

Decision D0052014 – Published in note form only

Re Truscott and Department for Child Protection and Family Support [2014] WAICmr 5

Date of Decision: 27 February 2014

Freedom of Information Act 1992: section 26

On 4 March 2013, Mr Stephen Truscott (**the complainant**) applied to the Department for Child Protection and Family Support (**the agency**), formerly the Department for Child Protection, under the *Freedom of Information Act 1992* (**the FOI Act**) for access to particular documents held by the agency (**the requested documents**). Specifically, the complainant sought access to those documents that support the ‘negative comment “to a point”’ appearing as a comment in a particular agency form (**the form**). The agency asked the complainant to amend his application to enable it to deal with the access application. The complainant maintained the terms of his access application and the agency refused to deal with the access application under section 20 of the FOI Act, on the basis that it would divert a substantial and unreasonable portion of the agency’s resources away from its other operations. On internal review, the agency confirmed its original decision. The complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency’s decision.

Following receipt of the complaint, the Commissioner obtained a copy of the full FOI file maintained by the agency in respect of the complainant’s access application.

The Commissioner required the parties to attend a compulsory conciliation conference in this matter pursuant to sections 70 and 71 of the FOI Act. The conciliation conference was conducted by an officer nominated by the Commissioner as conciliator under section 71(3) of the FOI Act. The parties were advised that the conciliation conference was confidential and the detail of matters discussed in that conference were not provided to the Commissioner. The Commissioner was not advised of the substance or detail of discussions in the conciliation conference. However, he was advised that the agency had suggested that it was now considering relying on section 26 of the FOI Act to refuse access to the requested documents on the basis that they do not exist. The parties did not agree to a resolution of the complaint at the conciliation conference and the matter was referred back to the Commissioner for formal review.

Following inquiries from this office regarding the agency’s decision, the agency advised the Commissioner that it withdrew its decision to refuse to deal with the access application. However, it refused the complainant access to the requested documents under section 26 of the FOI Act on the basis that they do not exist (**the amended decision**).

Section 26 provides that an agency may refuse access to a document if the agency is satisfied that all reasonable steps have been taken to find the document, and the agency 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 find those documents.

The complainant submitted that the author of the phrase that included the words ‘to a point’ in the form held a negative view of him and had treated him unfairly and unethically. He provided evidence that other people had reviewed his work favourably. The complainant submitted that the agency had, on several occasions, failed to treat him appropriately and it was denying him access to documents to avoid embarrassment.

The agency submitted that documents to justify the ‘negative comment “to a point”’ in the form did not exist because in the context of the form, the comment was not a negative comment. The full text of the sentence in which those words appeared was ‘The District was very happy with his performance to a point, where they would have offered him a position, however, had no vacancies’. It appears that this phrase contained a misplaced comma after the words ‘to a point’, leading to confusion. The completion of the form was part of a process to have a part-time job converted to a full-time job in the District Office so that it could be offered to the complainant.

The Commissioner’s view was that it was not reasonable to consider that the words ‘to a point’ were a negative comment in the context in which they were used. The Commissioner was of the view that, as the words ‘to a point’ were not a negative comment, there would be no documents to support the use of those words as a negative comment. Therefore, it was the Commissioner’s view that it was reasonable to conclude that documents to justify the words as a negative comment do not exist.

On 14 February 2014, after considering the information before him, the Commissioner provided the parties with a letter setting out his preliminary view of the complaint. It was the Commissioner’s preliminary view that the agency’s amended decision to refuse access to the 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.

Having reviewed all of the material before him, the Commissioner was not dissuaded from his preliminary view and confirmed the amended 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.