI Insurance Ltd v Winneke* (1982) 151 CLR 342 at 354 per Stephen J and 401 per Wilson J; Winterton at 51-54; RAC Report, *Volume I: The Options* at 35 and Volume II at 244; Australian Constitutional Commission, *Report of the Advisory Committee on Executive Government* (1987) at 39 and P Boyce, *The Queen's Other Realms*, Federation Press (2008) pp 124-130.

documents of her or his Official Secretary.

19. There are obvious explanations for that approach, some of them historical. It may be noted in that regard that, at least in the case of some such powers and functions, it remains doubtful that it is possible to obtain judicial review of their exercise.[18] Related to that notion or perhaps the notion that the counsels of the Crown are secret,[19] the "general practice" applicable to at least some such powers has been that the reasons for their exercise are not made public.[20] While such matters were held not to be material to the issues considered by this Court in *Osland v Secretary, Department of Justice*,[21] they nevertheless form part of the historical context that explains why Parliament has simply excluded the Governor-General from the scheme of the FOI Act.

20. This analysis does not change despite the current matter arising in connection with documents falling within the Governor-General's "ceremonial" or "community" functions.[22] Rather, it provides a useful illustration of how, even here, there exists an important public interest in preserving confidentiality in the discharge of the Governor-General's functions.

21. The arrangements as regards the Order of Australia embody the notion that membership or appointment is to be independently assessed and free of political interference (as compared to the British system). The independence preserved by the structural features put in place for the operation of the Order of Australia (see [7] above) would be threatened if the process was, through its disclosure, to become a matter of political controversy. As such, even in the area of ceremonial and community functions, there may exist strong public interest grounds for preserving confidentiality in the discharge of the Governor-General's functions.

22. Of course, the same could not be said of all such matters – for example, the functions of providing patronage and support, encouraging good works and being an independent and impartial representative of the community on significant national occasions.[23] The actual discharge of those functions will generally take place in public. Indeed, there is, necessarily, a public aspect to the performance of many of the Governor-General's functions (for example, the fact of assent to a bill or the fact of dissolution of Parliament are matters that will rapidly become known to the Australian public, as will the announcement of a decision to grant honours). But, in a manner which is of importance to the construction of s 6A, Parliament has not sought to exclude from the reach of the FOI Act documents relating to particular sensitive subject matters that arise in the exercise of gubernatorial powers or to provide for the disclosure of documentary material concerning matters that have entered the public domain.

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18 See eg *Horwitz v Connor* (1908) 6 CLR 38; *Flynn v The King* (1949) 79 CLR 1 at 7-9; *R v Toohey Ex Parte Northern Land Council* (1981) 151 CLR 170 at 186 per Gibbs CJ and 261 per Aiken J (cf Mason J at 219-221).

19 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 179 per Dixon J.

20 *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 282-283 [8] and 297-298 [47].

21 Ibid.

22 See classifying it in that fashion, RAC Report, Volume I at 35.

23 See Winterton at 54-56 and RAC Report, Volume I, at 36-38.

Instead, the Governor-General stands entirely outside the scheme.

23. That is, the FOI Act proceeds upon the assumption that, save in so far as disclosed by reason of the public aspects of the Governor-General's role, everything that is done in the performance of the Governor-General's functions may be conducted in private. This has implications for requests for documents from the Office under the FOI Act and what documents relate to "matters of an administrative nature". There is a symmetry with the position of Courts under s 5 of the FOI Act – as to which see further below. And, analogously to the Courts, the scheme of the Act may in that sense be seen to reflect a concern to avoid any threat to the independent and apolitical nature of the office.[24]

Section 6A of the FOI Act: a process of characterisation

24. The amendments made by the *Public Service Reform Act 1984* (Cth) (**1984 Amending Act**) to the Governor-General Act had the effect of bringing the Official Secretary within the meaning of "prescribed authority" in subsection (c) of the definition of that term in s 4(1) of the FOI Act. Simultaneously, the 1984 Amending Act amended the FOI Act to insert s 6A as a "consequential amendment".

25. Those cognate amendments suggested an obvious area of operation for s 6A: that is, in relation to the functions and duties incidental to performance of the support function (in particular, those conferred or imposed by ss 13, 14, 15 and 19, each of which was also added to the Governor-General Act by the 1984 Amending Act). Those are the "matters of an administrative nature" to which s 6A refers. That delineation (suggested by the text[25] and the contextual matters identified above) was inscribed more deeply by the creation and separation of the Office achieved by the *Public Employment (Consequential and Transitional) Amendment Act 1999* (Cth).

26. Thus, in assessing whether a request for access to a document falls outside the scope of the FOI Act under s 6A, the correct approach is to determine whether the document or class of documents requested fall(s) outside the prima facie immunity by reason of relationship to something characterised as a "matter of an administrative nature" in that sense. Documents will not possess that character unless a matter can be identified that involves, solely, the management or administration of the Office – in the sense of those things which need to be done to place the Office in the position to be able to carry out the (immune) support function.

27. Documents concerning things done in the course of the support function – even if otherwise of themselves "administrative" – remain immune from disclosure. That construction is reinforced by the language of the provision. Section 6A does not speak of a request for access to "a document of an administrative

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24 See the references collected by Winterton at 55-56.

25 As noted by Ellicott J in *Burns v Australian National University* (1982) 40 ALR 707 at 713-714, the word "administrative" carries with it the notion of "managing, running or administering [an] enterprise or undertaking".

nature" or "a document containing matters of an administrative nature". The exclusionary effect of the provision is only avoided in the case of a request for access to "a document [that] relates to matters of an administrative nature". The phrase "administrative nature" qualifies the matter or matters to which the document relates; it is not an appellation that describes the particular documents to which s 6A applies.

28. It is of course true that that will mean that requests made under the FOI Act will not extend to documents the contents of which, in some cases, are mundane and the disclosure of which will not (at least on their face) damage the public interest. But that is the line that the Parliament has drawn in respect of the functions and powers of the Governor-General, reflecting a judgment that their exercise involves sensitivities that are not best served by a requirement to pick piecemeal through documents in the possession of the Official Secretary that may (in compendious fashion) deal with matters of state and less significant aspects of vice-regal responsibilities. Indeed, the adoption of a more constrained construction of that immunity would defeat the apparent object in excluding the Governor-General from the Act.

29. This construction of s 6A is strengthened by a consideration of the scheme of exclusions and exemptions provided for by the FOI Act, which operate on a number of levels:

    29.1. First, at a fundamental level, the application of the Act is shaped by the key concepts of "agency" and "prescribed authority" defined in s 4(1). As submitted above, the operation of those concepts excludes, at an anterior stage, the Governor-General, Parliament and justices of the High Court. Those concepts also exclude, for example, private corporations in respect of which the Commonwealth is not in a position to exercise control.[26]

    29.2. Second, certain persons or bodies that would otherwise come within the definition of "agency" are also taken outside of the operation of the FOI Act altogether. Examples within this category are the Australian Security Intelligence Organisation, holders of judicial office (other than the members of the High Court)[27] and holders of other office pertaining to a court ("being an office established by legislation establishing the court"), and holders of an office pertaining to particular tribunals.[28]

    29.3. Third, certain documents are taken outside of the operation of the FOI Act, irrespective of whether the documents would or would not attract an exemption under Part IV.[29] In such a case, the operation of the Act turns

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26 Paragraphs (a) and (b) of the definition of "prescribed authority".

27 Justices of the "other federal Courts" created by the Commonwealth Parliament hold offices "established by an enactment" within the meaning of paragraph (c) of the definition of "prescribed authority": see ss 71 of the Constitution and eg s 5 of the *Federal Court of Australia Act 1976* (Cth).

28 See sections 7(1), 5(1)(b) and 6(b) of the FOI Act respectively.

29 See s 7(2) and (2AA). In addition, a document of a Minister that is not an "official document of a Minister", is exempt from the operation of the Act: s 11(1)(b). The effect of the definition of "official document of a Minister" in s 4 is that documents that are in the possession of a Minister in his or her capacity as an ordinary member of Parliament are not subject to the FOI Act.

on the *characterisation* of the document to which access is sought. For example, the Australian Broadcasting Corporation is exempt from the operation of the Act in relation to its "program material and its datacasting content", and the CSIRO is exempt in relation to documents "in respect of its commercial activities". Sections 5, 6 and 6A of the FOI Act are provisions that fall within this third category.

29.4. Fourth, the general right of access in s 11 of the FOI Act does not extend to an "exempt document", that is, a document that falls within the exemptions set out in Part IV of the FOI Act. Those exemptions can either be conditional exemptions (which are subject to a single form of public interest test weighted towards disclosure), or other exemptions. Each of the exemptions calls for an *evaluation* to be made regarding the circumstances in which a document came to be produced[30], and/or whether disclosure of the contents of a document might have a particular effect.[31]

30. This complex patchwork of immunities and exceptions reflects various judgments made by Parliament as to the line to be drawn between the public interest in disclosure and other public interests. Importantly, the structure of the scheme shows that Parliament adjudged the process of *evaluation* provided for under Part IV of the Act offered insufficient protection against disclosure where the documents in question fall within the first three categories set out above.

31. That also puts in proper context the statutory objects in s 3 of the FOI Act. It is true that those objects are broad and identify one statutory purpose (at a high level of generality) as being "to give the Australian community access to information held by the Government of the Commonwealth": s 3(1). It is also true that a construction that would best achieve the purpose or object of the Act is to be preferred to each other interpretation (a principle that is required by s 15AA of the *Acts Interpretation Act 1901* (Cth) and by the entrenched common law notion that the task of the judiciary in construing an Act is to seek to interpret it according to the "intent of them that made it"[32]). However, as this Court has said, that general principle or rule may be of little or no 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.[33] Legislation rarely pursues a single purpose at all costs, a proposition that is plainly true of the FOI Act particularly having regard to the intricate manner in which the Act draws a balance between the public interest evident in s 3(1) and other public interests. Further analysis of the text and context is necessary and,

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30 See for example, s 34 (cabinet documents) and s 42 (documents subject to legal professional privilege).

31 See for example, s 33 (documents affecting national security, defence or international relations), s 45 (documents containing material obtained in confidence), and all of the conditional exemptions (public interest test) contained in Division 3 of Part IV.

32 *Momcilovic v R* (2011) 245 CLR 1 at 44 [37] per French CJ.

33 *Carr v Western Australia* (2007) 232 CLR 138 at 143 per Gleeson CJ, cited with approval in *Construction Forestry Mining & Energy Union (CFMEU) v Mammoet Australia Pty Ltd* (2013) 87 ALJR 1009 at 1016 [40]-[41] per Crennan, Kiefel, Bell, Gageler and Keane JJ.

for the reasons given above, leads to the construction for which the First Respondent contends.

Approach of the Full Court

32. The First Respondent's approach is largely consistent with, but perhaps further explains, the reasoning of the Full Court below.

33. The Full Court identified the question posed by the appeal as being whether the Appellant's requests were for access to documents of the Official Secretary that relate to matters of an administrative nature.[34] After observing that context is especially important when considering the word "administrative"[35], the critical passages of the Full Court's judgment are found at [20]-[22][36]:

34. The most important contextual factor implicitly identified by the Full Court (at [20]) is that the Governor-General is not subject to the FOI Act. That is the background against which the Full Court considered the terms of s 6A fell to be construed, and which informed the Court's conclusion (at [21]) that the distinction being drawn by the section 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, on the other hand. On the Full Court's construction, only documents relating to the latter will be properly characterised as relating to matters of an administrative nature.

35. It is tolerably clear that the Full Court did not use the term "apparatus" as short-hand for *everything* supportive of the Governor-General's powers. That would, after all, embrace the whole of the statutory function of assistance conferred upon the Official Secretary and his staff by s 6 of the Governor-General Act, with the result that the exception to the exclusion in s 6A of the FOI Act would be inverted and become the general rule. Rather, having regard to the examples given by the Full Court (at [21]), the "apparatus" can be understood as referring to the infrastructure that underpins but is "merely supportive" of (or incidental to) the exercise of the Governor-General's substantive powers or functions.

36. Having ascertained the meaning of the term "relating to matters of an administrative nature", the Full Court then quite properly addressed itself (at [22]) to the question required by s 6A, namely, to what matter or matters did the documents identified in the Appellant's requests for access relate? The answer was the Governor-General's substantive power or function of administering the Order of Australia, and that that was not a matter of an administrative nature.

37. The Full Court distinguished between matters that are in some general sense supportive of the Governor-General's powers or functions (the apparatus), and matters that are supportive of the powers or functions but intertwined with their exercise. That is evident from the Court's rejection of a submission that

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34 (2012) 208 FCR 89 at [17].
35 (2012) 208 FCR 89 at [19].
36 (2012) 208 FCR 89 at [20]-[22].

documents relating to the Official Secretary's conduct of work antecedent to the consideration by the Council of its recommendations to the Governor-General came within the exception to the immunity.

38. It is unclear what use the Appellant seeks to make of ss 8 and 8A of the FOI Act: see AS [38, fn 35] (which are seemingly said to cast doubt upon the Full Court's reasoning). Those provisions have no application to the Governor-General, the Council, judicial officers or members of prescribed tribunals, as they only apply to "agencies". The Official Secretary is generally subject to s 8, but the obligation in s 8(2)(j) to publish "operational information" has no relevant operation here because neither the Official Secretary or his or her staff make decisions or recommendations that affect members of the public.[37]

The First Respondent's approach to construction applies equally to courts

39. The First Respondent's approach of characterisation of documents in the context of s 6A would apply to requests for access to documents of a court (within the meaning of s 5) in a like way.

40. As with the Governor-General, the holder of a judicial office enjoys absolute immunity from every aspect of the operation of the FOI Act (indeed, in the case of a High Court justice, the pathway to exclusion is identical). The exception to the exclusion of the operation of the Act to documents of a court must be construed against that background.

41. As with s 6A, it is convenient to commence with identification of the public interest in the protection of the confidentiality of aspects of the exercise of functions of judicial officers. In *Herijanto v Refugee Review Tribunal*[38] Gaudron J correctly identified that public interest as being the protection of judicial independence – ensuring that judges may be free in thought and independent in judgment (adopting a passage from Lord Denning MR in *Sirros v Moore*[39]). Thus, in her Honour's view, judicial officers are immune from disclosing any aspect of the decision making process.

42. There is obviously a constitutional dimension to those matters in the context of a Court that may be a repository for the judicial power of the Commonwealth and a resonance with the notion of decisional independence.[40] There is also an important (and perhaps on its face) countervailing constitutional imperative: being the open-court principle, which is an "essential aspect" of the characteristics of those Courts.[41] But, those matters are in fact properly regarded as complementary – the open court principle serves as a "visible assurance" of independence and impartiality and thereby the very same public

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37 At least not in relation to the Order of Australia: see the decision of the Administrative Appeals Tribunal, 27 February 2012, T 31 lines 33-41.

38 (2000) 74 ALJR 698.

39 [1975] QB 118 at 136.

40 See eg *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 477-8 [67]-[68] per French CJ; *Wainohu v State of New South Wales* (2011) 243 CLR 181 at 216-217 [62], [64] per French CJ and Kiefel J and *South Australia v Totani* (2010) 242 CLR 1 at 43 [62] per French CJ

41 *Totani* at 43 [62]; *Hogan v Hinch* (2011) 243 CLR 506 at 530 [20], 541-2 [46] per French CJ.

interest. As submitted above, there is an analogy to be drawn in that respect with the public aspects of the Governor-General's functions (see above at [22], [23]) and the importance that has been attributed to the apolitical nature of that office.

43. The FOI Act does not select as the criterion for the engagement of the immunity in s 5 the concept of an "aspect of the [judicial] decision making process". Rather, like s 6A, s5 proceeds from the opposite direction and disapplies the Act to any request for access to a document of the Court "unless the document relates to matters of an administrative nature". That does not suggest that the Court must, as a matter of course in response to an FOI application, make the potentially difficult judgment about whether the example of the record given by Gaudron J in *Herijanto* (referring to *MacKeigan v Hickman* [1989] 2 SCR 796) does or does not reveal an aspect of the decision making process.[42]

44. Section 5 is rather to be construed as leaving only a narrow scope for the operation of the FOI Act – it recognises, but does not precisely conform to, the contours of the public interest in preserving the confidentiality of that process. As with s 6A, the "overreach" of the immunity reflects Parliament's judgment as to the importance of the public interest in issue (the significance of which is plain from the fact that it also reflects that which is mandated by the Constitution).

45. So, while it is true that the public interests served by each of ss 5 and 6A are quite different (as the Full Court observed at [26]) the approach to the construction of those similarly worded provisions is in fact congruent (as the Full Court also noted in that same paragraph). The cognate wording of s 6 also suggests a similar approach for the Tribunals and other bodies specified in schedule 1 – that is, in each case, a relationship to something characterised as a "matter of an administrative nature is required". And, as with s 6A:

    45.1. the text suggests a division between the immune offices identified in ss 5(1)(b) and 6(b) and those parts of the Court or Tribunal that support those offices ("a registry or other office" and the "staff of such a registry or other office when acting in a capacity as members of that staff");

    45.2. the matters of an "administrative nature" to which ss 5 and 6 refer are to the matters relating, solely, to the management and administration functions undertaken by the registry and its staff that are necessary for, but incidental to, the performance of the functions of judicial officers and tribunal members.

46. The corollary is that the FOI Act excludes any documents, the release of which would reveal things done in or for the purpose of the proper performance of the exercise of the functions of judicial officers and Tribunal members. That is so even if they may in some sense, in whole or in part, be of themselves "administrative" or do not relate to any particular exercise of judicial power in the

[42] See, in that regard, the observations of the Full Court at [27].

case of a Court (for example, a court "bench book"[43] or a document offering general guidance as to the matters that might be included in reasons for judgments exchanged between members of the Court). A further example is provided by documents relating to exercise of the function of a head of jurisdiction to assign members of a court to hear particular cases – which is, as an essential aspect of judicial independence, to be "free of interference by, and scrutiny of, the other branches of government".[44] Indeed, as regards that function and other similar functions (determining sittings of the court; court lists – as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out those functions), Gleeson CJ observed in *Fingleton* that "[t]he distinction between adjudicative and administrative functions drawn in the context of discussions of judicial independence is not clear cut".[45]

47. The First Respondent's proposed construction may be confirmed by reference to the extrinsic materials. The Report by the Senate Standing Committee on Constitutional and Legal Affairs on the *Freedom of Information Bill and aspects of the Archives Bill 1978* records that the bill, in its original form, proposed a complete exclusion of the courts from the operation of the Act. While recognising that there was good reason not to impose requirements that would interfere with the independence of the judiciary and the proper administration of justice, the Committee took the view that there were documents of a "more clearly administrative character associated with the functioning of registries and collection of statistics" which might appropriately be exposed to the public gaze. The examples given included documents relating to matters such as the number of sitting days, the number of cases determined, the number of cases withdrawn, the cases which were subsequently appealed and the occasions on which bail was awarded.[46] The Committee, for similar reasons, further recommended that certain prescribed tribunals should be subject to the Act in respect of their administrative functions. It is apparent that, in moving amendments to the Bill, the recommendations of the Committee were taken up (with Senator Evans specifically referring to the examples just identified as the "kinds of matters the Committee had in mind"). He went on to observe that the public had an "overwhelming interest and indeed a right to know" how the Courts were "being administered, how effectively, how cost effectively and to what extent services were being made available in the public interest".[47]

48. Thus, the extrinsic materials suggest that the legislative purpose underpinning

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43 Previously regarded as confidential in at least some jurisdictions: see *R v Ellis* (2003) 58 NSWLR 700 at 714 [57].

44 *Fingleton v The Queen* (2005) 227 CLR 166 (***Fingleton***) at 190-191 [52] per Gleeson CJ (emphasis added) and (indicating that they agreed with his Honour's reasons) Gummow and Heydon JJ at 211 [123]. See also *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at 523-524 [12] per Gleeson CJ and *MacKeigan v Hickman* [1989] 2 SCR 796 at 806 per Lamer J and 833 per McLachlin J.

45 See at 191-192 [53], referring to *Valente v The Queen* [1985] 2 SCR 673 at 708-709. See also McLachlin J in *MacKeigan* at 832.

46 The Report by the Senate Standing Committee on Constitutional and Legal Affairs on the *Freedom of Information Bill and aspects of the Archives Bill 1978* p.158 [12.29].

47 Commonwealth of Australia *Parliamentary Debates: Official Senate Hansard*, 7 May 1981, p.1768.

ss 5 and 6 was to increase public scrutiny of how efficiently and cost effectively courts and tribunals were managed and administered. No aspect of the legislation was intended to expose the discharge of the functions of judicial officers and tribunal members or the other functions to the FOI Act. That limited legislative purpose is reflected in the structure of the provisions, which confer wholesale immunity from the operation of the Act on holders of judicial office and certain tribunal members, and limit the operation of the Act to documents of a court or tribunal "that relate to matters of an administrative nature".

The approach in *Bienstein*

49. In *Bienstein v Family Court*[48], Gray J took a quite different approach to s 5 of the FOI Act (and by extrapolation, s 6). His Honour held that s 5 should be interpreted so that access to documents relating to the exercise of the judicial functions of courts, and to the decision-making functions of tribunals, are not excluded from the right of access merely for that reason. Rather, Gray J held that the words "relates to matters of an administrative nature" in s 5 (and also in s 6) should be interpreted as including documents that bear upon the exercise of judicial, or decision-making, functions, and that only those documents "the availability of which would not impinge upon the necessary independence [of courts and tribunals]" should be regarded as documents relating to matters of an administrative nature.[49]

50. It followed, from his Honour's construction, that the task of a Tribunal (or other decision-maker) confronted with a request for access to documents of a court was to examine every document that answered the description in the request, or to satisfy itself by other means that every document belonged to a category on one side of the dividing line or the other.[50] Gray J's approach also invites the further exercise commended by the Appellant: the decision maker must examine each separate part of each document to determine on which side of the line it falls (AS [46]).

51. Gray J seems, in part, to have considered that his approach to construction was made necessary by the prospect that sensitive documents relating to administrative functions performed by judicial officers would otherwise be subject to the FOI Act.[51] But that concern was misplaced because, as the cases referred to by his Honour demonstrate (including *Fingleton*), functions of that kind are not properly characterised as "merely matters of internal administration" and are rather intimately related to the independent and impartial administration of justice.[52] In any event, any such concern is avoided by the construction for which the First Respondent contends.

52. A further strand in his Honour's reasoning seems to involve a misunderstanding of the examples referred to in the Senate Committee Report (reflected in the

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48 (2008) 170 FCR 382.
49 *Bienstein* at [78].
50 *Bienstein* at [81].
51 *Bienstein* at [67].
52 *Bienstein* at [55], citing Gleeson CJ in *Fingleton* at 190-191 [52].

Senate debates) of the types of things intended to be encompassed by the phrase "matters of an administrative nature" (as noted above, those were "the number of sitting days, the number of cases determined, the number of cases withdrawn, the number of cases which were subsequently appealed, criminal cases in which bail was awarded and so on"[53]). His Honour considered that there were "practical difficulties" in limiting the meaning of s 5 by reference to those examples because documents in relation to such things may or may not exist. Rather than simply treating the examples as indicative *of the character of the documents* intended to be carved out of the exclusion (which would have been the correct approach), Gray J seemingly assumed that those observations had in mind ensuring access to *particular information*. Hence, his Honour said, if a court did not keep statistics of this kind in a separate document, the only means to access that type of information would be by having access to documents relating to *individual cases*. It followed, his Honour held, that Parliament must have accepted that documents relating to individual cases might be characterised as documents relating to "matters of an administrative nature."[54]

53. But the most fundamental difficulty with the approach adopted by Gray J is that the question of whether a document of a court is subject to the FOI Act becomes an evaluative judgment by the person processing the request as to the likely effect of disclosure of the document on the independence of the court or tribunal concerned (cf. [30] above). Further, absolutely no guidance is to be found in his Honour's reasons as to how that assessment is to be carried out, what factors are relevant to the assessment, or the degree to which judicial independence must be affected for a document to retain the protection of the prima facie immunity. One cannot even assume that documents that are created in the course of and for the purpose of particular matters dealt with by the Court or Tribunal in the exercise of its adjudicative functions will be outside the operation of the Act, because, in his Honour's view, that approach would "constrain unduly" the operation of the phrase "relates to matters of an administrative nature".[55] Whilst acknowledging that "the test" will not necessarily be easy to apply, his Honour said only that one should not take "too strict a view" of what is necessary to be kept confidential in the interests of preserving the independence of the judicial and administrative decision-making functions. [56]

54. It is most unlikely that Parliament intended that s 5 (and s 6) would operate in such an indeterminate and unpredictable manner. The approach taken by Gray J should not be adopted in relation to s 6A. To the extent that the Appellant is seeking to extend the approach of Gray J in that fashion (which is unclear), her submissions should be rejected.

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53 Reproduced in *Bienstein* at [46].

54 *Bienstein* at [53].

55 *Bienstein* at [76]-[77]. This may be linked to his Honour's views, expressed at [53], that Parliament must have contemplated that documents relating to individual cases might be characterised as relating to matters of an administrative nature.

56 *Bienstein* at [78].

Why the Appellant's construction is wrong

Approach to construction

55. The Appellant contends (AS [4]) that the documents or categories of documents the subject of the request were capable of being characterised as documents that relate to matters of an administrative nature because the documents or categories on their face:

55.1. relate to administrative tasks performed within the Office; and

55.2. are capable of covering documents that do not disclose or involve the deliberative or decision-making process engaged in by the Council of the Order of Australia, or by the Governor-General, in respect of the Appellant's 2007 and 2009 nominations.

56. There are two inherent difficulties with the Appellant's approach:

56.1. First, the question posed by s 6A is not answered by determining whether documents "relate to administrative tasks performed by the Official Secretary". Rather, the first task required by s 6A is to identify the matter or matters to which the document relates. In this statutory context, matter should be understood as meaning the subject matter: see [27] and [36] above.

56.2. Second, in order to come within the exception to the immunity otherwise conferred by s 6A, a document must be characterised as relating to "matters of an administrative nature". The process of characterisation cannot begin until the meaning of that phrase is ascertained, and the scope of the documents encompassed by it is identified. The Appellant inverts the required task. She, wrongly, identifies a category of documents that are said to be excluded from the operation of the Act (those disclosing or involving the decision making or deliberative process) and then simply assumes that any document *not* caught by that category must fall within the exception to the exclusion. That same approach is evident at AS [20] and [33].

57. On this latter point, even when the Appellant purports to attribute the ordinary meaning to the word "administrative" in the context of ss 5 and 6 (AS [23] and [28]), she nonetheless contends for a construction of those provisions that strips the word (and indeed the phrase "matters of an administrative nature") of any content. That is, on the Appellant's construction (AS [28]), "documents relating to the management of the affairs of courts and specified tribunals" is, in truth, a default category, capturing *every* document the disclosure of which would not intrude upon or interfere with the independent discharge of the functions of those institutions. Seeking to avoid the uncertain seas charted in *Bienstein*, the Appellant seeks to give more defined content to that concept by invoking the criterion applied in *Herijanto*. But, for the reasons given above (developed further below), the text does not support the proposition that Parliament intended that such an approach apply to Courts dealing with requests made

under the FOI Act - let alone in the significantly different context of the exercise of the Governor-General's functions. Nor does the context, legislative history or purpose of s 6A support the Appellant's suggested construction.

The legislative history

58. The Appellant relies upon the legislative history of ss 5 and 6 to conclude that the "boundary" between documents that do and do not relate to matters of an administrative nature is delineated by whether disclosure of the document would intrude upon or interfere with the independent discharge of the functions of those institutions: AS [24]-[28]. In that regard, the Appellant's submission appears to rely, at least in part, upon the approach taken by Gray J in *Bienstein*, as to which see [49]-[54] above.

59. But, for the reasons set out at [47]-[48] above, the legislative history is in fact inconsistent with the Appellant's submissions. While it may be accepted that Parliament, when enacting ss 5 and 6, had no intention of intruding upon the independence of judicial officers and tribunal members in the exercise of their functions, that is because the limited purpose of those provisions was to increase public scrutiny of how efficiently and cost effectively courts and tribunals were managed and administered. Parliament achieved that purpose by leaving only limited scope for the operation of the Act. Nothing in the extrinsic materials suggests that it intended to demand the sorts of fine distinctions and evaluative judgments contended for by the Appellant.

Cognate provisions

60. The Appellant relies heavily upon the proposition that the same words in ss 5, 6 and 6A should be accorded a cognate meaning and operation: AS [31]. By that route, the Appellant seeks to graft principles from cases such as *Herijanto* onto the exercise of the powers and functions of the Governor-General: AS [19]-[20], AS [32]-[33].

61. It is accepted that words in a statute should be given the same meaning unless context requires a different result.[57] It is important, therefore, to consider the statutory context.

62. A feature shared by all three provisions, uniquely within the FOI Act, is that each of ss 5, 6 and 6A draws a distinction between office-holders (who carry out substantive functions but are located wholly outside of the Act) and the persons who carry out activities that support those office-holders. In each case, documents of those support persons enjoy prima facie immunity from the operation of the Act, subject only to the limited exception for documents relating to matters of an administrative nature. Further, while the public interests served by each of ss 5, 6 and 6A are quite different (see [44] above, cf. AS [30]), there is a common interest in protecting the discharge of the substantive powers and functions of the office holders from disclosure.

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

63. In those circumstances, there is considerable force behind the argument that the same meaning and operation should be given to the words "documents that relate to matters of an administrative nature" in each section. However, that does not lead to the result contended for by the Appellant. To the contrary, it is strongly supportive of the First Respondent's construction of ss 5, 6 and 6A. The reason why that is so is as follows.

64. For the reasons given above, there are useful analogies to be drawn between the position of the Governor-General, the Courts and Tribunals. In broad terms, the FOI Act appears to have taken the approach of supplying a more than ample immunity to protect the unique sensitivities associated with each of those offices (described above as an "overreach" of the respective immunities).

65. But the areas of commonality that support that analysis should not be overstated. In particular, it is a mistake to seek to equate the *specific functions* of each of those offices, which is what the appellant seeks to do. For, there is a significant difference between the substantive powers and functions of the Governor-General on the one hand, and those of judges and tribunal members on the other hand. The substantive functions and powers of the Governor-General are many and varied. They derive from the Constitution and also include those sourced in statute. The exercise of any particular function or power may, but will not necessarily, involve a decision-making process. The Appellant recognises this, but tries to obscure the distinction by moulding the context of s 6A to conform more readily to that of ss 5 and 6, by viewing the operation of s 6A through the prism of a request under the FOI Act "that relates to a matter involving a decision-making or deliberative process": AS [19].[58] But there is no warrant for approaching the construction of s 6A in a way that ignores the full extent of its operation. And no basis is demonstrated by the Appellant for transposing legal principles developed in the distinct context of judicial decision-making, into the arena of the Governor-General exercising her powers and functions.

66. What can be said, however, is that when Parliament enacted s 6A in 1984, it adopted the same statutory language as that used in ss 5 and 6 *notwithstanding* the distinctly different powers and functions of the Governor-General as compared to courts and tribunals. That drafting choice is readily explained by Parliament having understood the phrase "documents relating to matters of an administrative nature" in the manner contended for by the First Respondent. That is, the different statutory contexts of ss 5, 6 and 6A were of no moment because, in each case, Parliament intended that the exception to the general immunity from the operation of the Act would be limited to documents relating to the management or administration of the institution or office (or relevant part) that performs the support function.

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[58] Indeed, it is not even clear whether the appellant's "decision-making or deliberative process" excludes the documents dealing with the matters of critical importance to judicial independence identified in *Fingleton* at [53].

The Appellant's criticisms of the Full Court

67. Much of the Appellant's criticism of the Full Court's construction of s 6A stems from the Appellant's failure to identify paragraph [20] as forming a critical part of their Honours' reasoning: AS [36]-[40]. The Full Court did not invert the characterisation process: see [32]-[38] above.

68. Further, the Appellant's complaint that the Full Court's construction "effectively defeats Parliament's evident purpose of bringing the Official Secretary within the purview of the Act", with respect, misunderstands Parliament's intention: AS [41]. The legislative purpose of s 6A can be understood in much the way as that of ss 5 and 6, namely, as providing a means of public scrutiny of whether the Official Secretary, in the performance of his or her support functions to the Governor-General, manages and administers the Office in an efficient and cost effective way.

Application of s 6A to the Appellant's requests

69. If the Full Court's construction of s 6A is upheld, then it was correct to conclude that none of the documents identified in the Appellant's request for access were documents that related to matters of an administrative nature.[59] That is because none of the documents sought by the Appellant related to the management or administration of the Office. Rather, each category of document related to the Governor-General's function of administering the Order of Australia, which includes determining how and to whom appointments and awards are made.

70. But even if the Appellant's approach to the construction of s 6A were to be applied to the request, the First Respondent submits that the same result would follow:

70.1. **The case officer manual**: The Appellant's characterisation of the work of the Australian Honours and Awards Secretariat as being "anterior to the commencement of any deliberative or decision-making process" is artificial. The evidence before the Administrative Appeals Tribunal (summarised at AS [42]) demonstrated quite clearly that the manual formed part and parcel of the decision-making process. The process of research and inquiry carried out by the Secretariat forms the basis for the Council's consideration of any nomination.[60] It is work that the Council would have to do itself in order to consider the nomination if the Governor-General, as Chancellor of the Order, had not made the staff of the Secretariat available to assist. Disclosure of the manual would most certainly disclose "aspect(s) of the decision-making process": cf. AS [33]. But more fundamentally, the Appellant's submissions (AS [43]) disregard the fact that the administration of the Order of Australia is a function bestowed upon the Governor-General as Chancellor of the Order. That function is engaged upon receipt of a nomination, and continues until a decision is made to exercise the prerogative by grant of an honour or not.

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59 *Kline* at [22], [29].

60 Administrative Appeals Tribunal 27 February 2012, T 13 lines 45-46.

The Appellant's approach would require a substantial part of the performance of that function to be disclosed.

70.2. **Review processes**: The evidence before the Administrative Appeals Tribunal was that there were no appeal or review processes[61], but the Council has a "three year rule" (by which an unsuccessful nomination will not be reconsidered for three years). The First Respondent provided that information to the Appellant outside of the FOI Act.[62] In any event, for the reasons set out in the preceding subparagraph, documents relating to internal review processes in relation to the administration of the Order of Australia would not fall within the exception to the exclusion.

70.3. The correspondence and file notes sought by the Appellant are with respect to a specific nomination. They necessarily relate to, and would disclose, the way in which that particular nomination was considered and dealt with. The Appellant makes no submissions in support of access to these documents.

PART VII ESTIMATED HOURS

71. The First Respondent estimates that presentation of his oral argument will take approximately 1.5 hours.

Dated: 8 October 2013

....Justin Gleeson.....	.....	.....
Justin Gleeson SC Solicitor-General	Nitra Kidson	Craig Lenehan

Counsel for the First Respondent

61 Tribunal, Exhibit 4, (Bonsey report), p.3.
62 Administrative Appeals Tribunal 27 February 2012, T 28 line 37 – 29 line 7.