

Decision D0062023 – Published in note form only

***Re Gent and City of Mandurah* [2023] WAICmr 6**

Date of Decision: 28 June 2023

Freedom of Information Act 1992 (WA) section 26

In October 2021, Rodney Gent (**the complainant**) applied to the City of Mandurah (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents relating to a survey of the road outside his property.

By notice of decision dated 9 December 2021, the agency decided to give the complainant access in full to all of the documents it identified as coming within the scope of his access application. As the decision was made by the agency’s Acting Chief Executive Officer, under section 39(3) of the FOI Act, internal review was not available to the complainant.

In February 2022, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency’s decision. The complainant claimed that the agency held another document (a survey plan) that came within the scope of his access application (**the further document**), which the agency had, in effect, refused him access to under section 26 of the FOI Act (**section 26**).

The agency provided the Commissioner with its FOI file maintained in respect of the complainant’s access application. Further inquiries were made with the parties and attempts were made to resolve the matter informally, which were unsuccessful. Both parties provided submissions to the Commissioner’s office. The agency’s submissions detailed how it maintains plans and diagrams and described the searches it undertook to locate the further document, including the areas and locations searched and the officers who conducted the searches. The agency advised that, as a result of its searches, it was unable to locate the further document.

On 10 May 2023, after considering the material then before her, the Commissioner provided the parties with her preliminary view of the matter, which was that the agency’s decision to refuse access to the further document under section 26 was justified.

The complainant did not accept the Commissioner’s preliminary view and made further submissions. After considering all the information before her, the Commissioner was not dissuaded from her preliminary view.

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.

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.

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 to locate the further document.

As a result, the Commissioner found that the agency's decision to refuse the complainant access to the further document under section 26 of the FOI Act, on the ground that the further document cannot be found or does not exist, was justified. Therefore, the Commissioner confirmed the agency's decision.