

Decision D0032016 – Published in note form only

***Re Sideris and City of Joondalup* [2016] WAICmr 3**

Date of Decision: 17 February 2016

Freedom of Information Act 1992: section 26

On 2 February 2015, Mr Sideris (**the complainant**) applied to the City of Joondalup (**the agency**) under the *Freedom of Information Act 1992* (**the FOI Act**) for access to certain types of documents concerning the Percy Doyle Reserve.

The agency noted that a large amount of resources may be required to deal with the complainant's application (**the original access application**). The agency also noted that it may consider refusing to deal with the original access application on the basis that doing so would divert a substantial and unreasonable portion of the agency's resources away from its other operations, as described in section 20 of the FOI Act. The agency corresponded with the complainant to help him to reduce the scope of the original access application. On 19 March 2015 the agency wrote to the complainant confirming its understanding of the terms of the access application agreed to by the parties (**the amended application**).

In a notice of decision dated 2 April 2015, the agency decided to give the complainant access in full to certain documents and edited access to other documents. The complainant applied for internal review of the agency's decision. On internal review on 19 May 2015, the agency confirmed its decision and refused access to documents identified by the complainant on the basis that all reasonable steps had been taken to find the documents and that those documents do not exist or cannot be located, as provided by section 26 of the FOI Act. The agency also refused access to documents on the basis that they were outside the scope of the amended application.

The complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision. The complainant submitted that the agency had unilaterally narrowed the scope of the access application. Following receipt of the complaint, the Commissioner obtained a copy of the FOI file maintained by the agency in respect of the complainant's access application. The Commissioner also considered submissions from the parties, the communications between the parties about the scope of the access application and information from the agency as to searches it conducted for documents.

On 7 December 2015, after considering the information before him, the Commissioner provided the parties with a letter setting out his preliminary view of the complaint. The Commissioner was of the view that the agency's decision to refuse access to documents outside the scope of the amended application was justified.

The Commissioner was also of the preliminary view that the agency's decision to refuse access to documents under section 26 of the FOI Act, on the basis that they could not be found or did not exist, was justified.

Section 26 of the FOI Act 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.

The Commissioner was of the view the agency had taken all reasonable steps to find the documents within the scope of the amended application (**the requested documents**). In these circumstances, it was reasonable to conclude that either these types of documents were never created and do not exist or, if they were created, they cannot be located. Accordingly, in the Commissioner's preliminary view the agency's decision to refuse access to the requested documents under section 26 of the FOI Act was justified.

The complainant was invited to withdraw his complaint or to provide the Commissioner with further submissions relevant to the matter for the Commissioner's determination. The complainant advised that he did not accept the Commissioner's preliminary view and made further submissions to the Commissioner. In summary, the complainant submitted that the agency should deal with his original access application and the agency was not justified in refusing access to documents outside the scope of the amended application. The complainant also submitted that certain documents disclosed by the agency established that additional documents should exist within the agency.

Having reviewed all of the material before him, the Commissioner was not dissuaded from his preliminary view and confirmed the decision of the agency to refuse access to documents outside the scope of the amended application. The Commissioner was also not dissuaded from his preliminary view that the decision of the agency to refuse access to the requested documents under section 26 of the FOI Act, on the basis that the documents do not exist or cannot be found was justified.