

HOYTS AND GOSNELLS

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

**File Ref: 96139
Decision Ref: D00197**

Participants:

Hoyts Multiplex Cinemas Pty Ltd
Complainant

- and -

City of Gosnells
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - decision to give access by way of inspection only - refusal of copies of documents - architectural drawings - copyright - section 27(2)(c) of the FOI Act.

Freedom of Information Act 1992 (WA) ss.27(2)(c); Schedule 1 clause 4.

Copyright Act 1968 (C'wlth) ss. 10, 31, 32, 35(2), 36(1), 40, 43.

De Garis and Another v Neville Jeffress Pidler Pty Ltd (1990) 37 FCR 99.

DECISION

The decision of the agency to give access to the documents, by way of inspection only, is confirmed.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

20th January 1997

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the City of Gosnells ('the agency') to refuse Hoyts Multiplex Cinemas Pty Ltd ('the complainant') access to copies of documents sought by the complainant pursuant to the provisions of the *Freedom of Information Act 1992* ('the FOI Act').
2. By letter dated 5 July 1996, Mr Ken Adam, a consultant acting on behalf of the complainant, applied to the agency under the FOI Act for access by way of inspection to documents relating to a planning and development application lodged with the agency with respect to a proposed cinema complex in Canning Vale.
3. By letter dated 1 August 1996, the agency advised the complainant that it had decided to grant access to certain documents, but deferred giving access to plans of the proposed complex, pending advice from a third party. In a letter dated 2 August 1996, Mr Adam referred to his meeting with an officer of the agency on 31 July 1996, and advised the agency that it was his view that additional documents existed within the agency which came within the ambit of the access application, but to which access had been refused. I understand that, at the meeting of 31 July 1996, the plans of the proposed cinema were inspected by Mr Adam.
4. By letter dated 7 August 1996, the agency informed Mr Adam that it had located additional documents which were within the ambit of the access application, and granted access to those documents. However, the agency refused access to copies of the plans of the proposed cinema complex on the ground that those documents are exempt documents under clause 4 of Schedule 1 to the FOI Act.
5. In a request dated 26 August 1996, Mr Adam, on behalf of the complainant, sought an internal review of the agency's decision to refuse access to copies of the plans. On 28 August 1996, the agency's internal reviewer confirmed the initial decision to refuse access to copies of the plans on the ground that those documents are exempt under clause 4, even though access by way of inspection of those documents had already been granted to Mr Adam.
6. On 17 September 1996, the complainant's solicitor lodged a complaint with the Information Commissioner seeking external review of the agency's decision to refuse access to copies of the plans.

REVIEW BY THE INFORMATION COMMISSIONER

7. By letter dated 19 September 1996, I notified the agency that I had received a complaint against its decision and, pursuant to my powers under the FOI Act, I obtained the documents in dispute, together with the file maintained by the agency in respect of this matter.
8. After examining the material before me, on 15 October 1996, I informed the parties in writing of my preliminary view in relation to this complaint, and my reasons for that view. With respect to the agency's decision to refuse access to the disputed documents under clause 4 of Schedule 1 to the FOI Act, it was my preliminary view that the agency's claim for exemption had not been established.
9. Further, it was my preliminary view that the agency had complied with the initial request for access by allowing inspection of the disputed documents. In any event, it was my preliminary view that copying the documents in dispute would infringe the copyright in those documents. Accordingly, I was of the preliminary view that access to the documents by way of the provision of copies could not be given as s.27(2)(c) of the FOI Act applied.
10. Subsequently, the agency withdrew its claims for exemption under clause 4 and agreed with my preliminary view that s.27(2)(c) of the FOI Act applied. The complainant, through its solicitor, responded to my preliminary view by informing me that the complainant would undertake to use the documents only for the purpose of giving legal advice and for the purpose of judicial proceedings, such that the copying of the documents was not an infringement of copyright in accordance with the terms of s.43 of the *Commonwealth Copyright Act 1968* ('the Copyright Act').
11. After considering the provisions of the Copyright Act, I provided a further preliminary view to both parties dealing with the issue of copyright, and I invited the complainant to respond to my preliminary view that access had already been provided in the manner initially requested in the access application.
12. A response was provided on behalf of the complainant, maintaining the view that the provision of copies of the disputed documents would not constitute a breach of copyright in this instance if an undertaking was given in the terms previously advised. However, at no stage did the complainant address the issue of the agency having complied with the initial access application by allowing inspection of the disputed documents.
13. In the course of dealing with this complaint, my office also sought information from the architect who prepared the drawings and the developer for whom the drawings had been prepared and on whose behalf they had been submitted to the agency, in order to ascertain the views of those parties. The architect informed my office that, on the basis that it is his understanding that it is the usual practice of the agency to allow inspection of such documents, he does not object to the complainant being given access by way of inspection. However, he confirmed that he did object to copies of the documents being provided to the complainant.

14. A representative of the developer indicated that submissions would be made to my office on the matter, however, no response was received. Although the developer was informed of its right to be joined as a party to this complaint, the developer did not seek to be so joined.
15. As the agency has abandoned its claim for exemption for the documents and is prepared to provide the complainant with further inspection of the documents, the question of whether or not the documents are exempt - and whether further access may be given by way of inspection - is no longer in dispute. Accordingly, the only issue remaining for my determination in respect of this complaint is whether the decision of the agency to refuse access to copies of the disputed documents is justified in light of the requirements of s.27(2)(c) of the FOI Act.

COPYRIGHT

16. In accordance with s.27(2) of the FOI Act, if an access applicant has requested that access to a document be given in a particular manner, an agency is required to comply with that request unless doing so satisfies the terms of one of the paragraphs of s.27(2) of the FOI Act. In light of the complainant's request for access to copies of the disputed documents, the agency contends that s.27(2)(c) of the FOI Act applies. Section 27(2) provides:

“(2) If the applicant has requested that access to a document be given in a particular way the agency has to comply with the request unless giving access in that way -

(a) would interfere unreasonably with the agency's other operations;

(b) would damage or harm the document or would be inappropriate because of the physical nature of the document; or

(c) would involve an infringement of copyright belonging to a person other than the State,

in which case access may be given in some other way.”

17. Copyright subsists in a work if it is an original literary, dramatic, musical or artistic work within the terms of the Copyright Act, and it complies with the requirements of s.32 of the Copyright Act dealing with the authorship and the publication of the work. By s.35(2) of the Copyright Act, the author of the work is the owner of any copyright subsisting in the work.
18. An “artistic work” is defined in s.10 of the Copyright Act to include, *inter alia*, “(a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not”. “Drawing” is defined in the same section to include “...a diagram, map, chart or plan”. Following my examination of the documents in dispute, I am satisfied that they are architectural plans created and designed by the architect concerned. Accordingly, I am satisfied that those plans

are “artistic works” within the terms of the Copyright Act in which copyright subsists. Further, in accordance with s.35 of the Copyright Act, the owner of the copyright in the disputed documents is the architect who created them.

19. The nature of the rights protected by copyright is described in s.31 of the Copyright Act which states, so far as is relevant:

“(1) For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a work, is the exclusive right:

(a)...

(b) in the case of an artistic work, to do all or any of the following acts:

- (i) to reproduce the work in a material form;*
- (ii) to publish the work;*
- (iii) to include the work in a television broadcast;*
- (iv) to cause a television programme that includes the work to be transmitted to subscribers in a diffusion service.”*

20. Pursuant to s.36(1) of the Copyright Act, copyright in a work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner, does in Australia any act comprised in the copyright. In the circumstances of this complaint, I am satisfied that if the disputed documents are copied by the agency in order to grant the complainant access, the copying would constitute a reproduction of the work by the agency which, in accordance with s.31(1)(b)(i) of the Copyright Act, is an act comprising the copyright in the document, which may constitute an infringement by the agency of that copyright.

21. The complainant is of the view that the copying of the plans, although constituting an act comprised in the copyright held in the disputed documents, would not be an act infringing copyright in circumstances where the complainant gives an undertaking in the terms advised. The complainant contends, in those circumstances, that the act of copying the plans by the agency is an act of the type referred to in s.43 of the Copyright Act which, accordingly, is not an act which infringes copyright.

22. Section 43 of the Copyright Act describes a circumstance in which, *inter alia*, the reproduction of a document may not constitute an infringement of copyright. Section 43 provides:

“(1) The copyright in a literary, dramatic, musical or artistic work is not infringed by anything done for the purposes of a judicial proceeding or of a report of a judicial proceeding.

(2) A fair dealing with a literary, dramatic, musical or artistic work does not constitute an infringement of the copyright in the work if it is for the purposes of the giving of professional advice by a legal practitioner or a patent attorney.”

23. On behalf of the complainant, it is submitted that if the agency copies the disputed documents and provides them to the complainant or its agent on the basis of an undertaking that the documents will only be used for the purpose of the giving of professional advice by the complainant's solicitors or in judicial proceedings then, in accordance with the terms of s.43, the copying of the documents for that purpose does not constitute an infringement of copyright. The complainant submits that, if the purpose for which it wishes to obtain copies of the disputed documents is within the terms of s.43, then the agency's act of copying is not an infringement of copyright within the Copyright Act, regardless of the fact that the agency is not copying the disputed documents for the agency to obtain its own legal advice or for the agency to use them in judicial proceedings.
24. As I understand it, the submissions made on behalf of the complainant support a wide view of the application of the defence provided by s.43 of the Copyright Act. It appears that the complainant does not consider that the protection afforded by s.43 is limited to circumstances in which the party which undertakes the act which may infringe copyright does that act for the purpose of judicial proceedings or obtaining legal advice. The complainant maintains that, in order for s.43 to apply, it is sufficient that the party copying the disputed documents, in this case, the agency, is able to demonstrate that the purpose for which the copying is done is in accordance with the terms of the section, whether such purpose be that of the agency, or that of the complainant. The complainant contends that is so, even though the complainant is not responsible for the reproduction of the documents, and only receives the copies made by the agency.
25. In my view, in determining whether the copying of a document involves an infringement of copyright for the purpose of s.27(2)(c) of the FOI Act, the application of the defence provided by s.43 of the Copyright Act is restricted to circumstances in which the party copying the document can establish that the purpose for which the copying is done is its purpose, and not that of any other party. Accordingly, in this case, I consider that in order that the copying of the plans by the agency not infringe copyright, it must be established that the agency is copying the documents in order for it to use those documents in judicial proceedings or for it to obtain professional advice from a legal practitioner. I do not consider that it is sufficient for me to be satisfied that the complainant, if it obtains copies of the documents from the agency, will use those copies for the relevant purpose.
26. I consider that my interpretation of the application of s.43 is supported by the decision of Beaumont J in *De Garis and Another v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99. In *De Garis*, the Court considered the application of, *inter alia*, the defence provided for by s.40 of the Copyright Act, which provides that a fair dealing with a work for the purpose of research or study does not constitute an infringement of the copyright in that work.

27. In *De Garis*, the applicants were authors of articles published in various newspapers throughout Australia. The applicants claimed that the copyright in their works had been infringed by the respondent in the course of its business as a press clipping service, in which the respondent monitored newspapers required by subscribers to its service, and provided photocopies of the material in return for a fee.
28. The respondent argued that its actions did not constitute an infringement of copyright as, *inter alia*, its actions were done for the purpose of research. However, Beaumont J did not consider that the respondent's dealing with the work could be said to be for the purpose of research within the meaning of s.40. Further, Beaumont J stated at page 105:

“There is another reason why s.40 cannot apply here. The relevant purpose required by s.40(1) is that of [the respondent], not that of its customer. That is to say, even if a customer were engaged in research, this would not assist [the respondent]. In Sillitoe v McGraw-Hill Book Co (UK) Ltd [1983] FSR 545, Judge Mervyn Davies said (at 558):

“The onus of showing that the exception applies is on the defendants. Mr Jeffs contended that section 6(1) is widely drawn and not limited to the actual student, so that if a dealing is fair and for the purpose of private study the subsection applies whether the private study in mind is one's own or that of somebody else. Here, he said, the dealing was for the purpose of private study by the examinees who would acquire the notes. I do not accept that argument. To my mind, section 6(1) authorises what would otherwise be an infringement if one is engaged in private study or research. The authors of the Notes, when writing the Notes and thus 'dealing' with the original work, were not engaged in private study or research...”

It follows, in my view, that the activities of [the respondent] cannot be characterised as “research” for the purposes of section 40.”

29. Beaumont J also applied the same reasoning when determining whether the actions of the respondent could be said to be for the purpose of study within s.40. His Honour stated, at page 106, “(a)gain, even if “study”, [sic] were the purpose for which a subscriber retained the services of [the respondent], it cannot be said that “study” was the purpose of [the respondent]”. Accordingly, Beaumont J considered that s.40 had no application to the circumstances of the case before him.
30. Applying the same considerations to the application of s.43 of the Copyright Act in this case, I am satisfied that the agency cannot be said to be copying the documents for the purposes of it using the documents in judicial proceedings, or for obtaining legal advice. Further, the purpose for which the complainant seeks the documents is not relevant to determining whether the act of the agency in copying the documents infringes the copyright in those documents.

CONCLUSION

31. Accordingly, as I am of the view that the requirements of s.43 of the Copyright Act have not been established in this case, I am satisfied that the copying of the documents by the agency in order to give the complainant access in the manner requested, that is, by giving access to copies of the documents, would infringe the copyright in those documents held by the architect. Therefore, I am satisfied that s.27(2)(c) of the FOI Act applies in this instance. As such, I consider that access to copies of the disputed documents should be refused on the ground that to provide access to copies of those documents is a breach of copyright.
