

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

**File Ref: F2004122
Decision Ref: D0162004**

Participants:

Michael Bartucciotto
Complainant

- and -

Guardianship and Administration Board
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access - missing document - origin of transferred documents - right of access to documents not information - transfer of documents already accessed by complainant - right of inspection of documents - 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): ss.10(1), 13(1), 13(3), 15(2), 15(5), 30; Schedule 2, Glossary clauses 1, 3 and 5

Guardianship and Administration Act 1990 ss.13, 97 and 112

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 is confirmed. The disputed documents 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*.

D A WOOKEY
A/INFORMATION COMMISSIONER

2 September 2004

REASONS FOR DECISION

1. This complaint arises from a decision made by the Guardianship and Administration Board ('the agency') to refuse Mr Bartucciotto ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. On 10 March 2004, the complainant applied under the FOI Act to the Office of the Public Advocate ('the OPA') for access to all documents held by the OPA relating to him. On 23 April 2004, the OPA gave the complainant access to some of the requested documents but refused him access to others on the ground that they were exempt under clause 3(1) of Schedule 1 to the FOI Act because they contained personal information about a number of third parties. On 30 April 2004, the complainant applied to the OPA for an internal review of that decision.
3. On 4 May 2004, the complainant made a second access application under the FOI Act to the OPA seeking access to copies of all documents held by the OPA relating to his late mother, Mrs M Bartucciotto.
4. On 11 May 2004, the OPA confirmed its initial decision to refuse the complainant access to certain documents the subject of his first application, and also refused him access to all of the documents the subject of his second application, again on the ground that those documents were exempt under clause 3(1).
5. Thereafter, on 13 May 2004, the complainant applied to the Information Commissioner for external review of the OPA's two decisions to refuse him access to the requested documents. Following the receipt of the complainant's application and discussions between my office and the OPA, the OPA reconsidered its decisions in relation to both of the complainant's access applications.
6. On 23 June 2004, the OPA gave the complainant access to edited copies of most, but not all, of the requested documents, once all of the personal information about individuals other than him and his late mother had been deleted from those documents.
7. At the same time, the OPA decided to partially transfer the complainant's second access application to the agency, pursuant to section 15(2) of the FOI Act, because the 27 documents which the OPA transferred to the agency originated with or were received from the agency.
8. Accordingly, on 23 June 2004, the OPA wrote to the agency noting that it was enclosing 27 documents which it was transferring to the agency. As a result of that transfer, the agency was required to deal with the 27 documents and to

provide the complainant with a notice of decision in respect of them, in accordance with the requirements of sections 13(1) and 30 of the FOI Act.

9. In accordance with the provisions of section 15(5) of the FOI Act, the agency is regarded as having received the complainant's second access application on 4 May 2004, which is the date on which the OPA - the transferring agency - received his second access application. The permitted period of 45 days within which the agency was required under section 13(3) to deal with the complainant's access application expired on 18 June 2004. Given that the agency did not receive the transfer from the OPA until 23 June 2004, it was not possible for it to make a decision within the prescribed 45 day period.
10. In the event, the agency provided the complainant with its decision on 5 July 2004, which was that the requested documents are not documents of an "administrative nature" and, thus, are not documents which are accessible under the FOI Act. In addition, the agency advised the complainant that the FOI Act does not apply to documents that are available for inspection under another enactment and noted that a right of inspection exists pursuant to section 112 of the *Guardianship and Administration Act 1990* ('the G&A Act').
11. The agency also advised the complainant as follows:

"Notwithstanding that you are not entitled to access to the documents transferred to the Board by the Public Advocate under the FOI Act, the President of the Board has authorised me to allow you to inspect these documents as they were either documents that you in fact inspected during the course of the proceedings concerning your late mother or are documents that the Board may in its discretion under the G & A Act have allowed you to inspect at the time of the proceedings."
12. On 8 July 2004, the complainant inspected the documents that were transferred to the agency from the OPA, although the complainant says that the agency gave him inspection of 26 - rather than 27 - documents. However, such inspection has no relevance to the question of whether or not he is entitled to access the requested documents under the FOI Act.
13. Since the agency's decision was made by the President of the agency, who is the agency's principal officer for the purposes of the FOI Act, no internal review was available to the complainant pursuant to section 39(3)(a) of the FOI Act and, on 8 July 2004, the complainant applied directly to me for external review of the agency's decision.

The requested documents

14. The agency describes the 26 documents which the complainant inspected as follows:
 1. Social work report received on 17 November 2003.
 2. Doctor's report received on 17 November 2003.

3. Doctor's report dated 27 February 2004.
4. Form 2C dated 25 November 2003.
5. Application for a Guardianship Order received on 17 November 2003.
6. Application for an Administration Order received on 17 November 2003.
7. Application for Leave to Apply and an Application for Review of Guardianship and Administration Order dated 19 February 2004.
8. Copy Notice of Hearing dated 21 November 2003.
9. Copy letter from the OPA dated 26 November 2003.
10. Copy Notice of Hearing dated 21 November 2003.
11. Medical Report dated 3 December 2003.
12. Report from OPA dated 4 December 2003.
13. Letter from agency to OPA dated 9 December 2003.
14. Letter from agency to the complainant dated 9 January 2004.
15. Letter from agency to OPA dated 12 February 2004.
16. Letter from agency to OPA dated 18 February 2004.
17. Application for Leave to Apply for a Guardianship Review received on 20 February 2004.
18. Duplicate copy of page 1 of Document 17.
19. Letter from agency to OPA dated 23 February 2004.
20. Letter from agency to the complainant dated 23 February 2004.
21. Letter from Public Trustee to agency received on 25 February 2004.
22. Letter from agency to a third party dated 25 February 2004.
23. Letter from agency to OPA dated 26 February 2004.
24. Letter from agency to OPA dated 26 February 2004.
25. Letter from agency to OPA dated 2 March 2004.
26. Letter from agency to OPA dated 29 March 2004, with attachment.

Review by A/Information Commissioner

15. In his letter to me of 8 July 2004 seeking external review the complainant made the following points:
 - (1) the OPA transferred 27 documents to the agency but the agency only gave him inspection of 26 documents;
 - (2) not all of the documents originated from the agency, for example, Document 9 originated from the OPA;
 - (3) the date of one document raises a query about information given to the complainant by a third party; and
 - (4) the complainant already has a copy of some of the documents which he inspected so it does not make sense for the OPA to have transferred those documents to the agency.

The "missing" document

16. Following the receipt of the complainant's application for external review, I obtained the requested documents and the documents comprising the relevant

FOI file from the agency and examined that material. With regard to the complainant's first point, my office contacted the OPA seeking further information about the total number of documents transferred from the OPA to the agency and provided the OPA with a copy of the agency's list of 26 documents inspected by the complainant. In response the OPA advised that one of the documents which it had transferred to the agency had been omitted from that list and provided me with a copy of that document. The missing document is a facsimile coversheet from the agency, dated 21 November 2003, attaching a one-page file-note sheet.

17. A copy of that document - which I shall refer to as Document 27 - was forwarded by my office to the agency. The agency advised me that Document 27 was not included in the documents transferred to it by the OPA. Accordingly, it was not included in the agency's decision.
18. The agency claims that Document 27 is a document relating to a court of a kind that is not accessible under the FOI Act. The agency also advises that it is not prepared to give the complainant inspection of Document 27 outside the FOI Act as it did with the other 26 documents transferred from the OPA.
19. On 17 August 2004, I informed the parties, in writing, of my preliminary view of this complaint. My preliminary view was that the 27 documents were not accessible under the FOI Act because they do not relate to matters of an administrative nature and, thus, are not to be regarded as documents of a court, in this case, the agency. The agency accepted my preliminary view. The complainant, although invited to make submissions or provide further information, did not respond to my preliminary view.

Origin of the transferred documents

20. With regard to the second point raised by the complainant, section 15(2) of the FOI Act provides:

“If the agency holds the requested documents but the documents originated with or were received from another agency (other than an exempt agency), and are more closely related to the functions of that other agency, the agency may transfer the access application to that other agency together with copies of the documents.”

21. The words 'originate' or 'originated' are not defined in the FOI Act. In such cases, there is a well settled principle of statutory interpretation that words will be given their plain and ordinary meaning unless the contrary is shown or unless they are limited by their context. The Australian Concise Oxford Dictionary of Current English (third edition, 1997), at page 945, defines 'originate' to mean: *“cause to begin; initiate...have as an origin; begin...”*.
22. It seems to me that the words “originated with or were received from another agency” in s.15(2) are intended to refer, respectively, to documents that were created by that other agency (wherever the agency holding them received from) or were received from that other agency (wherever they may have been

created). Section 15(2) enables the agency holding the documents to transfer the documents and access application to the agency from which the documents originated or from which they were received, where they relate more closely to the functions of that other agency.

23. It is not clear to me, on the information presently available to me, who created Documents 1, 2, 5, 6, 7, 17 and 18. However, they are all completed forms of the agency and all bear receipt stamps that suggest they were initially received by the agency and shortly thereafter were received by the OPA. It appears to me therefore that they were received by the OPA from the agency. Document 21 is not an agency form and was not created by the agency but the receipt stamps on the face of that document indicate to me that it was received by the OPA from the agency. Documents 3 and 4 are also completed forms of the agency but do not bear receipt stamps. However, further inquiries by my office indicate that it is likely they were attachments to other documents which were received by the OPA from the agency.
24. My view is that documents that were created by an agency “originated with” that agency. Documents 8, 10, 13-16, 19, 20 and 22-27 appear to me to have been created by the agency and therefore originated with the agency.
25. Documents 9, 11 and 12 were not created by the agency. It is clear from the contents of each, however, that they were all prepared or obtained by the OPA specifically for the purposes of the agency’s hearing of the administration and guardianship application in respect of the complainant’s mother. For example, Document 9 refers to the fact that there was an application before the agency for the appointment of a Guardian and information was sought by the OPA to assist the agency in its consideration of that matter. Document 11 expressly states that the reason for its preparation was an agency hearing and Document 12 is prefaced with a statement to that effect.
26. Section 97 of the G&A Act bestows on the Public Advocate a number of functions in relation to proceedings before the agency. Those include obligations to present to the agency any information in the Public Advocate’s possession which is relevant to the hearing and to investigate and report to the agency on any matter or question referred to her by the agency. Given that particular statutory role and the nature of the documents concerned, I am inclined to the view that in these particular circumstances, Documents 9, 11 and 12 are documents which “originated with” the agency in the sense that it was specifically the proceedings before the agency that caused them to be brought into existence and the OPA was required to bring them into existence or obtain them for that purpose.
27. Having examined the requested documents, I am of the view that they all “originated with” or were received from the agency and are more closely related to the functions of the agency. In my view, the requested documents were properly transferred from the OPA to the agency, pursuant to section 15(2) of the FOI Act.

Query arising from content of documents

28. In relation to the complainant's third point, 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 to access 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 the complainant's questions.

Transfer of documents of which the complainant already has copies

29. Finally, with regard to the complainant's fourth point, if one agency gives access to a document under one FOI application and then - in relation to a second access application which includes that same document - decides to transfer those documents to another agency pursuant to section 15(5), then it has the discretion to do so, provided that the documents originated with or were received from that other agency and are more closely related to the functions of the latter.

Right of inspection

30. The agency claims that the complainant has no right of access under the FOI Act to the requested documents because the access procedures under the FOI Act do not apply to documents that are already available.
31. Section 6 of the FOI Act provides that Parts 2 [Access to Documents] and 4 [External Review of Decisions; Appeals] do not apply to documents that are:
- “(a) available for purchase by the public or free distribution to the public;*
 - (b) available for inspection (whether for a fee or charge or not) under Part 5 or another enactment;*
 - (c) State archives to which a person has a right to be given access under Part 6 of the State Records Act 2000 despite this Act;*
 - (d) publicly available library material held by agencies for reference purposes;*
 - (e) made or acquired by an art gallery, museum or library and preserved for public reference or exhibition purposes.”*
32. For the purpose of interpreting statutes, there is a syntactical presumption that subsections of a statutory provision should be read in the context of the whole section pursuant to the *noscitur a sociis* rule. That is, the meaning of a word can be gathered from its context. Applying that rule in the present case, I understand section 6 of the FOI Act to refer to access to documents that are generally available for purchase or inspection by the public at large.

33. The agency claims that the requested documents are available for inspection under another enactment - that is, under section 112 of the G&A Act. Section 112, insofar as it is relevant, provides as follows:
- “(1) a represented person, a person in respect of whom an application under this Act is made or a person representing any such person in any proceedings is, unless the Board otherwise orders, entitled to inspect or otherwise have access to -*
- (a) any document or material lodged with or held by the Board for the purposes of any application in respect of that person;*
 - (b) any accounts submitted under section 80 by the administrator of the estate of that person.*
- (2) Any other party to any proceedings, or a person representing any such party, is, unless the Board otherwise orders, entitled to inspect or otherwise have access to any document or material lodged with or held by the Board for the purpose of those proceedings, other than a document or material that is or contains a medical opinion not being an opinion concerning that party.*
- (3) ...*
- (4) The Board may on the application of any person, or of its own motion -*
- (a) by order, authorise any person, whether conditionally or unconditionally, to inspect or otherwise have access to any document or material lodged with or held by the Board for the purposes of any application; and*
 - (b) make any other order contemplated by this section.”*
34. In my view, the right to inspect or otherwise have access to the agency’s records is not a right bestowed on the public generally under section 112 of the G&A Act but is conditional on one or more factors. In particular, the two subsections under which the agency argues the complainant was permitted to inspect the documents – subsections (2) and (4) - do not make documents generally available for inspection. Subsection (2) creates a right for particular people to “inspect or otherwise have access to” certain documents, but that right is expressly stated to be subject to an overriding discretion in the agency to disallow it. Subsection (4) does not make documents “available for inspection” at all; it merely empowers the agency to, among other things, allow inspection of certain of its documents, entirely at the agency’s discretion.
35. In my view, therefore, documents cannot be said to be “available for inspection” under s.112(4). Given the overriding discretion of the agency, I consider it to be debatable whether documents can be said to be “available for inspection” under s.112(2) and more would be required to persuade me that that is the case. However, I need not decide that point in this instance in view

of my conclusion that the requested documents are not documents of an administrative nature and, thus, are not “documents of a court” for the purposes of the FOI Act and are therefore not accessible under the FOI Act, for the reasons set out below.

Documents of a court or tribunal

36. As I have noted, section 10 of the FOI Act gives every person a general right of access to the documents of an agency, other than an exempt agency. Clause 3 of the Glossary in Schedule 2 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.
37. 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".
38. 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 (‘the former Commissioner’) that the effect of clause 5 is to prevent the FOI Act from applying to documents concerning the judicial or quasi-judicial - but not the administrative - functions of State courts or 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; and *Re Rakich and Guardianship and Administration Board* [2000] WAICmr 3.
39. 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?

40. In *Re Rakich*, the former Commissioner considered the question of whether the agency was an adjudicative body or tribunal and therefore “a court” for the purposes of the FOI Act and determined that it was. I agree with that decision for the reasons set out in *Re Rakich*. Accordingly, I am satisfied that the agency is a court for the purposes of the FOI Act.

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

41. The Australian Concise Oxford Dictionary defines, at page 18, 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 of a court or tribunal.
42. I have examined the 27 requested documents. In my opinion, although some of them - for example, Documents 8 and 10 - are administrative in character, none of the requested documents relates to the agency’s routine administrative, operational or managerial affairs. Instead they relate to a particular matter dealt with in the discharge of the agency’s functions as set

out in section 13 of the G&A Act, which provides, among other things, as follows:

“The functions of the Board are -

- (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) to perform the other functions vested in it by this Act and any function vested in it by any other Act.”*

43. In my view, the requested documents are all documents which concern or relate to particular matters considered, reviewed and determined by the agency in the course of its quasi-judicial functions and do not concern matters of an administrative nature.

CONCLUSION

44. I find that the requested documents 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 - since they do not relate to matters of an administrative nature concerning the agency. Therefore, I find that there is no right of access to the requested documents under the FOI Act.
