

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

**File Ref: F2012377
Decision Ref: D0022014**

Participants:

Faileen James
Complainant

- and -

City of Albany
Agency

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – section 26 – documents that do not exist or cannot be found – the searches made by the agency – whether all reasonable steps taken to locate documents.

Freedom of Information Act 1992: sections 26; 66(5)

Re Leighton and Shire of Kalamunda [2008] WAICmr 52

Re Veale and City of Swan [2012] WAICmr 12

DECISION

The agency's decision is confirmed. I find that the agency's decision to refuse the complainant access to documents under section 26 of the FOI Act, on the ground that the requested documents cannot be found or do not exist, is justified.

Sven Bluemmel
INFORMATION COMMISSIONER

25 February 2014

REASONS FOR DECISION

1. This complaint arises from a decision made by the City of Albany (**the agency**) to refuse Ms Faileen James (**the complainant**) access to certain documents under the *Freedom of Information Act 1992* (**the FOI Act**).

BACKGROUND

2. In an access application dated 9 August 2012, the complainant sought access under the FOI Act to documents relating to:
 1. *My employment with the City of Albany, including but not limited to my recruitment, my engagement, any and all performance reviews, and any other information regarding my appointment and employment with the City.*
 2. *All policies that were applicable to employees of the City of Albany during the period February 2011 to July 2012.*
 3. *All benefits that were available to employees of the City of Albany during the period February 2011 to July 2012.*
 4. *All communication from and to Ms Linda Hill regarding her assuming the position of Chief Executive Officer, up to and including 29 June 2012.*
 5. *All communications from and to Ms Linda Hill regarding any [complaint] she has in respect of my performance as Chief Executive Officer.*
 6. *Complaints made against me by Messrs Keith Barnett and Robbie Monck.*
 7. *Complaint/s made against me by any council member (past and present) of the City of Albany.”*
3. The complainant also specified that she sought access to the above documents which were created by:
 - *any council member (past or present) of the City of Albany,*
 - *any officer of the Department of Local Government Western Australia,*
 - *any officer of the Office of the Minister of Local Government Western Australia, and or*
 - *any employees, consultants and or agents of the City of Albany.*
4. In a notice of decision dated 27 September 2012, the agency decided to:
 - grant the complainant access in full to 15 documents in relation to Point 1;
 - grant the complainant access in full to 4 documents in relation to Point 2;
 - refuse the complainant access to documents in Point 3 on the basis that those documents are exempt under clause 4(3)(a) of Schedule 1 to the FOI Act;
 - refuse the complainant access under section 26 to documents in relation to Points 4, 5 and 7;

- grant the complainant access in full to 3 documents in relation to Point 6.
5. The agency also advised the complainant of her rights of internal review of its decision.
 6. By letter dated 1 October 2012, the complainant wrote to me requesting a review of the agency's decision. In a letter dated 10 October 2012, my office wrote to the complainant and advised her that I have consistently taken the view that if internal review is available then the provisions of section 66(5) are not to be ignored unless there are compelling reasons why the agency should not be afforded the opportunity to review the initial decision on access.
 7. However, it appears to me that the complainant also sent the same letter to the agency, which it treated as an application by the complainant for internal review. Based on my examination of the agency's FOI file maintained for the purposes of the complainant's access application, the agency received her application for internal review on 5 October 2012.
 8. In her application, the complainant sought review on the basis that the agency had not identified nor released to her all of the documents coming within the scope of her access application. The complainant claimed that additional documents exist which come within the scope of her access application and provided the agency with details in relation to why she considers specific documents exist.
 9. In a letter dated 2 November 2012, the agency appears to have interpreted the complainant's application for internal review as a request by her to in effect broaden the scope of her initial request. Notwithstanding that, it appears that the letter dated 2 November 2012 is the agency's decision on internal review. Ms Linda Hill, the Acting Chief Executive Officer, confirmed the initial decision.
 10. In a letter dated 17 November 2012, the complainant wrote to the agency again making detailed submissions regarding her claims that additional documents should exist which come within the scope of her access application. That letter was also provided to me which I accepted as the complainant's application for external review.

REVIEW BY THE INFORMATION COMMISSIONER

11. On receipt of this complaint, I obtained from the agency the complete original of its FOI file maintained for the purposes of dealing with the complainant's access application. This office also undertook a series of further inquiries with the agency as to the searches it had undertaken to locate the documents the subject of the complainant's access application.
12. The scope of the complaint to me is limited to the agency's decision to, in effect, refuse access to further documents under section 26 of the FOI Act. My Investigations Officer wrote to the complainant on 17 April 2013 advising her that based on the information then before me, it appeared that the agency's decision under section 26 of the FOI Act was justified.
13. The complainant was invited to accept my officer's view or to make submissions to me whether she considers it reasonable for the agency to conduct further searches.

14. The complainant did not accept my officer's view and, in an email dated 28 April 2013, made additional submissions to me.
15. By email dated 30 April 2013, this office put the complainant's claims to the agency, which responded on 25 May 2013 advising that two additional documents had been located and released to the complainant.

SECTION 26 – DOCUMENTS THAT CANNOT BE FOUND OR DO NOT EXIST

16. Section 26(1) of the FOI Act deals with an agency's obligations when it is unable to locate documents sought by an access applicant or when those documents do not exist. Section 26 provides:
 - (1) *The agency may advise the applicant, by written notice, that it is not possible to give access to a document if –*
 - (a) *all reasonable steps have been taken to find the document; and*
 - (b) *the agency is satisfied that the document –*
 - (i) *is in the agency's possession but cannot be found; or*
 - (ii) *does not exist.*
 - (2) *For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a decision to refuse access to the document, and on a review or appeal under Part 4 the agency may be required to conduct further searches for the document.*
17. When dealing with an agency's decision to refuse access to documents pursuant to section 26, the questions to be asked are whether there are there 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 find the documents.
18. 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 the decisions of this office in: *Re Leighton and Shire of Kalamunda* [2008] WAICmr 52 at [85]; and *Re Veale and City of Swan* [2012] WAICmr 12.
19. I have consistently held that I do not consider that it is generally my function or that of my staff to physically search for documents on behalf of a complainant. Provided I am satisfied that the requested documents exist or should exist, I consider that it is my responsibility to inquire into whether the agency has taken all reasonable steps to find the documents and, if necessary, to require the agency to conduct further searches.

Is it reasonable to expect documents of the kind requested existed or should exist in the agency?

20. In my view, it is reasonable to believe that there will be documents relating to the employment; review of the performance; and termination of the employment of any employee in the agency, including the agency's Chief Executive Officer ('the CEO').
21. I would have expected, as a matter of good administrative and human resource practice, that there would be documentation which should exist in the agency relating to the engagement of consultants to employ the CEO; documents relating to the day to day management of any officer, including the CEO; and most particularly, documents relating to any complaints received about the performance of any officer, including the CEO; and the action taken by the agency in relation to those complaints, particularly where it has resulted in the officer having his or her employment terminated.

Has the agency conducted reasonable searches for the documents the subject of the complainant's access application?

22. In response to inquiries made by this office, the agency advised me that on receipt of the complainant's access application, a search of the agency's electronic Record Management System (known as 'Synergy') and its Email Archive were conducted to identify documents which may fall within the ambit of the access application. Documents which are maintained in Synergy were identified and all record numbers of those documents were noted. A further physical search was conducted of records held in the current A/Chief Executive Officer's office and the Mayor's office, and a number of documents were discovered, which had not been registered into the agency's electronic database. Those documents were considered by the agency in making its decision on access.
23. The agency also advised me that certain information, such as information relating to the appointment of a recruitment consultant, is recorded in the Minutes of Ordinary Council meetings and is available publicly.
24. The agency also advised me that all emails received or sent by officers of the agency are kept in an Email Archive. A search of that archive was conducted for emails coming within the scope of the access application, including all sent, received and deleted emails.
25. Further, the agency advised me that emails from Councillors to officers of the agency are captured and recorded in Synergy, in addition to being captured by the Email Archive, as are emails sent from officers of the agency to Councillors. The agency advised me, however, that emails sent by Councillors to external persons/agencies are not captured on the agency's system, unless a Councillor copies an agency email address into that email, in which case it would be captured and registered on Synergy, and stored in the Email Archive.
26. The agency advised the Commissioner that the 'keywords' used by the agency in conducting its searches were the names of specific officers; named individuals, including Councillors; specific file reference numbers, where known; and specific time frames.

27. In addition, the agency searched Synergy for any other documents which fell within the ambit of the application. In addition, the agency advised me that a physical search was conducted for documents which may have been held by the Mayor in 'Confidential' files, which may not have been recorded in the agency's electronic database.
28. The agency also advised me that all incoming correspondence (mail) is scanned and recorded in Synergy by Records staff. This incoming correspondence is then allocated electronically to the responsible staff member for response/action.
29. Emails sent to the City of Albany generic email address are also recorded in Synergy by Records staff, before being forwarded to the responsible staff member for response/action. Outgoing correspondence generated by officers of the agency is also registered in the agency's electronic database.
30. A physical search of the complainant's personnel file was conducted by the agency for hard copies of documents requested, in addition to an electronic search of Synergy for documents relating to her personnel file, as well as a search of the electronic file PER10467 (the complainant's electronic personnel file).
31. The agency advised me that it considers that documents coming within the scope of the complainant's access application are most likely to be held in Synergy in electronic form and in compactus in the Records Room for hard copies. The Email Archive (electronic) and personnel files are stored in a compactus in a locked room accessed only by Human Resources staff.
32. The agency has advised me that the CEO is also the Complaints Officer of the agency. In the circumstances of this matter, complaints against the complainant were made by Keith Barnett directly to the complainant in writing. Mr Barnett was consulted and agreed to the release of his complaint to the complainant as part of her FOI application. Another complaint about the complainant was received by the Mayor, a copy of which is held on her personnel file. During the course of dealing with the complainant's access application and in accordance with the agency's obligations under section 32 of the FOI Act, it consulted with the relevant third parties. One third party did not consent to the disclosure to the complainant of personal information, as that term is defined in the FOI Act, about them to her. Therefore, that document has not been disclosed to the complainant. However, as the scope of the complaint is limited to the agency's decision to refuse the complainant access to documents under s.26 of the FOI Act, it is not necessary for me consider the claims made by the agency under any of the exemption provisions of Schedule 1 to the FOI Act.
33. Despite inquiries by this office, and based on the information before me, there is no evidence before me that any additional documents exist within the agency which might come within the scope of the complainant's access application. This complaint highlights the fundamental importance of proper record keeping in terms of State and local government agencies' accountability for their processes, actions and decisions, particular decisions that directly and significantly affect individuals.
34. Having reviewed the searches undertaken by the agency, and the inquiries conducted by this office, I find that, in the circumstances of this matter, all reasonable steps to find the requested documents have now been taken but that the requested documents cannot

be found or do not exist. It is not my role to investigate complaints about agencies' administrative processes or record-keeping practices.

35. Accordingly, I find that the agency's decision to refuse the complainant access to documents under section 26 of the FOI Act on the ground that the requested documents cannot be found or do not exist is justified.
