

Decision D0112014 – Published in note form only

Re Mine Site Construction Services and City of Rockingham [2014] WAICmr 11

Date of Decision: 5 June 2014

Freedom of Information Act 1992: section 26

On 24 May 2013, Mine Site Construction Services (**the complainant**) applied to the City of Rockingham (**the agency**) under the *Freedom of Information Act 1992* (**the FOI Act**) for access to documents relating to the awarding of a tender relating to the Mundijong Road Extension.

The agency released in full certain documents it identified as coming within the scope of the complainant's access application and refused access in full to other documents. On internal review, the agency confirmed its original decision. On 28 August 2013, the complainant applied to the Information Commissioner for external review of the agency's decision, claiming that additional documents existed within the scope of its access application.

Following receipt of the complaint, the Commissioner obtained a complete copy of the FOI file maintained by the agency in relation to the complainant's access application. In addition, the Commissioner obtained copies of the documents identified by the agency as coming within the scope of the complainant's access application.

The Commissioner required the parties to attend a compulsory conciliation conference in this matter pursuant to sections 70 and 71 of the FOI Act. The conciliation conference was conducted by an officer nominated by the Commissioner as a conciliator under section 71(3) of the FOI Act. Although the parties did not agree to a resolution of the complaint at the conciliation conference, the agency agreed to conduct further searches for additional documents falling within the scope of the access application, particularly documents that recorded deliberations of the Tender Assessment Panel.

As a result, the agency identified and located a significant number of additional documents which were released to the complainant. The additional documents included the individual assessment notes of the panel members and the panel Decision Assessment Matrix. The agency also described in detail the process relating to its additional searches and inquiries for further documents.

After considering the additional documents and information provided to it by the agency, the complainant remained dissatisfied and maintained its claim that additional documents should exist.

Section 26 of the FOI Act provides that an agency may refuse access to a document if the agency is satisfied that all reasonable steps have been taken to locate the document, and the agency 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.

On 26 March 2014, after considering all of the information currently before the Commissioner, one of the Commissioner's officers wrote to the parties providing them with his preliminary view of the complaint. It was the officer's view that the agency's decision to, in effect, refuse access to additional documents under section 26 of the FOI Act was justified. That is, the officer was satisfied that after the additional searches had been completed, all reasonable steps had then been taken by the agency to locate the documents, and that any additional documents are either in the agency's possession but cannot be found or do not exist. The complainant was invited to withdraw its complaint or to provide the Commissioner with further submissions relevant to the matter for the Commissioner's determination. The complainant did not accept the officer's preliminary view and made further submissions.

The complainant repeated earlier submissions that additional documents should exist which detail the basis for the decision made by the tender panel to award the tender to a particular contractor. However, the complainant did not provide any new and relevant submissions in support of that claim.

The A/Commissioner reviewed all of the material before her, including the additional documents and information given to the complainant as a result of the conciliation conference. The A/Commissioner also considered the submissions of the complainant, but was not dissuaded from the preliminary view. Accordingly, the A/Commissioner confirmed the agency's decision to refuse access to documents under section 26 of the FOI Act on the basis that those documents either cannot be found or do not exist.