

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

CITATION : INFORMATION COMMISSIONER FOR WESTERN AUSTRALIA -v- MINISTRY OF JUSTICE
[2001] WASC 3

CORAM : WHEELER J

HEARD : 15 DECEMBER 2000

DELIVERED : 17 JANUARY 2001

FILE NO/S : CIV 2355 of 1999

BETWEEN : INFORMATION COMMISSIONER FOR WESTERN AUSTRALIA
Applicant

AND

MINISTRY OF JUSTICE
Respondent

Catchwords:

Case stated - Mixed questions of fact and law
Freedom of information - Documents of an agency - Possession - Whether mere physical custody or element of control - Exempt documents

Legislation:

Freedom of Information Act 1992 (WA) Schedule 2 cl 4(1), s 3, s 15

Result:

Case stated: Are the two documents located with the respondent and to which the complainant seeks access in the possession or under the control of the

respondent for the purposes of the definition of "documents of an agency" in clause 4(1) of the Glossary in Schedule 2 to the Act?

Answer: Yes

Representation:

Counsel:

Applicant : Ms D A Wookey & Ms A E Marshall
Respondent : Ms J C Pritchard

Solicitors:

Applicant : Information Commissioner for Western
Australia
Respondent : State Crown Solicitor

Case(s) referred to in judgment(s):

Minister for Transport v Edwards [2000] WASC 349
Police Force of Western Australia v Kelly (1997) 17 WAR 9
Victorian Public Service Board v Wright (1986) 64 ALR 206

Case(s) also cited:

Mann v Capital Territory Health Commission and Ors (unreported, AAT, 5 August 1983)
Martyr v Law Reform Commission of Western Australia (unreported, D03896, 3 July 1996)
Re Birrell and Victorian Economic Development Corporation (1989) 3 VAR 358
Re Healey and Australian National University (unreported, AAT Cth, 23 May 1985)
Re Holt and Education Queensland (1998) 4 QAR 310
Re Horesh and Ministry of Education (1986) 1 VAR 143
Re Price and Nominal Defendant (1999) 5 QAR 80
Re Sullivan and Department of Industry, Science and Technology (1996) 23 AAR 59

1 **WHEELER J:** This is a Case Stated for the opinion of the court on a question of law pursuant to s 78 of the *Freedom of Information Act 1992* ("the Act"). Before I turn to the question, it is convenient to set out the background.

Factual Background

2 The complainant, a prisoner at Karnet Prison Farm, seeks access to copies of two documents prepared for the consideration of the Parole Board of Western Australia. They are a psychological report by a clinical psychologist and a community corrections report prepared by a Community Corrections Officer, who is the complainant's case manager. The respondent has refused access to the documents on the basis they are not documents of the respondent but are documents of the Parole Board, which is an exempt agency under the Act.

3 The two documents are located on what is called a "blue file" created by the Parole Board's Secretariat at the premises of the Parole Board and forwarded to the complainant's case manager, who is employed by the respondent. A blue file is created by the Parole Board for each prisoner. A copy is created for each member of the Parole Board and an additional copy is provided for the prisoner's case manager. The originals of the relevant documents are retained on the Parole Board Chairman's file at the Parole Board premises. (I would add that this appears to be a reference to the "originals" in the sense of the documents first received or created by the Parole Board; as will be seen later, the blue file includes documents such as trial transcripts, the originals of which will normally be held by a court).

4 Once received by the respondent, the blue file is placed within the covers of, but separate from, the community corrections file compiled by the respondent for the case management of each prisoner. When a prisoner's sentence is completed, the blue file is stored together with its associated community corrections file.

5 The blue file contains copies of a number of documents, including the prisoner's criminal record, trial transcripts, Judge's sentencing remarks and documents of the type to which the complainant seeks access. The Parole Board determines what documents are held or recorded on the blue files and from time to time may recall them for its own purposes. So far as the respondent is concerned, it considers that the blue file remains the property of the Parole Board. The Case Stated recites that case managers are not permitted to add, alter or remove any documents contained in the

file, but it is not clear whether this is because of a direction given by the Parole Board or a direction given by the respondent.

6 Community Corrections officers do have access to the blue files to assist them in the case management of the prisoners and in the provision of reports and advice to the Parole Board and to give effect to the Parole Board's instructions. Directions for the use of the blue files are set out in the respondent's Community Corrections Practices and Procedures Manual. I do not think it is necessary to set out the extract from that manual attached to the Case Stated. The direction is very brief and does little more than record the fact that the blue file is made available to the supervising Community Corrections officer and that the respondent is of the view that it remains the property of the Board.

7 It appears that the Information Commissioner has formed a preliminary view that the documents requested by the complainant are in the possession of the respondent and may be documents of the respondent for the purposes of the Act, while the respondent maintains that they are not.

The Question

8 The question set out the in the case stated is:

"Are the two documents located with the respondent and to which the complainant seeks access in the possession or under the control of the respondent for the purposes of the definition of 'documents of an agency' in clause 4(1) of the Glossary in Schedule 2 to the Act?"

9 The question so framed is a mixed question of fact and law. The arguments of the parties proceeded on the basis that the underlying question is whether the expression "possession" in the definition of documents of an agency means more than mere physical custody and whether it imports an element of control; and if an element of control is imported, what sort of control is required? I am not convinced that it is necessary to deal with all the interesting issues which could possibly arise from this question.

The Statutory Framework

10 Clause 4 in the glossary, which is headed "Documents of an Agency", relevantly reads as follows:

"(1) Subject to subclause (2) [which is irrelevant for present purposes] a reference to a document of an agency is a reference to a document in the possession or under the control of the agency including a document to which the agency is entitled to access and a document that is in the possession of or under the control of an officer of the agency in his or her capacity as such officer.

...

(3) A document in the possession or under the control of an agency on behalf of or as an agent for -

(a) the Commonwealth, another State or a Territory;

...

is not a document of the agency."

11 It is convenient at this point to deal with what appeared to me to be one of the more attractive arguments put by the respondent. It was suggested that the various senses of "document of an agency" set out in subclause (1) of cl 4 were in effect a hierarchy, so that each of the various expressions used within that subclause encompassed the one which succeeded it. So, for example, it was argued that a document in the possession of an officer in his or her capacity as an officer must necessarily also constitute a document to which the agency was entitled to access; while a document to which the agency was entitled to access should be regarded as being under the control of the agency. Pursuing this line of argument, it followed that a reference to possession necessarily encompassed an element of control. The question would then arise as to whether control existed in the present case, but it is not necessary to pursue that for the moment.

12 The difficulty this argument faces is twofold. First, the expressions "in the possession" or "under the control" are used disjunctively and, while there may be a degree of overlap, one would not normally expect the expressions to have the same meaning. Second, by reference to the history of similar provisions elsewhere, counsel for the applicant demonstrated that there had been a concern in other jurisdictions, where the expressions used were not identical, that agencies might seek to argue that documents were not relevantly their documents simply by divesting themselves of physical possession. It may be that the use of the expression "control" was in part an attempt to ensure that no argument of this kind was open.

13 Some light, I think, is shed on the relevance of an element of control to the understanding of possession by other provisions of the Act. Section 3 sets out the objects of the Act, and subsection (2) of that section sets out how the objects are to be achieved. It provides that the objects are to be achieved by, *inter alia*, "(b) providing means to ensure that personal information held by State and Local Governments is accurate ..." (emphasis supplied). The understanding which appears to inform that subsection is that access will be available, under the provisions of the Act, to personal information "held" by State and Local authorities; the inference is that that expression is synonymous with the documents being "documents of" State agencies or Local Government authorities.

14 In similar vein, s 15 relevantly provides:

"(1) If the agency does not hold the requested documents but knows ... that the documents are held by another agency (other than an exempt agency), the agency has to transfer the access application to the other agency.

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

...

(8) If the agency holds the requested documents but the documents originated with or were received from an exempt agency, the agency has to notify the exempt agency that the access application has been made."

15 Although other interpretations may be open, it appears to me that the drafter of this provision assumed that for an agency to "hold" documents may be sufficient for the documents to be documents of that agency. It appears to me that s 15 assumes that the documents with which it deals are documents to which the agency holding those documents would otherwise have to give access, were it not for the provisions of s 15. If it were not so, it would not be necessary to make any legislative provision, for example, for documents which one agency merely "holds" but which were received from and relate to the functions of some other agency. Rather, it could be left to the agency simply to deny access on the basis that the documents were not its documents. It is also, I think, of

significance that subsection (8) does not require (or, read with subsection (1), permit) the return of documents received from an exempt agency to that agency; rather, the purpose of the notification provision appears to be simply so that the exempt agency may intervene if it wishes in order to suggest what should be done with the documents and to make its particular views or needs known.

16 It is important to note that the structure of the Act is that, as Hasluck J noted in *Minister for Transport v Edwards* [2000] WASCA 349 at [53], the Act is not concerned with ownership or authorship of a document, nor with the entitlement to exclusive possession. So, although agencies may be exempt, documents do not remain forever exempt on the basis of their agency of origin or the agency with which they have the closest connection; once they leave an exempt agency, they fall to be dealt with under Schedule 1 of the Act which defines what constitutes "exempt matter" and if they do not fall within that definition then they are no longer protected.

17 For the sake of completeness, I should note that under cl 5 of Schedule 1, a matter is exempt on the basis of its agency of origin if it was created by a limited number of agencies, including the Bureau of Criminal Intelligence or a Commonwealth Security agency. The Parole Board does not fall into this category.

18 The provisions of subclause (3) of cl 4 of the glossary illustrate the point already made that the Act is not concerned with which agency has the closest or the ultimate right to possess or control. If it were otherwise, it would not be necessary to provide expressly that a document in the possession of an agency on behalf of as agent for another is not a document of that agency.

Possession - "ordinary meaning"

19 It is against that statutory background that I turn to the submissions, upon which both applicant and respondent placed emphasis, that the expression "in possession" is to be given its ordinary or natural meaning. The difficulty with this submission is that in its ordinary or natural meaning the expression is susceptible of a variety of shades of meaning. Depending on whether one turns to the Shorter Oxford Dictionary, the Concise Oxford Dictionary, or the Macquarie Oxford Dictionary, different shades of meaning will be given as the primary meaning. In each case, however, the range of meanings extends from a rather narrow meaning of

a power of control similar to lawful ownership at one extreme, through to simply the act or state of actually holding something at another.

20 It is my view that the various statutory provisions to which I have referred indicate that the better view is that an agency is in possession of documents, so as to make them documents of the agency, when the agency actually physically holds those documents. It may be that mere transient physical custody will not suffice. There may arise sometimes questions of knowledge or of intention. For example, there may be inadvertent delivery of documents to an agency, or documents may be presented to an agency for the purpose of inspection (as for example when a person presents their birth certificate for the purpose of identification) in circumstances where it is plainly not intended that the document form any part of the records of the agency. These are questions which do not arise in the present case, however.

Objects of the Act

21 I do not think it is necessary in determining this question to consider whether the interpretation of the Act generally should be approached by leaning towards a wide interpretation of the access provisions or whether, as Anderson J suggested in *Police Force of Western Australia v Kelly* (1997) 17 WAR 9 at 12, the Act balances competing public interests in allowing and denying access to government records, so that the ordinary meaning of the words and the subject matter of the Act show where the line is to be drawn. I do note, however, that in relation to the somewhat different objects provision of the Victorian *Freedom of Information Act*, the High Court in *Victorian Public Service Board v Wright* (1986) 64 ALR 206 suggested at (212) that it was proper to give to the relevant provisions of the Act "a construction which would further, rather than hinder, free access to information". This case does not appear to have been cited to Anderson J in *Police Force of Western Australia v Kelly*. It would, if accepted as a proper way to view the objects and principles sections of the Act, be a further reason for adopting the construction which I have in any event preferred.

Conclusion

22 In relation to the documents which are to be found in the blue file, it may be that the Parole Board retains ownership of them, and it is clearly the case that as between the Parole Board and the respondent the Parole Board is regarded by each of them as having the superior right of

possession, or the ultimate right of control, of the blue file. However, the documents in the blue file are documents in the physical possession of the respondent, which certain of its officers are entitled to use, in accordance with directions given by it, for its purposes. I express no opinion on the question of whether those documents are not only in the possession of the respondent but are also to be regarded as under its control. However, the degree of control which is able to be exercised, together with the physical holding of the blue files by the respondent in the same place as certain of its records, is in my view sufficient to constitute the documents contained therein, "documents of "the respondent for the purpose of cl 4(1) of the glossary in Schedule 2 to the Act.

23 I would therefore answer the question stated for the opinion of the court: Yes.