

Decision D0012020 – Published in note form only

Re Rawet and Main Roads Western Australia [2020] WAICmr 1

Date of Decision: 13 February 2020

Freedom of Information Act 1992 (WA): section 26

On 10 August 2018, David Rawet (**the complainant**) applied to Main Roads Western Australia (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to certain documents relating to the revised Northern Section Alignment of the Bunbury Outer Ring Road (**BORR**) including variations and alternatives investigated or considered by the agency. At that stage, there were four parts to the complainant's access application.

By notice of decision dated 5 October 2018, the agency gave the complainant access to two documents in full – including a report titled 'Bunbury Outer Ring Road Northern Section Alignment Report' dated September 2018 (**the Report**) which related to part 1 of the complainant's access application – and an edited copy of three documents, claiming the deleted information was exempt under clause 3(1) of Schedule 1 to the FOI Act (personal information) (**clause 3(1)**).

On 24 October 2018, the complainant applied for internal review of the agency's decision on the basis that the agency had not identified all documents within the scope of parts 1 and 4 of his application. By internal review decision dated 8 November 2018, the agency varied its initial decision by refusing to deal with part 4 of the application, under section 20 of the FOI Act, on the basis that dealing with it would divert a substantial and unreasonable portion of the agency's resources away from its other operations. In addition, the agency maintained that disclosure of the Report satisfied part 1 of the application.

On 14 November 2018, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision. The agency provided the Commissioner with its FOI file maintained in respect of the access application.

On 4 February 2019, the parties attended a conciliation conference conducted by the Commissioner's office, which resulted in the agency undertaking additional searches and locating further documents. The agency released those further documents to the complainant in full, apart from one document that was edited on the ground that the deleted information was exempt under clause 3(1). The agency also gave the complainant additional information about the documents released and the searches it had undertaken.

Based on the further documents released by the agency – including a document titled 'BORR Alignment options – Multi-criteria analysis; A comparison of ultimate treatment concepts' – the complainant claimed that it was reasonable to believe that documents which explain or relate to the options considered for the revised Northern Section of the BORR exist or should exist (**the further documents**). That was, in effect, a claim that the agency had refused the complainant access to the further documents under section 26 of the FOI Act (**section 26**).

The Commissioner's office made further inquiries with the agency about the existence of the further documents and its searches. Additional attempts to resolve the matter by conciliation between the parties were unsuccessful. During the course of the external review, the

complainant advised that he no longer disputed the agency's decision in relation to part 4 of his application and that he did not dispute the editing of one of the further documents released. Accordingly, those aspects of the matter were not considered further by the Commissioner.

On 18 December 2019, after considering the material then before her, the Commissioner provided the parties with her preliminary view of the matter. It was her preliminary view that the agency's decision to refuse the complainant access to the further documents under section 26 was justified.

The complainant was invited to accept the Commissioner's preliminary view or to provide further submissions. By email dated 30 December 2019, the complainant indicated that he did not accept the Commissioner's preliminary view and provided further submissions. The Commissioner made inquiries with the agency about the claims made in the complainant's further submissions and the agency provided additional information.

After considering all of the information before her, including the complainant's further submissions and the further information provided by the agency, the Commissioner was not dissuaded from her preliminary view.

Section 26 provides that an agency may refuse access to a document if all reasonable steps have been taken to locate the document, and it is satisfied that the document is either in the agency's possession but cannot be found, or does not exist. The Commissioner considers that, in dealing with section 26, the following questions must be answered. First, whether there are reasonable grounds to believe that the requested documents exist or should exist and are, or should be, held by the agency. Where those questions are answered in the affirmative, the next question is whether the agency has taken all reasonable steps to locate those documents.

As observed in *Re Boland and City of Melville* [1996] WAICmr 53 at [27], the question is not whether an agency has taken every possible step to locate documents, but whether it has taken all reasonable steps.

The adequacy of an agency's efforts to locate documents is to be judged by having regard to what was reasonable in the circumstances: see *Re Leighton and Shire of Kalamunda* [2008] WAICmr 52 at [85] and *Re Veale and City of Swan* [2012] WAICmr 12.

On the material before her, the Commissioner was satisfied that, apart from the documents already provided by the agency to the complainant, documents that explain or relate to the options considered for the revised Northern Section of the BORR were not created by the agency and therefore do not exist. On that basis, and having regard to the searches conducted by the agency, the Commissioner was satisfied that the agency had taken all reasonable steps in the circumstances to locate the further documents. As a result, the Commissioner did not require the agency to conduct additional searches.

Accordingly, the Commissioner confirmed the decision of the agency to refuse the complainant access to documents under section 26 of the FOI Act on the ground that the further documents either cannot be found or do not exist.