

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

**File Ref: F2371999
Decision Ref: D0032000**

Participants:

Janet Vera Rakich
Complainant

- and -

Guardianship and Administration Board
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – right of access – Glossary – whether a court is an agency – whether respondent is a tribunal and thus a court for the purposes of the *Freedom of Information Act 1992* – meaning of tribunal – whether documents relate to matters of an administrative nature.

Freedom of Information Act 1992 (WA) s.10; Schedule 2 Glossary clauses 3 and 5.
Freedom of Information Act 1989 (NSW)

Freedom of Information Act 1982 (Cth)

Guardianship and Administration Act 1990 (WA) ss.5, 13, 15, 19, 21, 40, 71(3) and 72(2); Schedule 1 clauses 7 and 11.

DECISION

The decision of the agency is confirmed. The requested documents are documents of a court and there is no right of access to them under the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

17 January 2000

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Guardianship and Administration Board ('the agency') to refuse Ms Rakich ('the complainant') access to documents requested by her under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 18 February 1999, the complainant applied to the agency for guardianship and administration orders with respect to her mother. As part of its consideration of that application, the agency obtained a copy of the mother's will. On 20 April 1999, as a result of the application made to it, the agency appointed the complainant's sister and elder brother as joint plenary administrators of their mother's estate. The complainant's mother died on 12 August 1999 and, consequently, the joint administrators were required to submit to the agency accounts relating to the estate of the deceased for the period 20 April 1999 to 12 August 1999.
3. By letters dated 30 September 1999 and 5 October 1999, the complainant made two applications to the agency seeking access under the FOI Act to documents relating to her mother's estate. On 6 October 1999, in a notice of decision that treated the two access applications as a single application, the agency advised the complainant that the agency was a court for the purposes of the FOI Act and that the requested documents were documents of a court to which there was no right of access under the FOI Act.
4. The agency informed the complainant that she could make an application under s.112 of the *Guardianship and Administration Act 1990* ('the Guardianship Act') to inspect the requested documents. The complainant made application for inspection of those documents under the Guardianship Act. However, on 15 October 1999, the agency rejected the complainant's application for inspection and, as part of its reasons for refusal, advised the complainant that:

"The Board notes that inspection of a final will is not permitted in the Probate jurisdiction of the Supreme Court until it is proved. The Board's records form part of the judicial process and should not be used to circumvent the probate jurisdiction and its processes".
5. On 23 October 1999, the complainant sought an internal review of the agency's decision under the FOI Act. The internal reviewer confirmed the agency's initial decision. On 9 December 1999, the complainant made a complaint to the Information Commissioner seeking an external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained the requested documents from the agency. Inquiries were made to determine whether this complaint could be resolved by conciliation between the parties. However, conciliation was not an option. On 7 January 2000, after considering the material before me, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the agency is a tribunal and that the documents requested by the complainant are documents of a tribunal to which there is no right of access under the FOI Act.
7. Subsequently, the complainant withdrew that part of her complaint concerning access to her late mother's will. However, she did not withdraw her complaint concerning access to the accounts tendered to the agency by the joint plenary administrators of the estate.

Documents of a court or tribunal

8. 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 the term "court" is defined in clause 1 of the Glossary to include a tribunal. Clause 5 of the Glossary 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".
9. Therefore, the right of access to documents of a court is limited to documents relating to matters of an administrative nature. In my opinion, the effect of clause 5 is to prevent the FOI Act from applying to documents concerning the judicial or quasi-judicial functions of State courts or tribunals, although not to documents concerning the administrative functions of such courts or tribunals.
10. In the context of this complaint, I consider that there are two questions to be answered. They are, firstly, whether the agency is a court or tribunal and, secondly, whether the requested documents relate to matters of an administrative nature.

The first question

11. The term 'tribunal' is not defined in the FOI Act. The Australian Concise Oxford Dictionary (3rd Edition, 1997, at page 1459) 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".
12. Section 10 of the *Freedom of Information Act 1989 (NSW)* (the 'NSW FOI Act') contains a comparable provision in respect of courts and tribunals and, similarly,

the term ‘tribunal’ is not defined. There is no analogous exemption under the *Freedom of Information Act 1982 (Cth)*, although that Act specifically exempts courts and tribunals from its operation in relation to their judicial functions.

13. The NSW Ombudsman has set out a number of tests that are 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 are a useful guide as to whether the agency in this case is a tribunal. 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 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).

14. The agency is established under s.5 of the Guardianship Act. Section 13 of that Act provides that the functions of the agency are, amongst others:

“(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”.

15. The President and Deputy President of the agency are, respectively, required under the Guardianship Act to be or have been:

(a) a Judge, Master or Registrar of the Supreme Court; or a Judge of the District or Family Court of Western Australia, recommended for appointment by the Chief Justice; and

(b) a legal practitioner or a Registrar of the Supreme Court.

16. With respect to the agency’s formal and procedural attributes, s.40 of the Guardianship Act provides that proceedings are initiated by interested parties. In the performance of its functions, the agency may require any person to attend and to be examined on oath or affirmation (Schedule 1 clause 7). Section 15 of

that Act provides that the agency is not bound by the rules of evidence. Except in specified circumstances, all hearings before the agency are open to the public (Schedule 1 clause 11). In my opinion, these formal and procedural attributes are similar to those of a court.

17. Where the agency has not vested plenary functions in an administrator, it may authorise the administrator to perform any specified function and may make any order that it thinks is necessary or expedient for the proper administration of the estate of the represented person (sections 71(3) and 72(2)). An appeal from a determination of the agency lies, by leave, to the Supreme Court but otherwise there is no appeal from a determination of the agency. 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 (sections 19 and 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.
18. Accordingly, I consider that the agency is an adjudicative body or tribunal and therefore "a court" for the purposes of the FOI Act.

The second question

19. The Australian Concise Oxford Dictionary (cited above) defines 'administrative' as "*concerning or relating to the management of affairs*". In my view, there is a right of access under the FOI Act to documents relating to the management of the affairs of a court or tribunal only.
20. I have examined the disputed documents in this matter. I understand that the documents of account were provided to the agency pursuant to the granting of administration orders. That is, those documents were obtained by the agency as evidence or in consequence of orders made in a particular matter heard and determined by the agency. In my opinion, those documents do not relate to the administration of the agency. Rather, they are documents related to the quasi-judicial functions of the agency as provided in s. 13(a) and (b) of the Guardianship Act.
21. I find that the disputed documents are documents of a court or tribunal, being the Guardianship and Administration Board, and that those documents do not relate to matters of an administrative nature concerning that court. Therefore, there is no right of access to those documents under the FOI Act.
