

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: F2005123
Decision Ref: D0092006**

Participants:

Michael Bartucciotto
Complainant

- and -

State Administrative Tribunal
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access - right of access to documents not information - documents of a court - Glossary - definition of “court” - definition of “documents of a court” - whether the agency is a court - whether the documents relate to “matters of an administrative nature”.

Freedom of Information Act 1992 (WA): sections 3(3), 10, 10(1), 63(1), 72(1)(a), 72(1)(b), 74, 75(1), 76(4); Schedule 1, clauses 3(1), 5(1)(a), 8(2), 12(c); Schedule 2, Glossary clauses 1, 2(4), 3, 3(b), 3(c), 5.

Freedom of Information Regulations 1993: regulation 10.

State Administrative Tribunal Act 2004: sections 5, 7, 32, 34, 42, 59, 66, 61(1), 67, 82, 85, 86, 107, 148; Part 4.

Freedom of Information Act 1989 (NSW): clause 10.

State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004.

Guardianship and Administration Act 1990: sections 5, 13(a)-(g), 17, 19, 21, 56A; Part B of Schedule 1.

Re Bartucciotto and Guardianship and Administration Board [2004] WAICmr 16.

Re Post Newspapers Pty Ltd and Town of Claremont [2005] WAICmr 17.

Re Rehman and Medical Board of Western Australia [1995] WAICmr 24.

Re Geary and Others and Ministry of Justice [1995] WAICmr 29.

Re Cohen and Real Estate and Business Agents Supervisory Board [2001] WAICmr 42.

Re Rakich and Guardianship and Administration Board [2000] WAICmr 3.

DECISION

The decision of the agency to refuse access is confirmed. Documents 2-81 are not documents of a court because they do not relate to matters of an administrative nature, and they are not accessible under the *Freedom of Information Act 1992*. Document 1 and the matter deleted from the edited documents released to the complainant are outside the scope of the access application.

D A WOOKEY
A/INFORMATION COMMISSIONER

13 April 2006

REASONS FOR DECISION

1. This complaint arises from a decision made by the State Administrative Tribunal ('the agency') to refuse Mr Bartucciutto ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. On 20 May 2005, the complainant sought access to:

"...a copy of all documents (in relation to myself, Michael Bartucciutto or my mother, the late Maria Carmel Bartucciutto), dated from 1 November 2003 to present day, [the complainant's emphasis] which are held by an agency of the State Administrative Tribunal, namely the Guardianship and Administration Board as was formally [sic] known.

My application is for all documents, including file notes, recorded conversations, recorded opinions, letters and records of visits made by me to the Guardianship Board offices in the relevant time frame. My application is to include any relevant material whether stored in written form or electronic form such as an audio tape or a computer.

I have some understanding that some documents of a court are exempt under the FOI Act, therefore my application is for all records which are administrative in nature such as records of my visits to the Board offices prior to, and after a Guardianship hearing held in relation to my mother....".

3. The Guardianship and Administration Board ('the Board') no longer exists and its jurisdiction, functions and powers have been transferred to the agency. The agency holds the Board's files.
4. In a letter dated 26 May 2005, the agency acknowledged receipt of the complainant's access application, confirming that it was for personal information about himself and his late mother only. The agency confirmed that, therefore, there would be no application fee or any charges payable by the complainant. The agency also informed the complainant that, should he wish to obtain access to non-personal information, the usual fees and charges would apply to his access application.
5. In a notice of decision dated 9 June 2005, the Executive Officer of the agency informed the complainant of its decision to refuse him access to the requested documents on the basis that it considered those documents are not documents of a court and are not accessible under the provisions of the FOI Act. In making that decision, the agency relied on my decision in *Re Bartucciutto and Guardianship and Administration Board* [2004] WAICmr 16, a previous matter involving the same complainant.

6. Thereafter the complainant made an application to the Information Commissioner seeking external review of the agency's decision dated 9 June 2005.

REVIEW BY THE A/INFORMATION COMMISSIONER

7. I accepted the complainant's application for external review as it appeared to me that the Executive Officer of the agency – the decision-maker in this instance – is the principal officer for the purposes of the FOI Act, and therefore internal review was not available. I served notices on the agency under ss.72(1)(b) and 75(1) of the FOI Act requiring the production to me of the documents the subject of the complaint and certain other documents I considered to be relevant to the matter.
8. As a result of those notices, the agency produced to me certain files which contained some documents relevant to the complainant's access application. However, it was not clear from those files whether those files contained all of the documents which might come within the scope of the complainant's access application or that all the documents relevant to the complaint had been produced to me as required. Therefore, a meeting was arranged between my office and the agency.
9. During that meeting, the agency raised, amongst other things, a number of queries in relation to my powers to require the production of documents. It became apparent in that meeting that the agency had at least one document which could be within the scope of the complainant's access application: a document consisting of seven pages of records of telephone attendances and various other contacts between the complainant and the Board.
10. The agency was invited to release that document, which it did. However, it was not clear to me whether that document was a complete record of the Board's contacts with the complainant or whether it was merely a compilation of contacts recorded in other documents. It appeared to me to be a summary of information and not an original record of the contacts and actions summarised in it, and suggested to me that the agency may have had other documents within the scope of the access application but which had not been produced to me. Therefore, it remained unclear to me whether all the documents the subject of the complainant's access application had been identified and produced to me as required.

Preliminary issue

11. When this was raised with the agency, the agency again queried the authority under which I required the production of the disputed documents in this matter, as the agency claimed it was a court for the purposes of the FOI Act and therefore was not required to produce documents to me in accordance with my notice to produce documents pursuant to s.75(1) of the FOI Act. In addition, the agency claimed that its Executive Officer is not part of an agency for the purposes of the FOI Act. I dealt with this preliminary issue by writing to the agency on 23 August 2005 and advising it of my view in relation to this issue

and served on the agency a further notice under s.75(1) requiring the production of documents. I explained my authority to require their production as follows.

Power to require production of documents

12. Under s.63(1) of the FOI Act, the main function of the Information Commissioner is to deal with complaints about decisions made by agencies in respect of access applications. Section 72(1)(b) empowers the Commissioner to require a person whom the Commissioner has reason to believe has a document relevant to the complaint to produce the document to the Commissioner. That power applies in respect of any person, not just officers of agencies and, indeed, has been exercised in respect of private individuals and organisations. Similarly, the Information Commissioner is empowered by s.72(1)(a) of the FOI Act to require any person whom the Commissioner has reason to believe has information relevant to a complaint to give that information to the Commissioner.
13. Section 75(1) empowers the Information Commissioner to require an agency to produce a document for inspection so that the Commissioner can decide whether the document contains exempt matter or is a document of the agency. That power applies even in respect of exempt agencies. It was in exercise of that power – in order that I might determine whether or not the documents concerned are “documents of a court” – that a written notice requiring the production was issued to the agency.

Is the State Administrative Tribunal an agency for the purposes of the FOI Act?

14. The FOI Act creates a right of access to “the documents of an agency” (other than an exempt agency) subject to and in accordance with the FOI Act.
15. Clause 3 of the Glossary to the FOI Act provides that courts are agencies for the purposes of the FOI Act and “court” is defined in clause 1 of the Glossary to include a tribunal.
16. Clause 3 of the Glossary provides that, for the purposes of the FOI Act:
 - “(a) a court [including a tribunal] is an agency;
 - (b) a registry or other office of a court and the staff of such a registry or other office are part of the court;
 - (c) a person holding a judicial office or other office pertaining to a court, being an office established by the written law establishing the court, is not an agency and is not included in an agency”.
17. Clearly, therefore, the Tribunal is an agency, although its members are not and are not part of the agency for the purposes of the FOI Act. As the Tribunal is not listed in Schedule 2 to the FOI Act, it is not an exempt agency.
18. I understand that, rather than having a “registry”, the agency has administrative staff provided by the former Department of Justice now the Department of the Attorney General (‘the Department’). I consider that those administrative staff

effectively comprise an “other office of a court”, referred to in paragraph (b) of clause 3 of the Glossary. Those administrative staff are, clearly, in my view, staff of the office of the Tribunal and therefore part of the agency.

19. Clearly, the President and judicial members of the Tribunal are, by virtue of clause 3(c) of the Glossary, not agencies or included in the agency as they are persons holding judicial offices. Similarly, the senior members and members are not agencies or included in the agency because they are people holding other offices pertaining to the Tribunal, being offices established by the *State Administrative Tribunal Act 2004* (‘the SAT Act’) (s.107) which also establishes the Tribunal (s.7).

Is the Executive Officer part of the agency?

20. The Executive Officer, *inter alia*, manages the administrative staff of the Tribunal. Those staff are, in my view, officers of the agency for the purposes of the FOI Act.
21. Section 148 of the SAT Act provides:

“148. Executive officer and other staff of Tribunal

- (1) *The chief executive officer is to make an officer of the Department available to perform, under the control of the President, the functions under this Act of the executive officer of the Tribunal and assist in the administration of this Act and the exercise of the Tribunal's jurisdiction.*
- (2) *In addition, the chief executive officer is to make other officers of the Department available to assist, under the control of the executive officer, in the administration of this Act and the exercise of the Tribunal's jurisdiction.*
- (3) *Otherwise, the services and facilities of the Department may be used for the purposes of this Act on such terms as are agreed to by the President and the chief executive officer”.*
22. That section does not appear to me to create any “office pertaining to [the Tribunal]”. It does not create a statutory position of Executive Officer to the Tribunal; it merely provides that the chief executive officer (of the Department) must make available the Department’s facilities and officers to assist the Tribunal, including an officer to perform executive officer functions and control the officers of the Department who have been made available to assist the Tribunal.

The principal officer

23. I understand that, although (pursuant to s.148(1)) the Executive Officer is under the control of the President while performing his duties for the Tribunal, he remains an employee of the Department, as do the other officers made available

by the chief executive officer to assist the Tribunal. This is similar, as I understand it, to the position in respect of registry and other administrative staff provided by the Department for the various Western Australian courts.

24. It is my usual practice (except where I require information or documents from a particular individual) to nominate the principal officer of the agency in the notice of requirement and to serve the notice on the principal officer. In the case of the courts and other tribunals, the Director General of the Department is the principal officer for the purposes of the FOI Act because, pursuant to clause 2(4) of the Glossary to the FOI Act, the courts and other tribunals have been declared by regulation 10 (and Schedule 2) of the *Freedom of Information Regulations 1993* ('the Regulations') to be "related agencies" to the Department; that is, they are not to be regarded as separate agencies but are to be regarded as part of the Department.
25. I am of the view that the Executive Officer is an officer of the agency for the purposes of the FOI Act, and that the Executive Officer is the principal officer of the "other office of a court" ('the administrative office of the SAT') which is an agency for the purposes of the FOI Act. Paragraph (g)(ii) of the definition of "principal officer" provides that, in relation to an agency otherwise unspecified in the definition and which is a body constituted by 2 or more persons, the person who is entitled to preside at any meeting of the body at which he or she is present is the principal officer for the purposes of the FOI Act.
26. The administrative office of the SAT which is an agency for the purposes of the FOI Act does not appear to me to be a body of a kind described in any of the other paragraphs of the definition of "principal officer". With the judicial and other members excluded from the agency for the purposes of the FOI Act, it would seem to me that the Executive Officer would be entitled to preside at any meeting of the administrative office of the SAT which is an agency for the purposes of the FOI Act.

Documents of the Tribunal

27. Clause 5 of the Glossary defines "documents of a court" as follows:

"a document relating to a court is not to be regarded as a document of the court unless it relates to matters of an administrative nature."

28. In my decision in *Re Bartucciotto and Guardianship and Administration Board* I discussed the meaning of 'document of a court'. As nothing has been put before me to dissuade me from that view, for the reasons given for that decision, I remain of the view that documents directly relating to, or very closely connected with, the judicial function of a court, being the determination of the issues between the parties in the particular matter before the court, are of such a nature that, by virtue of clause 5 of the Glossary, they are not to be regarded as documents of the court.

29. However, documents that are purely administrative in nature and not part of the record of the judicial process will in my view be documents of the court for the purposes of the FOI Act and potentially accessible under the FOI Act.
30. In my opinion, those provisions are designed to ensure that, whilst the public interest in preserving the integrity and independence of the judicial process of courts and of tribunals exercising a judicial function is recognised and those processes are not in any way prejudiced or impinged upon by the operation of the FOI Act, such public bodies are nonetheless required to be open and accountable in respect of their administrative processes and actions, in furtherance of the public interest in public sector agencies of all kinds being more accountable to the public whom they are designed to serve and by whom they are funded.

The agency's response

31. The agency responded to my letter and notice of 23 August 2005 by producing, on 9 September 2005, the originals of all of its files relating to the complainant and his deceased mother.

Review following production of documents

32. As indicated at paragraph 10 above, it was not clear to me whether the seven page document, in the form of a running sheet, initially released to the complainant by the agency, was the primary document recording contacts between the Board and the complainant or whether it was a summary compiled from other primary documents - for example, file notes - recording those contacts. Therefore, once the agency's files were received, I had my Investigations Officer examine each file to ascertain which was the case and whether the document released was the agency's only - and complete - record of contacts between the complainant and the Board. The agency, when asked, could not confirm whether or not that was the case, submitting that the document was created prior to the establishment of the agency and therefore it was difficult for the agency to establish its purpose, or to ascertain what the Board's usual practice for recording such contacts was.

Documents initially identified as within the scope of the access application

33. My Investigations Officer examined each file and identified 14 documents which she considered came within the scope of the complainant's access application. One of those (Document 11) appeared to be a copy of the seven pages previously released to the complainant recording contacts between the complainant and the Board from 17 November 2003 to 15 November 2004. Documents 10, 11 and 13 bore no headings but were in the form of 'running sheets' recording contacts between the complainant and the Board. The first five pages of Document 11 was a copy of Document 10. Page 6 of Document 11 recorded a number of contacts between 6 April 2004 and 14 June 2004, some of which were also recorded on page 4 of that document, but others of which appeared to have been omitted in sequence. Page 7 recorded contacts between 14 June 2004 and 15 November 2004, the first two of which also appeared on

page 4 of the document and the final of which also appeared on page 5 of the document. It appeared to me that Documents 10 and 11 were printouts of different versions of a computer record which, from time to time, was updated to record in one document contact between the Board and the complainant. Document 13 was a copy of Document 10.

34. Documents 6, 7 and 8 were each headed "File Running Sheet" and each bore the same file number. Document 6, however, bore a different officer name to Documents 7 and 8 which both bore the name of one officer. Document 6 bore one application number, whereas Documents 7 and 8 both bore another application number in addition to the one appearing on Document 6. All three documents, however, were also in the form of running sheets recording contacts between the Board and the complainant. The first four pages of Documents 7 and 8 were identical, but page 5 of Document 7 contained entries between 23 February 2004 and 26 February 2004 (although actually dated 26 February 2002, which it is clear, from the context, is a typographical error) and Document 8 contained entries recording contacts between 8 March 2004 and 15 November 2004, which were not contained in Document 7. The first three pages of Document 6 contained the same entries contained in Document 7 up to 6 February 2004. The last two pages of Document 6 contained the entries from Documents 7 and 8 but only up to 3 February 2004. Again, all three documents appear to be printouts of different versions of a computer running sheet, updated to various stages. Some of the entries appeared to record contacts also recorded in Documents 10, 11 and 13, but other of the entries recorded contacts not recorded in those other three documents.
35. Documents 1, 2, 4 and 14 were each headed "File Note Sheet" and all bore the same file number carried by Documents 6, 7 and 8. Each of Documents 1 and 2 were marked with the same two application numbers, which were different from the application numbers marked on Documents 7 and 8. Documents 1 and 2 were also all marked as having the same case manager. There was no application number and no case manager noted on Document 4. Document 14 was a copy of Document 1, except that Document 14 bore facsimile transmission markings at the top of the document. Document 2 recorded contacts between the Board and the complainant between 18 November 2003 and 14 December 2003. Document 1 contained the first four of those entries only and, again, Document 1 appeared to be an earlier version of Document 2, with Document 2 having been updated as further contacts occurred. Document 4 recorded one contact on 16 December 2003. That entry was identical to the first entry on Documents 6, 7 and 8. Document 2 appeared to contain more detailed records of some contacts recorded in Documents 10, 11 and 13, some additional contacts not recorded in Documents 10, 11 and 13 and some contacts in respect of which it is not clear whether they were additional contacts on the same day or different records of contacts recorded in Documents 10, 11 and 13.
36. Document 3 was an undated handwritten note headed "Meeting 11:00am Tuesday", the author of which is not noted on the document. It was date stamped by the Board as having been received on 18 November 2003, and may be a note relating to the complainant's attendance at the Board on

18 November 2003, which is recorded in Documents 1, 2, 10, 11, 13 and 14. Document 12 was a copy of Document 3.

37. Document 5 was a memorandum dated 6 February 2004 concerning a telephone contact with the complainant on the previous Friday. It appears to relate to a contact or contacts on 4 February 2004 recorded in Documents 6, 7, 8, 10, 11 and 13.
38. Document 9 was an email on 9 September 2004 passing on a telephone message from the complainant to the case manager named on Documents 1, 2 and 14.
39. None of Documents 3, 5, 9 and 12 appeared to me to be a primary record of a contact subsequently recorded in one of the running sheets. Given that Document 3 was date stamped as having been received by the Board, it did not appear to me to be a record created by the Board, but more likely a note handed to the Board by the complainant. Document 5 was an internal communication between officers of the Board resulting from a contact with the complainant, the latter of which was recorded in the running sheets. Document 9 was merely an email requesting that the case manager return a telephone call from the complainant. That contact was not recorded in the running sheets (and I would not expect that it would be).
40. The agency has confirmed that the only files in its possession which relate to the complainant and his deceased mother and the Board have been produced to me for my examination. From that examination, it appears that the running sheets, however variously described, were created as separate documents and are the only records of most of the complainant's telephone and personal contacts with the Board, other than those recorded in documents relating to the formal processes of the Board. My office could find no additional documents on the files which correspond with the entries on the running sheets, other than as indicated above.
41. The agency has advised me that the manner in which the running sheet records contacts is not its usual practice of recording telephone attendances and visits. Based on the information currently before me, including my officer's inspection of the files, there do not appear to be any other documents which exist within the agency which record, in any greater detail or at all, the contacts made by the complainant as specified in his access application.
42. By letter dated 13 September 2005, my Investigations Officer wrote to the agency, providing it with a schedule of those 14 documents, and invited the agency to make a decision on access with respect to each of those documents. A copy of that letter and schedule of documents was provided to the complainant by my office.
43. In a letter dated 22 September 2005, the agency wrote to the complainant informing him that it had decided to grant him access in full to Documents 3, 9 and 12 and access to edited copies of the other 11 documents. The agency claimed exemption for the information deleted from those documents under clauses 3(1), 5(1)(a) and 8(2) of Schedule 1 to the FOI Act.

44. In addition, the agency claimed that certain information deleted from those documents is outside the scope of the complainant's access application. My office was provided with a copy of the agency's letter dated 22 September 2005 to the complainant.
45. In a letter dated 23 September 2005, my Investigations Officer wrote to the complainant, informing him that it was her initial assessment that all of the information deleted from those documents is outside the scope of his access application as it does not record telephone or other contacts between him and the Board. On that basis, my Investigations Officer advised the complainant that she did not consider it necessary to consider the agency's claims for exemption for the deleted information.
46. The complainant was then invited to reconsider his complaint, and either withdraw or make submissions to me as to why he considered the deleted information was within the scope of his access application.

Clarification of scope of access application and identification of additional documents

47. At that time, the complainant had nominated a person to act as his agent in this matter. It appears there was some delay in the complainant's agent forwarding the letter of 23 September 2005 from my office to him and, therefore, it was not possible for the complainant to respond in the timeframe specified in that letter.
48. To assist the complainant to put his views to me and to make submissions, my Investigations Officer met with him and his agent at the office of the agent. That meeting took place on 21 October 2005, being the first date the complainant's agent was available.
49. As a result of that meeting, the scope of the complainant's access application was clarified and my officer then understood it to include all correspondence between him and the Board and the agency within the specified time period, as well as records of his visits and telephone contacts. My Investigations Officer photocopied all of the additional documents produced by the agency which she identified as within the clarified scope of the complainant's application, forwarded those copies to the agency and invited it to make a decision on access with respect to all of those documents. The complainant made no further submissions to me in response to the letter dated 23 September 2005 from my Investigations Officer.
50. In a letter dated 22 November 2005, the agency informed the complainant that it had identified 206 additional documents as coming within the scope of the access application. The agency decided to release to him 125 of those documents and to refuse him access to 81 documents.
51. In its notice of decision the agency also advised the complainant that, notwithstanding my decision in *Re Bartucciottto and Guardianship and Administration Board*, cited above, it had decided to grant the complainant

access to certain documents to which it could have refused him access. Those documents are Documents 14 and 20 as referred to in paragraph 14 of my reasons for decision in *Re Bartucciotto and Guardianship and Administration Board*.

Agency's discretion

52. Where an agency exercises its discretion to release documents, for which it could claim exemption, or to which access could be denied for other reasons, it is to be commended for exercising its discretion and upholding the spirit of the FOI Act. Unfortunately, instead of recognising this as a decision which has clearly benefited him, and which the agency was not required by the FOI Act to make, the complainant has continued to complain to me about being given access to documents to which access had previously been refused.
53. Despite the efforts of my office to disabuse him of it, the complainant continues to labour under the misapprehension that, because the agency has disclosed to him some documents that I have previously found to be exempt, my decision has changed. That is not the case. Agencies always have the discretion to disclose documents that are exempt or are not accessible under the FOI Act (s.3(3)), subject to any other legal constraints. I have no such discretion. If an agency refuses access to a document and it is established that the document is exempt then I cannot make a decision to the effect that it is to be disclosed (s.76(4)).
54. In this case, the agency chose to release some documents that I have previously found not to be documents of a court and therefore not accessible under the FOI Act. My decision that the FOI Act gives no right of access to those documents has not changed. Had the agency sought to refuse access to them on this occasion it is likely that I would have made a similar decision. However, they are the agency's documents and, if the agency chooses to release them even though I have previously found that the FOI Act gives no right of access to them, the agency is entitled to do so. In this case, I am required only to make a decision in respect of the documents to which the agency has refused access on this occasion.

Schedule

55. The agency provided the complainant with a schedule of documents with its decision dated 22 November 2005. However, that schedule appeared to describe only those documents to which access had been provided. It only referred in very general terms to those documents to which access had been refused.
56. The FOI Act does not require an agency to provide an applicant with a schedule of documents. It does, however, require the agency, when its decision is to refuse access to documents, to provide a notice of decision that among other things gives the reasons for the refusal and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based. In some cases, that can be done adequately in the

notice of decision without individually identifying each of the documents to which access has been refused. However, in other cases, particularly where more than a few documents are involved and they are not all similar in nature, meeting those requirements can best be achieved by providing a schedule of documents.

57. In the present case, although it was not required to do so, it is my view that it would have been desirable for the agency to have provided the complainant with a schedule of documents providing more detail in relation to the documents to which access was refused, including a description of the types of documents to which access had been refused, in order to at least endeavour to provide enough information to assist the complainant to understand, from the description of the documents, the basis on which it was considered they were not “documents of a court” as defined in the FOI Act and therefore not documents accessible under the FOI Act, particularly given that the complainant had expressly stated in his access application that he had some understanding of the situation in respect of documents of a court and sought only documents of an administrative nature.
58. In a letter dated 17 January 2006, I informed the parties of my preliminary view on this matter. It was my preliminary view that one of the 81 documents was outside the scope of the access application and the other 80 documents are not documents of a court as they do not relate to matters of an administrative nature and are not accessible under the FOI Act. To assist the complainant to better understand the agency’s decision on access, and my preliminary view, my office prepared a schedule describing the disputed documents in as much detail as possible without breaching my obligations under s.74 of the FOI Act which prohibits me from disclosing exempt matter.
59. For similar reasons to those given by me in *Re Post Newspapers Pty Ltd and Town of Claremont* [2005] WAICmr 17 at paragraphs 22 and 23, I take that prohibition necessarily to extend to the disclosure of disputed matter, that is, matter that is claimed to be exempt or claimed not to be accessible under the FOI Act. If I were to disclose matter claimed by an agency to be exempt or otherwise not accessible (even though it were my decision that it was not exempt or was accessible) that agency’s right of appeal from my decision on a question of law would be negated; the very information the agency sought to protect from disclosure would have already been disclosed.
60. With the agency’s agreement, a copy of that schedule was provided to the complainant with my letter dated 17 January 2006.
61. As my preliminary view was that the disputed documents are not documents of a court for the purposes of the FOI Act and do not come within the scope of the complainant’s access application, I did not consider it necessary for me to consider the agency’s claims for exemption under clauses 8(2) and 12(c) of Schedule 1 to the FOI Act.
62. The agency accepted my preliminary view. The complainant did not accept my preliminary view and made a detailed submission to me raising 29 separate

points directly relating to this matter. The complainant also raised a number of other points which either relate to previous matters dealt with by my office, or have been dealt with previously by me in correspondence with the complainant.

THE DISPUTED DOCUMENTS

63. The agency has refused the complainant access to 81 documents ('the disputed documents'). The disputed documents have been described to the parties in the schedule of documents prepared by my office and provided to the parties under cover of my letter dated 17 January 2006. Apart from one (Document 1), they relate directly to various applications to the Board relating to the affairs of the complainant's late mother.

THE GROUNDS FOR REFUSAL

64. The agency has refused access to one document (Document 1) on the basis that it is exempt under clause 12(c) of Schedule 1 to the FOI Act. Access to Documents 2-81 was refused on the basis that, firstly, they are not "documents of a court", as defined, and therefore are not accessible under the FOI Act and, secondly, they are exempt under clause 8(2) of Schedule 1 to the FOI Act.

THE COMPLAINANT'S SUBMISSION

65. The complainant's submission largely consists of arguments and allegations he has raised with this office on numerous previous occasions all of which have been addressed in the course of dealing with this matter and with previous matters involving this complainant. Little of the complainant's submission contains arguments for me to consider as to why the complainant believes that the disputed documents should be disclosed to him and, in particular, arguments that they are documents of a court for the purposes of the FOI Act.
66. The only submissions that it appears to me that he made on that point were that: if any of the documents contain details about him, they cannot be documents of a court as he was not the represented person at the Board's hearing; if the documents contain information about him then he has a right to access them so that he can ensure that it is true and correct, up to date and not misleading; some of the documents pre-date any application being made to the Board so cannot be documents of a court; as some of the documents are addressed to or were received from him, they cannot be exempt; and, as some of the documents have previously been released to him, they cannot now be exempt.
67. The complainant continues to raise queries in relation to the content of some of the documents to which he has been given access. Section 10(1) of the FOI Act provides that a person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with the FOI Act. That right is a right of access to documents and not a right of access to information generally. Under the FOI Act, agencies are not obliged to answer any queries that access applicants may have about the content of documents to which they have been given access and I have no power to direct the agency to answer those questions.

68. Many of the points in the complainant's submission were requests for more information in respect of the documents listed on the schedule provided by my office. As I have said above, I consider that I have given as much information concerning the disputed documents as I can give the complainant without breaching my obligation under s.74 of the FOI Act and I consider that the complainant has been given sufficient information as to the nature of the disputed documents to enable him to make submissions to me as to whether or not they are "documents of a court" for the purposes of the FOI Act.
69. I appreciate the complainant is deeply upset by the death of his mother and his belief that her death was a direct result of actions, or inactions, on the part of various government agencies and private health care providers. However, it is not within my jurisdiction to comment on the medical treatment provided to the complainant's mother. Nor is it within my jurisdiction to comment on the veracity or otherwise of the contents of the disputed documents.
70. The complainant continues to make allegations of improper behaviour on the part of certain government agencies and officers of those agencies, including my own office. The complainant has also made an allegation about the agency tampering with certain documents. Previously the complainant claimed that the agency had tampered with the transcript of the hearing of the Board. In his submission dated 18 January 2006 he alleged that his signature on a document has been tampered with. I have written to the complainant in response to his allegations about my office. Other than that, his allegations are not matters for me. If he considers that he has evidence of maladministration, misconduct or corrupt or criminal conduct on the part of public officers or agencies, it is for him to take that evidence to the proper authorities established to investigate such matters.
71. The only matter within my jurisdiction on which I must decide is whether the complainant has a right of access to the disputed documents under the provisions of the FOI Act.

CONSIDERATION

72. The complainant's submission largely misunderstands the issue in this case. The issue is whether or not the disputed documents are documents to which the FOI Act applies at all; it is not whether or not exemption may be claimed for them under one of the exemptions provided in Schedule 1. Whether or not a document contains personal information about the complainant is irrelevant to the question of whether or not it is a document of a court and therefore accessible under the FOI Act. If the document is a document of a court - that is, it relates only to administrative matters - and the FOI Act therefore applies to it, the fact that it contains personal information about the complainant will be relevant to a determination of whether or not it is exempt under clause 3. Until the threshold question of whether or not the FOI Act applies to the documents at all is decided, the issue of whether or not they are exempt does not arise.

73. The complainant's submission that, because he was not a represented person in the Board's hearing, if the document contains personal information about him it cannot be a document relating to the statutory functions of the agency, is clearly a nonsense. The complainant was the applicant in at least one of the proceedings to which the documents relate and an interested party in respect of others. Even if that were not the case, the complainant had been his mother's carer. It is not at all unlikely that information about him might be in documents relating to proceedings concerning his mother's future care.
74. The complainant's submission that he has a right to access documents containing personal information about himself in order that he may have it amended if it is inaccurate, out of date, incomplete or misleading is misconceived. The FOI Act gives that right only in respect of documents that are subject to the provisions of the FOI Act. No such right is given in respect of documents that are not subject to the provisions of the FOI Act and, as I have said, documents created in the course of or for the purpose of the exercise of the Board's or the agency's statutory adjudicative functions in respect of a particular matter are not, in my view, documents relating to a matter of an administrative nature and are therefore not accessible under the FOI Act. The FOI Act does not apply to them.
75. I do not accept the complainant's submission that at least one of the documents pre-dates any application to the Board and therefore cannot relate to a particular matter dealt with by the Board. None of the documents in dispute in this matter and listed in the schedule provided to the complainant pre-dates his application to the Board.
76. The complainant's submission that some of the documents have already been released to him and therefore cannot now be exempt is also misconceived. As I have said, the question is not whether or not the documents are exempt under the FOI Act but, rather, whether the FOI Act applies to them at all. If it were the case that this complaint concerned documents that I have previously found to be not exempt, then - although it would still be open to another agency, or even the same agency, to claim exemption for those same documents - it would clearly be extremely difficult for an agency to establish exemption for documents that have already been found to be not exempt and/or have already been disclosed to the complainant or to any other applicant for access to them.
77. However, again, that is not the case in this instance. If the documents are not documents to which the FOI Act applies then whether or not the agency or any other agency has previously chosen to disclose them is irrelevant. If the documents are not documents to which the FOI Act applies then it is entirely at the discretion of the agency (subject to any other legal requirements or constraints) whether it releases or does not release them on any occasion.

Document 1

78. Document 1 is a copy of a facsimile cover sheet dated 20 September 2004 from an external body to the Board. I understand that the document that was transmitted with it was a copy of a letter written by the complainant to a range

of people. That letter has already been released to the complainant and Document 1 consists only of the fax cover sheet. The agency claims that Document 1 is an exempt document under clause 12(c) of Schedule 1 to the FOI Act.

79. I do not consider that the agency has established that the document is exempt under clause 12(c). However, I need not consider that claim any further as the document is clearly, in my view, outside the scope of the complainant's access application. It is not, and does not record, a communication between the complainant and the Board or the agency. The agency is, therefore, entitled to refuse access on the basis that it is not a document to which the complainant has requested access, and I need consider that no further.

Documents 9 and 10

80. Documents 9 and 10 are draft copies of draft orders of the Board; Document 9 is dated 12 March 2004 and Document 10 is dated 18 March 2004. In his response to my preliminary view, the complainant indicated that the agency had released to him a copy of Document 9 and queried whether, on that basis, he could be given a copy of Document 10. My office invited the agency to reconsider its decision with respect to Document 10 in light of the complainant's claims.
81. The agency advised that Document 9 has not been released to the complainant and that the reference on the Schedule of Documents prepared by the agency and provided to the complainant with its notice of decision dated 22 November 2005 indicating that Document 9 had been released was in fact an error. Therefore, Documents 9 and 10 remain in dispute in this matter, as do Documents 2-8 and 11-81.

Documents 2-81

82. I have examined Documents 2-81, as previously described to the parties. I have considered the terms of the complainant's access application dated 20 May 2005 as noted in paragraph 2 above. It is clear from that application that the complainant is seeking access to documents of an administrative nature which relate to himself and his late mother and which are, or record, contacts between the complainant and the Board or the agency. The agency confirmed at the outset with the complainant that he would not be charged by the agency for it to deal with his access application because it was an application for access to personal information about himself and his late mother. That fact has never been disputed by the complainant.
83. Having inspected, Documents 2-81, I am of the view that they are documents that are not accessible under the FOI Act as they are not "documents of a court" – as defined in clause 5 of the Glossary to the FOI Act – because they do not relate to matters of an administrative nature. My reasons follow.

Documents of a court or tribunal

84. As I have noted in paragraph 68 above, section 10 of the FOI Act gives every person a right of access to the documents of an agency, other than an exempt agency, subject to the FOI Act. Clause 3 of the Glossary to the FOI Act provides, among other things, that a court is an agency for the purposes of the FOI Act and clause 1 of the Glossary defines "court" to include a tribunal.
85. As indicated earlier in these reasons, clause 5 of the Glossary states:
- "A document relating to a court is not to be regarded as a document of the court unless it relates to matters of an administrative nature".*
86. Therefore, the right of access to documents of a court is limited to documents relating to matters of an administrative nature. I agree with the view of the former Information Commissioner that the effect of clause 5 of the Glossary is to prevent the FOI Act from applying to documents concerning the judicial or quasi-judicial - but not the administrative - functions of State courts and tribunals: see *Re Rehman and Medical Board of Western Australia* [1995] WAICmr 24; *Re Geary and Others and Ministry of Justice* [1995] WAICmr 29; *Re Cohen and Real Estate and Business Agents Supervisory Board* [2001] WAICmr 42; *Re Rakich and Guardianship and Administration Board* [2000] WAICmr 3; and my decision in *Re Bartucciotto*.
87. In the present case, I consider that there are two questions to be answered: firstly, whether the agency is a court or tribunal and, secondly, whether the requested documents relate to matters of an administrative nature.

Is the agency a court?

88. In my earlier decision in *Re Bartucciotto and Guardianship and Administration Board*, I considered the question of whether the Board was an adjudicative body or tribunal and therefore "a court" for the purposes of the FOI Act. At paragraph 40 of my reasons for that decision I adopted the reasoning of the former Commissioner in *Re Rakich* and determined that it was. The Board no longer exists and the functions of that body, among others, have been taken over by the agency and the agency now holds the Board's documents. I remain of the view that the Board was a court for the purposes of the FOI Act. As it is not in dispute that the agency is a tribunal, I do not consider that I need canvass in any great detail my reasons for accepting that the agency is a tribunal and therefore a court, as defined, for the purposes of the FOI Act. However, briefly, they include the following.
89. The agency is established by s.7 of the SAT Act and entitled the "State Administrative Tribunal". The long title of the SAT Act states that it is "[a]n Act to establish a tribunal...". The term 'tribunal' is not defined in the FOI Act. The Australian Concise Oxford Dictionary (4th Edition, 2004) defines 'tribunal' to mean:

“1 an adjudicative body. 2 a court of justice. 3 a seat or bench for a judge or judges. 4 (a) a place of judgment. (b) judicial authority...”

90. In his FOI Guidelines (2nd Edition), published online at www.ombo.nsw.gov.au, the New South Wales Ombudsman suggests that “tribunal” in the New South Wales *Freedom of Information Act 1989* (‘the NSW FOI Act’) should be interpreted narrowly, as “*applying to bodies analogous to, or which are in effect substitutes for, courts*”, and has set out a number of tests that would be relevant to determining whether a body is a “tribunal” for the purposes of clause 10 of the NSW FOI Act. I consider that those tests suggested by the NSW Ombudsman are a useful guide as to whether a particular body is a tribunal for the purposes of the FOI Act.
91. The wording of the relevant provisions of the NSW FOI Act is significantly different from that of the relevant provisions of the Western Australian legislation, so the NSW Ombudsman’s arguments for a narrow interpretation of “tribunal” in the NSW FOI Act do not apply directly to the FOI Act in this State. However, given that the term “court” is defined in the FOI Act to include a tribunal, and given the wording of clause 3 of the Glossary (quoted in paragraph 16 above), I am inclined to the view that a similarly narrow interpretation is to be preferred, although I need not decide that on this occasion as it seems to me that the agency is a body that is analogous to a court and therefore satisfies that narrower interpretation.
92. Those tests are as follows:
- (a) *“that the body has formal and procedural attributes that are similar to that of a court”*, including initiation of proceedings by parties, public proceedings, the power to compel attendance or witnesses who may be examined on oath or affirmation, a requirement to follow the rules of evidence (although not conclusive as it should be noted many tribunals are not bound by the rules of evidence) and the power to enforce compliance with orders given;
 - (b) that the body *“makes a conclusive determination ... resolving disputed questions of fact or law”*; and
 - (c) that the orders of the body have the force of law without the need for confirmation or adoption by a court or any other body (NSW Ombudsman, *FOI Policies and Guidelines* (1994) at p.65).
93. On 1 January 2005, the SAT Act which established the agency, came into operation. The agency’s jurisdiction is given to the agency by the SAT Act and by other legislation (enabling Acts), most of which are named in the *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* (‘the Conferral Act’), which among other things permits applications to be made, or matters to be referred to the agency. It exercises both original and review jurisdiction. The President and the Deputy President of the agency are, respectively, required by the SAT Act to be a Judge of the Supreme Court of Western Australia and a Judge of the District Court of Western Australia.

94. With respect to the agency's formal and procedural attributes, its procedural requirements are set out in Part 4 of the SAT Act, subject to any inconsistent provisions in the particular enabling legislation, which prevail (s.5). They include the following. Proceedings before the agency are initiated by interested parties by application, referral or other means (s.42). In the performance of its functions, the agency may require any person to attend and give evidence on oath (ss.66 and 67) or produce documents (s.66), may examine or cross-examine witnesses and may compel witnesses to answer questions (s.67). It may hold directions hearings and give directions as to the proceedings before it (s.34). The agency may decide questions of law, including questions of mixed law and fact (see s.59). Section 32 of the SAT Act provides that the agency is not bound by the rules of evidence. Except in specified circumstances, hearings before the agency are open to the public (s.61(1)). The agency's decisions generally come into effect immediately after they are given, or at a time specified in the decision (s.82). Sections 85 and 86 provide for their enforcement.
95. In 2004, the *Guardianship and Administration Act 1990* ('the Guardianship Act') was amended by the Conferral Act to confer on the agency jurisdiction in respect of guardianship and administration matters. That amendment came into effect on 24 January 2005.
96. Consequently, the agency has jurisdiction to deal with matters of guardianship and administration previously vested in the Board, and now in the agency, by the Guardianship Act, as listed in paragraphs (a)-(g) of section 13 of that Act, including jurisdiction:
- “(a) *to consider applications for guardianship and administration orders;*
(b) *to make orders appointing, and as to the functions of, and for giving directions to, guardians and administrators;*
(c)....
(d) *to review guardianship and administration orders and to make orders consequential thereon;*
(e) ...
(f) ...
(g) *any other jurisdiction vested in it by this Act or any other Act in relation to matters of guardianship administration”.*
97. When carrying out those functions, the agency is clearly, in my view, determining legal rights and exercising an adjudicative function. When exercising its jurisdiction under the Guardianship Act, the agency is to be constituted by one or 3 members (s.5) except in respect of particular specified matters which require that a Full Tribunal sit (s.56A). Section 17 provides that all the provisions in the SAT Act operate in respect of the agency's proceedings under the Guardianship Act, together with the provisions of Part B of Schedule 1 to the Guardianship Act, which allow for, among other things, closed hearings and limitations of publication of proceedings.
98. An appeal from a decision of the agency under the Guardianship Act lies, by leave, to the Supreme Court but otherwise there is no appeal from a decision of the agency (s.19). An application for leave to appeal may be made on the

ground that the agency made an error of law or fact, or acted without, or in excess of, jurisdiction, or because there is some other reason that is sufficient to justify a review (s.21). In my view, it is evident from the legislation that the agency's determinations are conclusive determinations and that its orders have the force of law without the need for confirmation or adoption by a court or any other body.

99. When exercising its jurisdiction under the Guardianship Act, the agency performs the functions previously performed by the Board. Accordingly, for the reasons given in *Re Rakich* in respect of the Board and for the foregoing reasons, I consider that the agency – in any event but, in particular, for the purposes of this matter, in the exercise of its jurisdiction under the Guardianship Act – is an adjudicative body or tribunal and therefore "a court" for the purposes of the FOI Act.

Do the requested documents relate to “matters of an administrative nature”?

100. As I explained in my earlier decision, cited in paragraph 5 above, the Australian Concise Oxford Dictionary defines the word ‘administrative’ to mean "*concerning or relating to the management of affairs*". In my view, there is only a right of access under the FOI Act to documents relating to the management of the affairs and routine administrative activities of a court or tribunal, and not to documents relating to its judicial or adjudicative functions. The key distinction, in my opinion, is that documents that are created in the course of and for the purpose of particular matters dealt with by the agency in the exercise of its adjudicative functions under the various pieces of legislation which confer jurisdiction upon it are not documents “relating to matters of an administrative nature”.
101. I have examined Documents 2-81. In my opinion none of those documents relates to the agency’s routine administrative or managerial affairs. Rather, they relate to particular matters dealt with in the discharge of the Board’s adjudicative functions as set out in s.13 of the Guardianship Act, which include those set out in paragraph 96 above.
102. In my view, Documents 2-81 are all documents which concern or relate to particular applications made to, considered, reviewed and determined by the Board in the exercise of its statutory adjudicative functions and do not concern matters of an administrative nature.

CONCLUSION

103. Documents 2-81 are documents relating to a court but are not “documents of a court” - as defined for the purposes of the FOI Act in clause 5 of the Glossary - because they do not relate to matters of an administrative nature concerning either the Board or the agency. Therefore, I find that there is no right of access to those documents under the FOI Act.
104. I also find that Document 1 is not within the scope of the complainant’s access application and therefore access to it need not be considered. Finally, for the

reasons given to the complainant in a letter dated 23 September 2005 to him from my Investigations Officer, I find that the information deleted from the 15 documents released to the complainant (the initial seven-page document and the 14 documents described in paragraphs 34-39 above) is outside the scope of the complainant's access application; the agency need not, therefore, give him access to it; and I need not consider it further.
