

**Decision D0052022 – Published in note form only**

***Re Humphrys & State Administrative Tribunal [2022] WAICmr 5***

**Date of Decision: 31 May 2022**

***Freedom of Information Act 1992 (WA): section 23(1)(b); clauses 1, 3 and 5 of the Glossary.***

On 17 February 2021, Tracey Humphrys (**the complainant**) applied to the State Administrative Tribunal (**the SAT**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents relating to certain matters that had previously been heard by the SAT (**the requested documents**).

By notice of decision dated 23 March 2021, the SAT refused the complainant access to the requested documents under section 23(1)(b) of the FOI Act on the basis that they were not ‘documents of the agency’. On 22 April 2021, the complainant applied for internal review of the SAT’s decision. By letter dated 28 April 2022, the SAT confirmed its initial decision.

On 28 June 2021, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the SAT’s decision to refuse access to the requested documents. The SAT provided the Commissioner with its FOI file maintained in respect of the access application.

On 6 April 2022, the Commissioner provided the parties with her preliminary view, which was that the requested documents were not ‘documents of the agency’ that were accessible under the FOI Act.

The complainant did not accept the Commissioner’s preliminary view and made further submissions. After considering all of the material before her, the Commissioner was not dissuaded from her preliminary view.

Section 10 of the FOI Act establishes a right of access to ‘the documents of an agency (other than an exempt agency) subject to and in accordance with this Act’. Section 23(1)(b) of the FOI Act provides that an agency can refuse access to documents if ‘the document is not a document of the agency’.

Clause 3 of the Glossary to the FOI Act (**the Glossary**) 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. Clause 3 of the Glossary also provides that ‘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’. Clause 5 of the Glossary provides 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.’

The central question in this matter was whether the requested documents were ‘documents of the agency’ to which the FOI Act applied. This required determination of firstly, whether the SAT was a ‘court’ for the purposes of the FOI Act and, secondly, whether the requested documents related to matters of an administrative nature: *Re Bartucciutto and State Administrative Tribunal [2006] WAICmr 9 (Re Bartucciutto)* at [87]. If the SAT was a ‘court’ for the purposes of the FOI Act and the requested documents were not of an

administrative nature, then the requested documents could not be ‘documents of the agency’ to which the FOI Act applied.

The complainant did not accept that the requested documents were not accessible under the FOI Act. She made submissions regarding the phrase ‘court includes tribunal’ in the Glossary. The complainant submitted that the SAT was not a court as defined in the FOI Act.

The Commissioner found that the SAT was a ‘tribunal’ and therefore a ‘court’ for the purposes of the FOI Act. The Commissioner applied the decision of the Supreme Court of Western Australia (**Supreme Court**) in *Salaries and Allowances Tribunal v West Australian Newspapers Ltd* [2008] WASC 39 (**Salaries and Allowances Tribunal**) which held, at [73], that ‘the word ‘tribunal’ is used in the Act to connote a body which performs judicial or quasi-judicial functions which are analogous to those performed by a court.’ The Commissioner also referred to *Re Bartucciotto* at [99] which found that the SAT was a ‘court’ for the purposes of the FOI Act.

The Commissioner considered the terms of the complainant’s access application and found that the requested documents related to certain proceedings before the SAT. Therefore, the Commissioner found that the requested documents were not documents relating ‘to matters of an administrative nature.’ In making this finding the Commissioner applied the reasoning in *Salaries and Allowances Tribunal* at [54] and [77] that documents ‘of an administrative nature’ mean ‘documents which relate to the administration of the court’ and include documents relating to the caseload and efficiency of the court, but not documents relating to individual cases before the court, such as documents or evidence filed by parties. See also *Re Bartucciotto* at [100]. Consequently, the Commissioner found that the requested documents were not ‘documents of the court’ and were not ‘documents of the agency’ that are accessible under the FOI Act.

The complainant also contended that the Commissioner should not have regard to previous decisions of (former) Information Commissioners or the Supreme Court.

The Commissioner stated that, in determining matters under the FOI Act, regard is had to the specific provisions of the FOI Act. Further, where superior courts such as the Supreme Court, consider specific provisions of the FOI Act, the Commissioner is bound by those decisions and must apply the law as stated by the Supreme Court: *Re U, V, W, X and Curtin University of Technology* [1997] WAICmr 30 at [15]; *Re Duggan and Department of Agriculture and Food* [2011] WAICmr 31 at [33].

Sections 76(5) and 76(8) of the FOI Act require the Commissioner to provide reasons for the decision and to arrange to have decisions, made under section 76 of the FOI Act, published ‘in order to ensure that the public is adequately informed of the grounds on which such decisions are made’. Although there is no binding doctrine of precedent created by decisions of the Information Commissioner, consistency in decisions under the FOI Act is highly desirable, unless new arguments are advanced that have not been previously considered that persuade the Commissioner to decide a matter differently in a different case: *Re Byrnes and Department of Environment and Anor* [2006] WAICmr 6 at [95].

The Commissioner found that the requested documents are not ‘documents of the agency’ and therefore are not accessible under the FOI Act. The Commissioner confirmed the decision of the SAT to refuse access to the requested documents.