

Decision D0062016 – Published in note form only

Re Kimberley Community Legal Services Inc and Department of Aboriginal Affairs [2016] WAICmr 6

Date of Decision: 30 March 2016

Freedom of Information Act 1992 (WA): section 26

On 17 October 2014 Kimberley Community Legal Services Inc (**the complainant**) applied to the Department of Aboriginal Affairs (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to certain documents relating to or arising from a report delivered to the State Government in 2008 by the Stolen Wages Taskforce (**the Taskforce**) entitled '*Stolen Wages Taskforce, Western Australia, Reconciling the Past – Government control of Aboriginal monies in Western Australia, 1905-1972, Report 2008*'. The request included documents concerning the actuarial modelling and calculations used and undertaken by the Taskforce.

By decision dated 16 January 2015, the agency identified 84 documents within the scope of the complainant's access application and gave the complainant access in full to 68 of those documents. The agency refused access to seven documents, on the basis that they were exempt under clause 7 of Schedule 1 to the FOI Act, and gave access to an edited copy of nine documents, deleting certain information on the basis that it was exempt under clauses 3 and 7 of Schedule 1 to the FOI Act.

The complainant applied for internal review of the agency's decision on the basis that further documents exist within the scope of its access application. On internal review, the agency effectively refused access to further documents under section 26 of the FOI Act on the basis that all reasonable steps had been taken to find those documents but they cannot be found or do not exist. On 21 May 2015 the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision.

Section 26 of the FOI Act 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 second, whether the requested 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 those documents.

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 required the parties to attend a compulsory conciliation conference pursuant to sections 70 and 71 of the FOI Act. The matter was not resolved and was referred to the Commissioner for formal determination. Following the conciliation conference, the Commissioner's office made further inquiries with the agency and obtained additional information from the agency about its searches.

On 28 October 2015, after considering the information before him, the Commissioner provided the parties with a letter setting out his preliminary view of the complaint. Although the Commissioner considered that, in the circumstances of this matter, it was reasonable to conclude that at a certain point in time in the Taskforce's operations certain documents within the scope of the complainant's access application may have existed in addition to those located by the agency, he was unable to conclude on the information before him whether or not further documents did or do in fact exist. The Commissioner was also satisfied that, even if further documents did or do exist, the agency had taken all reasonable steps to find the documents described in the complainant's access application and that further documents either could not be found or do not exist. Accordingly, the Commissioner was of the preliminary view that the agency's decision to refuse the complainant access to further documents under section 26 was justified.

The complainant did not accept the Commissioner's preliminary view and made further detailed submissions about the existence of further documents. The complainant also submitted that the agency had not taken all reasonable steps to locate documents within the scope of its access application. The complainant contended that further steps should be taken by the agency, specifically by making inquiries with certain former staff of the Taskforce about possible locations of the requested documents within the agency's records and by conducting further electronic searches of the agency's records using additional search terms. After considering the complainant's further submissions, the Commissioner's office made additional inquiries with the agency and obtained further information from the agency.

On the information before him, the Commissioner was satisfied in the circumstances that it was not necessary for the agency to conduct further searches using additional search terms. In addition, the Commissioner was of the view that, if further documents within the scope of the complainant's access application did exist, the searches performed by the agency would have located them. The Commissioner also did not consider that it would be reasonable to expect former Taskforce staff to recall the locations in which documents created at least eight years ago were stored. Searches of the locations which would reasonably be expected to hold further documents, if they existed, had been unsuccessful in locating further documents. Consequently, the Commissioner was satisfied that it would not be a reasonable step for the agency to contact former Taskforce staff to inquire as to possible locations of further documents within the agency's records, as the complainant submits.

Having regard to the age of the further documents the complainant contends should exist, the agency's records management systems and the steps that the agency had taken to locate the requested documents, the Commissioner was satisfied that the agency had conducted searches in appropriate locations and that all reasonable steps had been taken in the circumstances to locate documents within the scope of the complainant's access application.

After reviewing all of the material before him, the Commissioner was not dissuaded from his preliminary view. Accordingly, the Commissioner confirmed the decision of the agency to refuse the complainant access to further documents under section 26 of the FOI Act, on the basis that further documents either cannot be found or do not exist.