

Decision D0042024 – Published in note form only

Re Humphreys and Forest Products Commission [2024] WAICmr 4

Date of Decision: 26 March 2024

Freedom of Information Act 1992 (WA): section 26

On 29 July 2022, Brian Humphreys (**the complainant**) applied to the Forest Products Commission (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to a particular audit report regarding historical payments by the agency to sharefarmers and certain other related documents. The agency gave the complainant an edited copy of the requested audit report and other documents. After that, the complainant amended his access application and sought access to seven categories of documents. Relevant to this external review, the documents requested in category one were documents relating to a decision made by the agency in 2013 to change the method of calculating stumpage for sharefarmer payments (**the requested documents**). The agency requested an extension of time to deal with the access application, which the complainant agreed to.

By notice of decision dated 18 November 2022, the agency identified nine documents within the scope of the complainant’s access application and, in the main, gave him access to edited copies of those documents. In relation to the documents requested in category 1, the agency gave the complainant a copy of two documents that provided information on the publishing of stumpage schedule rates but otherwise advised the complainant that the requested documents do not exist.

The complainant did not accept the agency’s decision that documents did not exist within the scope of category 1 of his access application and applied for internal review of that aspect of the agency’s decision. By internal review decision dated 17 January 2023, the agency confirmed its initial decision that the requested documents could not be found or did not exist. In effect, the agency refused the complainant access to the requested documents under section 26 of the FOI Act (**section 26**).

In February 2023, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency’s decision, stating that he sought the ‘documentation of the Executive [and/or] the Board...of the [agency] that authorised the change to the method of calculating stumpage for Share Farmer’s payments.’

The agency provided the Commissioner with its FOI file maintained in respect of the complainant’s access application. The agency was requested to provide further, specific information about the searches and inquiries it had conducted for the requested documents, as there was insufficient information before the Commissioner to form a view about whether the agency had taken all reasonable steps to locate the requested documents. The agency provided the requested information.

On 20 February 2024, the Commissioner provided the parties with her preliminary view, which was that, based on the information then before her, the agency’s decision to refuse the complainant access to the requested documents under section 26 was justified. The complainant did not accept the Commissioner’s preliminary view and provided further submissions.

In her preliminary view letter, the Commissioner also observed that the agency's notices of decisions given to the complainant did not comply with section 30(f) of the FOI Act because they did not include any details of the searches conducted by the agency (for example, the locations searched and the search parameters used). In response, the agency advised that it would be mindful to include more specific information when responding to similar requests in the future.

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] WAICmr52 at [85] and *Re Veale and City of Swan* [2012] WAICmr 12.

The complainant contended that the requested documents must exist because the method of calculating stumpage for sharefarmer payments is a 'major decision of the agency'. The agency conducted searches for the requested documents and did not locate them. The agency advised that price decisions tend to be made operationally, with Executive approval, and acknowledged that the procedure was less formal in the period to which the access application refers. The agency submitted that, if there has been an Executive or Commission decision, it would be an item on the agenda paper and/or be recorded in relevant minutes, and that 'there were no such papers referenced in respect of the timeframe the decision appears to have been made in'.

The agency noted that 'Today, any such determination would be recorded in Executive agenda, would be the subject of a digitally stored executive paper and, depending on its scope, may well be minuted in a Commission/Committee meeting'. The agency stated that, if the requested documents existed, they were 'dated nine years prior to the [complainant's] request and pre-date the [agency's] policy of digitising all media'.

Based on the information provided by the agency, the Commissioner considered it was unlikely that the requested documents exist. After considering all of the material before her, including the searches undertaken by the agency and the complainant's further submissions, the Commissioner was satisfied that the agency had taken all reasonable steps in the circumstances to locate the requested documents and that the requested documents either could not be found or do not exist.

Accordingly, the Commissioner found that the agency's decision to refuse the complainant access to the requested documents under section 26 of the FOI Act is justified. Therefore, the Commissioner confirmed the agency's decision.