

Decision D0092023 – Published in note form only

Re McLerie and City of Melville [2023] WAICmr 9

Date of Decision: 30 June 2023

Freedom of Information Act 1992 (WA): section 26

In February 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 15 categories of documents relating to what he described as an order made by the agency in 2016 relating to his property.

The agency did not give the complainant a notice of decision within the period prescribed in the FOI Act. As a result, under section 13(2) of the FOI Act, the agency was deemed to have given the complainant a decision to refuse him access to the requested documents.

The complainant sought internal review of the agency's deemed refusal of access but 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 deemed decision to refuse the complainant access to the requested documents.

On 15 April 2019, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's deemed refusal of access.

On 17 April 2019, the agency advised the complainant that it had identified 108 pages within the scope of his access application. The agency gave the complainant access to 102 of those pages, either in full or in part, and refused him access to six pages under clause 7(1) of Schedule 1 to the FOI Act.

The complainant subsequently confirmed that he sought external review of the agency's decision on the basis that he claimed that additional documents exist within the scope of his access application. That is, in effect, a claim that the agency has refused the complainant access to documents 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, 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.

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 advised that it had undertaken searches in its email records; correspondence; building forms; and plans and drawings. The agency made inquiries with its building and planning departments and advice was received that those departments had provided all documents in response to this FOI request.

During the external review, the agency advised 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 processes. However, the complainant maintained his claim that further documents should exist or, alternatively, that the agency has 'failed to properly record...its activities in compliance with the State Records Act'.

The Commissioner accepted that deficiencies in the agency's past record keeping practices have likely contributed to the agency's inability to identify or locate further documents within the broad scope of the complainant's access application in this matter. The Commissioner observed that good record-keeping underpins the right of access to documents under the FOI Act. However, the Commissioner noted that it is not her role to examine in detail an agency's record-keeping practices, but rather to ensure that agencies are aware of their responsibilities under the FOI Act.

Having regard to all of the material before her including the complainant's further submissions, the agency's submissions and searches undertaken, the documents identified by the agency in response to this access application and all of the documents that the complainant had been given access to, the Commissioner was not persuaded that there were reasonable grounds to believe that additional documents within the scope of the complainant's access application exist. Further, the Commissioner was satisfied that the agency had taken all reasonable steps in the circumstances to locate documents within the scope 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.