

GEARY AND WIGLEY AND MOJ AND GEARY (2) AND MOJ

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

**File Ref: 95123
Decision Ref: D02995**

Participants:

**Jennifer Lee Geary and Terence
Wigley**
Complainants

- and -

Ministry of Justice
Respondent

John Kevin Geary and Janet Geary
Complainants

- and -

Ministry of Justice
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - request for access to transcript, audiotapes and exhibits - clause 5 of Schedule 2 - whether a document is a "document of a court" - whether documents are administrative in nature

Freedom of Information Act 1992 (WA) ss. 10(1); 68(1); Schedule 2 clauses 3; 5.

Re Rehman and Medical Board of Western Australia (Information Commissioner, WA, 1 August 1995, unreported).

Loughnan (Principal Registrar, Family Court of Australia) v Altman (1992) 111 ALR 445.

DECISION

The decision of the agency is confirmed. The documents to which access is sought are documents of a court that do not relate to matters of an administrative nature, and, pursuant to clause 5 of Schedule 2 to the *Freedom of Information Act 1992*, are not, therefore, to be regarded as documents of the court.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

29th August 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Ministry of Justice ('the agency') not to accept as valid the separate applications of Ms Geary and Mr Wigley ('the first complainants') and Mr and Mrs Geary ('the second complainants') for access to documents under the *Freedom of Information Act 1992* ('the FOI Act").
2. Between November 1994 and May 1995, the first complainants were parties to an action before the Perth Children's Court ('the Court') which proceeded to a formal hearing. The second complainants were not parties to that action but were witnesses at the hearing.
3. On 8 June 1995, the first complainants lodged with the Court an access application under the FOI Act seeking access to certain records pertaining to themselves and their children. The second complainants also applied to the Court on the same date for access under the FOI Act to personal information held by the Court relating to themselves.
4. I am informed that the Courts Division is a division of the agency, and is responsible for the administration of the Court. The Executive Director of the Courts Division is directly responsible to the Director General of the agency. Accordingly, the agency dealt with the access applications of the first and second complainants.
5. On 23 June 1995, the first and second complainants were refused access by Mr W Bykerk, the FOI Co-ordinator of the agency, on the ground that the requested documents were not accessible under the FOI Act because those documents are documents of the Court which are of a judicial nature. However, as the first complainants had been parties to the proceedings in the Court, they were also informed that, in accordance with standard policy, the Court would allow them to inspect the relevant documents and copies of those documents are also available for purchase by them from the Court under that policy. That policy did not apply to the second complainants, as they were not parties to the proceedings.
6. On 1 July 1995, the first complainants sought internal review of the decision of the agency and, on 2 July 1995, the second complainants also applied for internal review. On 5 July 1995, Mr P Nella, Manager, Records Management Branch of the agency, confirmed the initial decision of the agency not to accept the access applications as valid access applications under the FOI Act. On 9 July 1995, in separate complaints to my office, the first and second complainants sought external review by the Information Commissioner of the decision of the agency that the requested documents are documents of a court.

REVIEW BY THE INFORMATION COMMISSIONER

7. Following receipt of those complaints, inquiries were made with the agency to ascertain the nature of the documents held by the Court and to which access had been denied. On 19 July 1995, in accordance with my statutory obligation under s.68(1) of the FOI Act, the agency was notified that I had accepted both complaints for external review. At that stage I did not consider it necessary to require the production to me of the requested documents.
8. On 19 July 1995, having considered the submissions of the first and second complainants and the notices of decision provided by the agency, I also provided the parties with my preliminary view and reasons for that view. It was my preliminary view that the documents to which access was sought are documents pertaining to the judicial functions of the Court and that, accordingly, they are not documents to which a right of access under the FOI Act exists.
9. On 25 July 1995, the first and second complainants responded to my preliminary view and provided further material for my consideration. Further, by letter dated 6 August 1995, the first and second complainants confirmed that the documents to which they are seeking access under the FOI Act consist of transcripts of the proceedings, audio tapes of the proceedings and exhibits tendered to the Court in the course of the hearings of the particular matter from November 1994 to May 1995.
10. Therefore, the matter for my determination is whether the requested documents are documents to which there is a general right of access, subject to any claims for exemption, under the FOI Act.

THE RIGHT OF ACCESS

11. The FOI Act provides a general right of access to documents held by State and local government agencies. Section 10 of the FOI Act provides:

"10. (1) 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 this Act.

(2) Subject to this Act, a person's right to be given access is not affected by -

(a) any reasons the person gives for wishing to obtain access;
or

(b) the agency's belief as to what are the person's reasons for wishing to obtain access."

12. The right of access in s.10(1) is a right of access to "documents of an agency". Clause 3 in Schedule 2 to the FOI Act provides:

"3. For the purposes of this Act -

- (a) a court is an agency;
- (b) a registry or other office of a court and the staff of such a registry or other office are part of the court;
- (c) 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."

13. Further, clause 5 in Schedule 2 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. In my view, it is clear from those provisions that, when the agency is a court, the general right of access to documents of an agency is limited to documents of an administrative nature only. Hence, there is no right under the FOI Act to access documents of a court unless those documents relate to matters of an administrative nature. Further, in my view, it makes no difference, if a document of a court relates to matters other than those of an administrative nature, whether the documents contain personal or non-personal information, the deciding factor being the character of the document rather than the nature of its contents.

Documents of a court

14. There are few decided cases on this point. In my decision in *Re Rehman and Medical Board of Western Australia* (1 August 1995, unreported) I discussed a similar issue and referred to a decision of the Full Court of the Federal Court in *Loughnan (Principal Registrar, Family Court of Australia) v Altman* (1992) 111 ALR 445. In that case, the Full Court considered whether the respondent was entitled to access, under the Commonwealth FOI Act, to a transcript of an *ex tempore* judgment produced by a court reporting service at the request of a judge. The Court decided that the transcript was a "document of a court" although it was in the possession of another agency, being the court reporting service, then called "Auscript". In that decision, Black CJ, Sweeney and Lee JJ said, at p.449:

"The exclusion of the application of the Act to a request for access to a document of a court unless the document relates to matters of an administrative nature, read in the light of the stated object in s.3, reflects the view that an exception or exemption is necessary in such a case for the protection of an essential public interest."

15. The Court in *Loughnan v Altman* did not define the outer limits of the field covered by the expression "a document of a court". It was unnecessary for it to do so because, in the context of the matter before it, the documents to which the respondent was seeking access were clearly documents relating to the judicial function of that court.
16. However, the question for me in this instance is, as it was in *Re Rehman*, whether the documents requested by the first and second complainants are documents of a type so closely connected with the judicial or quasi-judicial functions of a court that they are clearly within the description of "documents of a court" to which the FOI Act does not apply, or whether they are documents that are purely administrative in nature and hence accessible under the FOI Act.
17. The Concise Oxford Dictionary, Eighth Edition, 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. That is, where a court is an agency under the FOI Act, it is my view that the right of access is limited to all of those documents which concern the routine administration of the court, or contain information about the operation of the court generally.
18. The documents requested by the first and second complainants are closely connected with the actual proceedings to which the first complainants were parties. That is, the transcripts, audio tapes and exhibits are documents that came into existence by, or were created in the course of the determination of those proceedings. They consist of or record the evidence given in the particular matter before the Court. In my view, a transcript of proceedings, and the audio tapes from which that transcript is transcribed, are produced to enable a judicial officer to perform his or her judicial functions, and also, in case of an appeal, so that there exists a record of the earlier proceedings for the benefit of the appellate body.
19. Similarly, documentary exhibits tendered to a court in the course of proceedings are tendered as part of the evidence provided to the court for the purpose of assisting the judicial officer to decide the facts in issue and to determine the matter before the court. I consider those documents are not documents of a court of an administrative nature, but relate to the primary judicial function of the court so as to be judicial in nature.
20. In my view, the transcripts, audio tapes and exhibits are documents of a type that are so closely connected with the judicial function of the Court, being the determination of the issue between the parties in the particular matter before the Court, that I consider that they are documents relating to a court which are of such a nature that, by virtue of clause 5 of Schedule 2 to the FOI Act, they are not to be regarded as documents of the Court and are not accessible under the FOI Act.
