

**Decision D0082023 – Published in note form only**

***Re McLerie and City of Melville [2023] WAICmr 8***

**Date of Decision: 30 June 2023**

***Freedom of Information Act 1992 (WA): section 26***

In April 2019, 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 various documents relating to certain building approvals for properties owned by other individuals (**Part 1**) and access to documents relating to the actions taken by the agency in response to a particular email (**the Email**) he sent to the agency in April 2013 (**Part 2**).

The agency made its decision in response to the complainant's access application in two parts. In a notice of decision dated 1 May 2019, the agency identified 22 documents within the scope of Part 1, giving the complainant access to one document in full and access to edited copies of 21 documents, claiming the deleted information was exempt under clause 3(1) of Schedule 1 to the FOI Act (**clause 3(1)**).

In a notice of decision dated 21 May 2019, the agency identified 15 documents within the scope of Part 2, giving the complainant access to edited copies of 10 documents under clause 3(1) and refusing access to five documents on the basis they were exempt under clause 14(1)(c) of Schedule 1 to the FOI Act.

The complainant sought internal review of the agency's decisions, claiming that additional documents existed within the scope of his access application. The agency did not give the complainant an internal review decision within the period prescribed in the FOI Act. Therefore, under section 43 of the FOI Act, the agency was taken to have confirmed its initial decision.

In June 2019, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision. During the external review, the complainant confirmed that the scope of his application for external review was limited to the agency's decision to, in effect, refuse him access under section 26 of the FOI Act (**section 26**) to further documents within the scope of Part 2 of his access application.

The agency provided the Commissioner with its FOI file maintained in respect of the complainant's access application, together with other material. Inquiries were made with both the agency and the complainant.

On 12 June 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 further documents under section 26 was justified.

The complainant did not accept the Commissioner's preliminary view and made further submissions. The complainant asserted that the agency should hold more documents within the scope of Part 2 of his access application but did not provide any substantive material to support that assertion.

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.

The agency conducted further searches for documents within the scope of Part 2 but did not locate any additional documents. The agency provided the Commissioner with additional information about its record keeping system and acknowledged that its administrative processes at the time the Email was received (in 2013) did not represent 'best practice' in record keeping.

The Commissioner considered that this matter demonstrated deficiencies in the agency's record keeping practices and the way in which it deals with applications under the FOI Act, noting the importance of good record keeping systems and the need to ensure that members of staff are trained to conduct comprehensive searches of those systems to ensure the proper functioning of the FOI Act.

The Commissioner observed that, in the time since the complainant lodged this request for external review, the agency had given him access to a substantial number of documents, including documents within the scope of this access application, through a number of different processes.

Having regard to all of the material before her including the complainant's further submissions, the searches conducted by the agency, the further information provided by the agency and all of the documents that the complainant had been given access to, the Commissioner was satisfied that the agency had taken all reasonable steps in the circumstances to find further documents within the scope of Part 2 of the complainant's access application and that further documents either cannot be found or do not exist.

As a result, the Commissioner found that the agency's decision to refuse the complainant access to further documents under section 26 of the FOI Act was justified. Accordingly, the Commissioner confirmed the agency's decision.