

Decision D0082022 – Published in note form only

Re McLerie and City of Melville [2022] WAICmr 8

Date of Decision: 30 June 2022

Freedom of Information Act 1992 (WA): section 26

On 28 May 2020, Mark McLerie (**the complainant**) applied to the City of Melville (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents relating to a neighbouring property.

As the agency did not provide the complainant with a notice of decision within the permitted period under the FOI Act, the agency was deemed to have made a decision to refuse access to the requested documents. By letter dated 13 July 2020, the complainant sought internal review of the agency’s deemed decision. Although a document purporting to be the internal review decision was provided by the agency on 28 July 2020, this in fact related to a different access application from the complainant.

By a notice of decision dated 29 July 2020, the agency decided to give the complainant access to an edited copy of documents, and to refuse access to further documents.

In an internal review decision dated 6 August 2020, the agency identified additional documents. It gave the complainant access to one of those documents and advised that further ‘searches and evaluation’ were required before a decision on the remaining documents could be made. By letter dated 12 August 2020, the agency gave the complainant access to a further 121 folios.

On 1 September 2020, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency’s decisions, claiming that he believed additional documents exist within the scope of his access application. That was, in effect, a claim that the agency refused access to documents, pursuant to section 26 of the FOI Act.

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.

If the Commissioner is not satisfied that there are reasonable grounds to believe that additional documents should exist, the onus is on the person asserting that further documents should exist – in this case, the complainant – to provide the Commissioner with material to establish this claim.

Following inquiries with the parties, on 13 May 2022, the Commissioner provided the parties with her preliminary view of the matter. It was her preliminary view that the agency’s decision to refuse the complainant access to additional documents, pursuant to section 26, was justified.

The complainant was invited to accept the Commissioner's preliminary view or to provide further submissions relevant to the matter for her determination. The complainant did not accept the Commissioner's preliminary view and made further submissions. However, those submissions, relevant to the matter for determination, were generally that additional documents should exist, based on events that had taken place either immediately before, or subsequent to, the complainant making his access application. In the circumstances, the Commissioner did not consider that it was reasonable to believe that additional documents existed within the scope of the complainant's access application.

The Commissioner considered that the manner in which this application had been dealt with by the agency, including the series of notices of decision and the lack of a coherent record of documents provided, and the number of inter-related access applications that had been made by the same complainant, made it difficult to ascertain the exact progress of the matter and the documents to which access had been given.

However, taking into account all the information before her, including the complainant's further submissions, the Commissioner was not dissuaded from her preliminary view.

Accordingly, the Commissioner confirmed the agency's decision to refuse the complainant access to further documents, pursuant to section 26 of the FOI Act, on the ground that those documents either cannot be found or do not exist.