

Decision and reasons for decision D0052018 – Published in Note form

Re Wells and Legal Practice Board of Western Australia [2018] WAICmr 5

Date of Decision: 29 June 2018

Freedom of Information Act 1992 (WA): Section 26

Background

Gavin Wells (**the complainant**) applied to the Legal Practice Board of Western Australia (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to several categories of documents in relation to the Roll of Certified Legal Practitioners, including changes to the appearance of his name and status on the Roll.

On 9 June 2017, the agency made a decision to refuse access, in full or in part, to certain documents on the basis that matter was exempt and to refuse access to documents on the basis that those documents could not be found or do not exist, as described in section 26 of the FOI Act (**section 26**).

On 3 July 2017, the complainant applied to my office for external review of the agency's decision to refuse access to documents or parts of documents on the basis that they were exempt. The complainant also submitted that additional documents falling within the scope of his access application had not been identified by the agency (**additional documents**).

The agency provided my office with a copy of the documents claimed to be exempt together with its FOI file maintained in respect of the access application. My officer communicated with the parties in writing and received further submissions from both parties and also met with the parties with a view to resolving the matter by conciliation.

During the course of the external review, the agency undertook further searches and gave the complainant access to additional documents. The agency also withdrew its claims for exemption and released all of the documents it had identified as coming within the scope of the complainant's access application.

The only issue remaining in dispute for my consideration is the agency's decision to refuse access to additional documents on the basis that they do not exist or cannot be found, as described in section 26.

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.

In a letter dated 8 June 2018, I wrote to the parties setting out my preliminary view. It was my preliminary view that the decision of the agency to refuse access to the additional documents under section 26 was justified (**preliminary view**). The complainant was invited to accept my preliminary view or to provide further submissions.

The complainant did not accept my preliminary view and made further written submissions by email on 22 June 2018. The complainant maintained that the additional documents must exist, for reasons including that, the agency's list of documents was not sufficiently specific to enable him to match it against the categories of documents in his access application.

Consideration

I consider that, in dealing with section 26, the following questions must be answered. First, whether there are reasonable grounds to believe that the additional documents exist or should exist, second, whether the additional documents 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 additional documents.

The complainant submitted that there was sufficient information to support his claim that the additional documents exist or should exist, especially as, otherwise the agency's decision would be regarded as an admission that it does not hold any 'core business documents'. I do not accept the complainant's submission as the agency has provided details of the types of documents it does hold. I have considered all of the material before me, including all of the complainant's submissions, and I am not dissuaded from my preliminary view. Based on all the material before me, I am not satisfied that there are reasonable grounds to expect that the additional documents exist or should exist.

Further, I note and accept that section 26 requires an agency to take 'all reasonable steps' rather than 'all steps' and that the adequacy of the agency's steps to find the documents are to be considered 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 at [51]). I am satisfied having considered the details of the numerous and extensive searches conducted by the agency that it has taken all reasonable steps to find the additional documents.

I find that the material facts underlying my reasons are as set out in my preliminary view and above. For the reasons given in both my preliminary view and above I am not satisfied that there are reasonable grounds to expect that the additional documents exist or should exist.

Decision

The agency's decision is confirmed. I find the agency's decision to refuse access to the documents under section 26 of the FOI Act is justified.

Lisa Ward
ACTING INFORMATION COMMISSIONER