

Decision D0092022 – Published in note form only

***Re Rogers and Western Power* [2022] WAICmr 9**

Date of Decision: 18 July 2022

Freedom of Information Act 1992 (WA): section 26

On 9 August 2021, Eric Rogers (**the complainant**) applied to Western Power (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to a copy of a costing assessment report relating to the underground infrastructure located on the complainant's property and a neighbouring property, as well as a particular underground location map for the neighbouring property.

By notice of decision dated 28 September 2021, the agency gave the complainant access in full to two documents coming within the scope of the first part of his access application. The agency refused access to documents coming within the second part of the access application under section 26 of the FOI Act on the grounds that the requested documents do not exist or cannot be found.

The complainant applied for internal review of the agency's decision to refuse access to documents under section 26 and the agency confirmed its initial decision.

On 29 October 2021, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision. The agency provided the Commissioner with its FOI file maintained in respect of the access application.

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. 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 locate those documents.

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.

Following inquiries with the parties and unsuccessful attempts to resolve the matter informally, on 17 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 further documents under section 26 was justified.

The Commissioner observed that neither of the agency's notices of decision complied with section 30(f) of the FOI Act because they did not provide sufficient detail about the nature and extent of the searches undertaken by the agency or reasons for its conclusion that thorough searches had been conducted. The Commissioner considered that it was evident from the

material on the agency's FOI file that the agency had conducted extensive inquiries and searches for documents within the scope of the complainant's access application, and that, had the agency provided those details to the complainant, the complainant would have had a better understanding of why the agency concluded that further documents did not exist and may have been less likely to apply for review of the agency's decisions.

The complainant did not accept the Commissioner's preliminary view and provided further submissions. As a result, additional inquiries were made with the agency and the agency was requested to conduct further searches using a particular search term. Those searches did not locate any additional documents within the scope of the complainant's access application. Having regard to the searches undertaken by the agency, the Commissioner was satisfied that the agency had taken all reasonable steps to locate documents within the scope of the complainant's access application.

After considering all of the information before her, including the complainant's further submissions and the further information provided by the agency, the Commissioner was not dissuaded from her preliminary view.

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