

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

**File Ref: F2001102
Decision Ref: D0422001**

Participants:

**Harry Cohen
Betty Rose Cohen
Margaret Anne Levy**
Complainants

- and -

**Real Estate and Business Agents
Supervisory Board**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – right of access – Glossary – whether a court is an agency – whether disputed documents relate to matters of an administrative nature – ambit of access application – documents falling outside the scope of complainants’ access application – clause 3(1) – personal information – deletion of exempt matter – clause 5(1)(b) – whether disclosure could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case – clause 7 – legal professional privilege

Freedom of Information Act 1992 (WA) s.10; Schedule 1 clauses 3(1), 5(1)(b) and 7; Schedule 2 Glossary clauses 3 and 5.

Real Estate and Business Agents Act 1978

Re Real Estate and Business Agents Supervisory Board; Ex parte Cohen (1999) 21 WAR 158
Police Force of Western Australia v Kelly and Another (1996) 17 WAR 9

DECISION

The decision of the agency is varied. It is decided that:

- Documents 10 and 68 are not documents of a court and those documents are not exempt; and
- Document 31 is exempt under clause 5(1)(b) of Schedule 1 the FOI Act.

B KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

16 November 2001

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Real Estate and Business Agents Supervisory Board ('the agency') to refuse Mr and Mrs Cohen and Ms Levy ('the complainants') access to documents requested under the *Freedom of Information Act 1992* ('the FOI Act').
2. In November 1997, the complainants' solicitors notified the agency of a number of claims against the Fidelity Guarantee Fund ('the Fund') constituted under the *Real Estate and Business Agents Act 1978* ('the REBA Act'). The complainants' claims against the Fund arose out of allegedly fraudulent conduct by a former Director of the now bankrupt real estate firm, Ideal Realty Pty Ltd. Between 1991 and 1997, Ideal Realty Pty Ltd had managed properties on behalf of the complainants. The complainants' claims against the Fund were initially disallowed by the agency. The agency's decisions were taken on review by prerogative writ to the Full Court of the Supreme Court of Western Australia. The Full Court overruled the agency's decision: see *Re Real Estate and Business Agents Supervisory Board; Ex parte Cohen* [1999] 21 WAR 158.
3. Following the decision of the Full Court of the Supreme Court, in August 1999, the agency gave directions to the parties as to the conduct of its determination of the complainants' claims against the Fund. Among other things, the agency directed that those claims were to be divided into five groups. In September 2000, the agency determined that most, but not all of the complainants' claims against the Fund were established and awarded the complainants compensation. However, the agency found that some of the complainants' claims were not substantiated and those were disallowed. The complainants lodged an appeal with the District Court of Western Australia in relation to the claims that were disallowed.
4. In May 2001, the complainants' solicitors made an application to the agency, on behalf of the complainants, for access under the FOI Act to various documents relating to their claims against the Fund. A similar application was also made to the then Ministry of Fair Trading.
5. The Deputy Registrar of the Agency decided that the agency is a "court" for the purposes of the FOI Act and restricted the scope of the access application to documents of an administrative nature only. However, without identifying any of the requested documents, the Deputy Registrar refused access on the ground that none of the requested documents was administrative in nature. Following an internal review, some administrative documents were identified and, with the exception of two, those documents were released to the complainants. The complainants were refused access to the two documents on the ground that those documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. The internal reviewer otherwise confirmed the agency's initial decision that the requested documents are documents of a court and that the complainants had no right of access to those documents under the FOI Act.
6. On 10 August 2001, the complainants lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. After notifying the parties that I had received this complaint, my Senior Legal Officer inspected the files in the possession of the agency relating to the complainants' claims against the Fund. This was done to ensure that all of the documents described in the complainants' access application were identified and tagged. The agency prepared a schedule of those documents ('the scheduled documents') and a copy of that schedule was given to my office and to the complainants' solicitors.
8. Part of the complainants' access application was transferred to the Department of Consumer and Employment Protection. As a result, there were 82 documents then in dispute. The scheduled documents were produced to me, for my examination and various inquiries were made with the parties. On 26 October 2001, I informed the parties in writing of my preliminary view of this complaint, including my reasons.
9. It was my preliminary view that some of the 82 documents were documents of a court to which the FOI Act does not apply; that some documents fell outside the scope of the access application having been created after the date of the agency's decision concerning the claims against the Fund; a number were administrative in nature and, subject to any claims for exemption, that the complainants had a right of access to those documents; that one document may be exempt under clause 5(1)(b), but others may not be exempt under that clause; that parts of two others contained matter that consisted of personal information that was *prima facie* exempt matter under clause 3(1); and that the remaining scheduled documents may not be exempt as claimed by the agency.
10. Following that, the agency released most of the scheduled documents to the complainants and made a written submission to me in support of its claims for the documents numbered 10, 24, 31 and 68. The complainants' solicitors also responded in writing and advised me that the complainants withdrew part of their complaint. The complainants' solicitors also made a written submission to me, about Documents 18 and 69, which I considered to be documents of a court. They also asked me to reconsider my preliminary view about the documents which I considered fell outside the scope of the complainants' access application.
11. After making further inquiries with the complainants' solicitors, it was established that the complainants had previously been given copies of Documents 18 and 69 and they withdrew their complaint in respect of those two documents and also for the information deleted from parts of three documents, for which the agency had claimed exemption under clause 3(1).

Documents outside the scope of the access application

12. I have revisited the question of whether some of the scheduled documents are outside the scope of the complainants' access application. The agency claimed that Documents 28, 29 and 30 relate to matters concerning the agency's subrogation rights arising as a result of the complainants' claims against the Fund. I accept the agency's claim in respect of those documents. Document 28 was created in March 2001 and Documents 29 and 30 are dated January and February 2001, some time after the agency delivered its decision of 27 September 2000. Documents 29 and 30 are

extracts from minutes of the compliance and licensing meetings of the agency and refer, briefly, to the complainants' previous claims against the Fund. However, neither document deals with or contains any information related to the complainants' actual claims against the Fund. Accordingly, I am satisfied that those documents are outside the scope of the access application.

13. I also consider that a number of other scheduled documents fall outside the scope of the access application. Specifically, they are Documents 11, 25-27, 71-86, 88 and 89. Documents 11 and 26 are extracts from minutes of the compliance and licensing meetings of the agency. They do not contain information relating to the complainants' claims against the Fund. Similarly, Documents 25, 83, 84, 85, 86, 88 and 89 concern matters clearly unrelated to the complainants' claims against the Fund. Documents 27 and 71-82 were created after the date on which the agency delivered its decision on the complainants' claims. I take the view that the date of the decision is the cut-off date for determining which documents are covered by the terms of the complainants' access application. Accordingly, I shall not deal further with any of those documents, because I consider that none of them is covered by the terms of the access application.

THE DISPUTED DOCUMENTS

14. At the completion of the external review process, 3 documents remain in dispute between the parties. The disputed documents are Documents 10, 31 and 68. The agency claims that Documents 10 and 68 are documents of a court to which there is no right of access under the FOI Act. The agency also claims that Document 31 is exempt under clause 5(1)(b) and under clause 7.

Documents of a court

15. Although a court is an agency for the purposes of the FOI Act, the right to have access to documents of a court is limited by clause 5 of the Glossary, which states that 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. In my opinion, the effect of clause 5 is to exclude from the FOI Act those documents that relate to the judicial or quasi-judicial functions of State courts and tribunals.
16. The Shorter Oxford Dictionary defines "administrative" as "*concerning or relating to the management of affairs*". In my view, unless Documents 10 and 68 concern or relate to the management of the affairs of the agency when it is not constituted as a court or tribunal, they are not documents to which the complainants have a right of access under s.10 of the FOI Act.

Document 10

17. Document 10 is a letter dated 1 November 1999 from Counsel assisting the agency to the complainants' solicitors and includes a draft statement of agreed facts. The letter contains handwritten notations allegedly made by the Chairman of the agency. It is my understanding that the original of Document 10 was sent to the complainants' solicitors on or about 1 November 1999. Only the handwritten notations have not been disclosed. The agency claims that the handwritten notations constitute a file note and

submits, effectively, that the notations should be treated as a separate document and that Document 10 is a document of a court because it relates to the consideration of the complainants' claims against the Fund.

18. I do not accept that handwritten notations constitute a separate document. It is clear from the definition of "document" in the FOI Act that it includes a record and any part of a record, and each page of a multi-page record may be a separate document for the purposes of the FOI Act. In my view, a notation is part of the document itself, whether the document consists of one or more pages. Document 10 is a single document. The words, or paragraphs or notations written on it do not constitute separate documents. The agency is unable to establish when the Chairman made the notations and it is not apparent to me from the document itself when they were made. In any event, even if I were to accept that the notations relate to the adjudicative function of the Chairman in deciding the complainants' claims, the notations themselves cannot be a "document of a court". They are information or matter, not documents. Further, having examined the notations, it is not apparent to me that they are exempt and the agency has not claimed exemption for them. Therefore, I find that Document 10 is not a document of a court within the meaning of the FOI Act. It follows from that that the complainants have a right of access to it and I find that the matter deleted from Document 10 is not exempt.

Document 68

19. Document 68 is an agency file note, dated 14 September 2000. The agency claims that Document 68 is a document of a court because it contains the comments of an officer of the agency about the agency's draft decision and includes the request that those comments be passed on to the Chairman of the agency. The agency submits that Document 68 is so closely connected with the judicial functions of the agency that it is a document of a court to which the FOI Act does not apply.
20. I have examined Document 68. I consider that Document 68 is administrative in nature. It merely records part of the administrative history of the agency dealing with the claims against the Fund. In my view, it is the kind of document that is routinely created as part of the accepted accountability requirements on agencies to maintain proper records of their activities and business. Therefore, I find that it is not a document of a court within the meaning of the FOI Act and, I find that it is not exempt.

Document 31

21. The agency claims that Document 31 is exempt under clause 5(1)(b) and clause 7. Clause 5(1)(b) provides that matter is exempt matter if its disclosure could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted.
22. For the purposes of the exemption in clause 5(1)(b), a document may "reveal" an investigation, if it reveals the fact of a particular investigation of a particular incident involving certain people and it is unnecessary that the document reveal the content of the investigation: see *Police Force of Western Australia v Kelly and Another* (1996) 17 WAR 9. A document may also reveal an investigation for the purpose of clause

5(1)(b), even though the person seeking access already knows the fact of the investigation.

23. Document 31 is a letter dated 19 July 2000 from Counsel assisting the agency to an officer of the then Ministry of Fair Trading. It requests certain action be taken. However, I am unable to describe this document any further without breaching my duty under s.74(2) of the FOI Act not to disclose exempt matter. Having examined Document 31, I am satisfied that its disclosure could reasonably be expected to reveal something about an investigation into a contravention or possible contravention of the law. Accordingly, I find that Document 31 is exempt under clause 5(1)(b). Given that finding, I am not required to decide whether Document 31 is also exempt under clause 7.
