OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2011013 Decision Ref: D0122012

Participants:

Ian Leslie Veale
Complainant

- and -

City of Swan
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to residential land – scope of the access application – terms of access application cannot be unilaterally extended at the stage of external review – section 26 – documents that do not exist or cannot be found – the searches made by the agency – whether all reasonable steps taken to locate documents.

Freedom of Information Act 1992: sections 26, 30(f) and 102(1)
Contaminated Sites Act 2003
Interpretation Act 1984: section 17
Freedom of Information Act 1982 (Cth)

Re Leighton and Shire of Kalamunda [2008] WAICmr 52
Re Anti-Fluoridation Association of Victoria and Secretary to Department of Health (1985) 8 ALD 163
Re Doohan and Western Australia Police Force [1994] WAICmr 13
Chu v Telstra Corporation Ltd [2005] FCA 1730
Re MacTiernan and Minister for Regional Development [2009] WAICmr 29
Re Boland and the City of Melville [1996] WAICmr 53

DECISION

The agency's decision made under s.26 of the FOI Act is confirmed. I find that the agency has taken all reasonable steps to locate the requested documents and that those documents either cannot be found or do not exist.

Sven Bluemmel
INFORMATION COMMISSIONER

9 May 2012

REASONS FOR DECISION

1. This complaint arises from a decision made by the City of Swan ('the agency') to refuse Mr Ian Veale ('the complainant') access to documents under the *Freedom of Information Act 1992* ('the FOI Act') on the ground that all reasonable steps had been taken to locate them but that those documents either could not be found or do not exist pursuant to section 26 of the FOI Act.

BACKGROUND

2. The former West Midland tip site in Ray Marshall Park ('the former tip-site'), now known as Woodbridge Riverside Park, accepted a range of wastes from local authorities from the 1960s to the 1980s, when it was closed and restored.

3. In 2006, the agency evaluated the suitability of integrating the former tip-site into the proposed Swan Regional Riverside Park as part of plans to transform the area. Following certain investigations, the agency discovered the potential presence of landfill material on properties along Harper Street and Bayley Street, Woodbridge, which border the former tip-site.

4. As a result, in 2007 a number of those properties were reported to the Department of Environment and Conservation as known or suspected contaminated sites under the *Contaminated Sites Act 2003* ('the CSA'). Residents and owners of those properties were advised that their sites would be classified under the CSA and notice given of the classification.

5. The complainant is a co-owner of 20 Bayley Street, Woodbridge (Lot 5 on Plan 26078 as shown on certificate of title 2507/745) ('the Land'), one of the sites reported for classification under the CSA. The whole of Lot 33 and portions of Lot 80 were incorporated into Lot 5 in September 2001 as part of a subdivision. The adjoining property to the Land is 22 Bayley Street (Lot 34, formerly known as Lot 80).

6. By letter dated 19 August 2010, the complainant wrote to Mr Scott Hollingworth, Executive Manager, Planning and Development of the agency with respect to a discussion he had with the agency concerning matters relating to the Land ('the August Letter'). The August Letter reads as follows:

> *"Dear Mr Hollingworth*
>
> ***PORTION OF 20 BAYLEY STREET, WOODBRIDGE (LOT 5) – CONTAMINATED SITE CLASSIFICATION***
>
> *Thank you for the time provided to me on 10 August 2010 to discuss the three "challenge ahead" points "(i) to (iii)" raised by me in my letter of 1 July, 2010...*
>
> *In respect of point '(ii)' of the above (Contaminated Site Classification), you mentioned that Council has within its records letters of consent of owners of the land within Lot 5 (previously Lots 33 and 80) that provided the City of Swan with the right to deposit landfill refuse from its former*

tip-site within the low AHD [Australian Height Datum] *areas (ie. AHD levels below 5.5 metres) of these Lots situated along the periphery boundary of Lots 33 and 80 and Ray Marshall Park land contained within Lot 98 (previously Lot 182) then owned by the City of Swan.*

I have ascertained from Landgate that Lots 33 and 80 were previously owned by the following people between the following times from 1953 and 1983:

[The complainant then listed the names of previous owners of Lot 33 from 1945 to 1975 and thereafter, and Lot 80 from 1951 to 1985].

I would be grateful if you would kindly arrange for a copy of the letter, or letters of consent of any, or, all of the above owners of the above Lots that you referred to at our meeting, to be sent to me care of the email address...

Alternatively, I would be happy to collect from the City of Swan's administration office, the copy of the letter, or, letters of consent."

7. In the August Letter, the complainant specifically requests a number of times for *"a copy of the letter, or letters of consent"* from any owners of the land within Lot 5 (formerly Lots 33 and Lots 80) that provided the agency with the right to deposit landfill refuse from its former tip-site along the boundary of the Land.

8. As he did not receive the documents sought in his August Letter, the complainant applied to the agency on 3 September 2010 under the FOI Act for access to certain documents relating to the Land. In particular, the complainant sought access to copies of:

> *"1. ... those documents referred to in* [the August Letter]. ***(SEE ATTACHMENT "C" A COPY OF*** [the August] ***LETTER*** (complainant's emphasis).
>
> *2 ... any correspondence in respect of Lot 80 between 1955 and 1973, and in respect of Lot 33 between 1961 and 1987, between the Shire of Swan (now the City of Swan) and any government body, or bodies and/or authorities in respect of:*
>
> *(a) the depositing of landfill rubbish material (the "rubbish"); and*
>
> *(b) rubbish adjoining the boundaries of Lot 80 and Lot 33 and Ray Marshall Park; and*
>
> *(c) alterations to ground levels within Lot 80 and Lot 33 as a result of the depositing of this rubbish."*

Items 1 and 2 together are the requested documents in this matter.

9. The complainant also set out the reasons for his request as follows:

> ***"Reasons for Request***
>
> *The request for documents in respect of the rubbish is based upon and relies upon aerial photographic evidence of the area carried out yearly between 1953 and 1987 and photographic evidence of more recent excavations carried out within Lots 80 and 33.*
>
> *As one of the two owners of 20 Bayley Street, Woodbridge, (Lot 5), the Applicant is directly affected by the existence, or otherwise of the alleged 'letters of consent' of previous owners of Lots 80 and 33 and requires a copy of such letters to assist:*
>
> *(i) The Applicant in establishing Lot 5 owners' legal position and obligations in respect of any past agreement, or, agreements provided to Shire of Swan (now City of Swan) in respect of items "1" and "2" of this application (above) that were entered into and/or currently exist in respect of land contained within Lot 5 (previously Lots 80 and 33) and not noted on Certificates of Title; and*
>
> *(ii) with on-going discussions with local and State government bodies, and others, including the City of Swan, in respect of legislation, past and present, directly affecting Lot 5, in respect of the rubbish."*

10. The complainant paid the $30 application fee payable under the FOI Act for non-personal information.

11. On 13 September 2010, the agency acknowledged receipt of the complainant's access application and said:

> *"I hereby confirm you are requesting the City of Swan provide copies of*
>
> *1. Letters of consent of the owners of the land within Lot 5 (previously Lots 33 and 80) that provided the City of Swan with the right to deposit landfill refuse from its former tip-site.*
>
> *2. Any correspondence in respect of Lot 80 between 1955 and 1973, and in respect of Lot 33 between 1961 and 1987, between the Shire of Swan and any government body or bodies and/or authorities in respect of:*
>
> *a) The depositing of landfill rubbish material; and*
> *b) Rubbish adjoining the boundaries of Lot 80 and Lot 33 and Ray Marshall Park; and*
> *c) Alterations to ground levels within Lot 80 and Lot 33 as a result of the depositing of this rubbish..."*

The agency advised the complainant, among other things, that it had 45 days in which to process his application and provide him with a notice of decision.

12. By notice of decision dated 13 October 2010, the agency set out the scope of the application in identical terms to that in paragraph 10 and advised the complainant as follows:

> *"An extensive search of the City's records discovered few documents relevant to the scope of your application. In regards to item 1 of your application I advise that I can find no physical record from owners of land within Lot 5 (previously Lots 33 and 80) consenting to the deposit of landfill by the City. Records do indicate however that the City had every intention of gaining abutting landowners consent prior to depositing fill on their properties and particular item numbers mentioned below insinuate that the City had* [the] *landowner*[s] *permission to deposit on their properties.*
> ...
> *As such after an extensive and exhaustive search and with regard to the above I advise that under section 26(1)(a)(b)(i) of the* Freedom of Information Act 1992 *you are hereby notified that the City has taken all reasonable steps to find the documents in question and is satisfied that the documents relating to item 1 of your application are within the City's possession but cannot be found."*

13. With respect to item 2 of his access application, the agency gave the complainant access to 11 documents, some in full and some in edited form. Those 11 documents are not in dispute in this complaint. The agency advised that, although some of those 11 documents did not fall within the scope of the complainant's application, they were provided to assist him as they appeared to be relevant to his application.

14. On 12 November 2010, the complainant applied for internal review of the agency's decision setting out why he considered that further documents should exist. On 19 November 2010, the agency confirmed its decision on internal review advising, among other things, that it was unable to locate any further relevant documents. Thereafter, on 15 January 2011, the complainant applied to me for external review of the agency's decision and requested that I *"make an order to the City"* in respect of various matters.

REVIEW BY THE INFORMATION COMMISSIONER

15. Following my receipt of the complainant's application for external review, the agency produced to me the original of its FOI file maintained in respect of his access application.

16. On 19 January 2011, I advised the complainant that I did not have the power to make the orders that he had requested and confirmed that this external review was limited to a review of the agency's decision under s.26 of the FOI Act. I also advised the complainant that, based on the information before me, it appeared to me that the agency had taken reasonable steps to locate the requested documents. I asked the complainant to explain why he considered that the steps taken by the agency were not reasonable in the circumstances of this case.

17. By letter dated 3 February 2011, the complainant responded with detailed submissions in support of his claim that further documents should exist and why he considered that the agency had not taken reasonable steps to find such documents. To illustrate why he considered the searches conducted in dealing with his access application were not reasonable in the circumstances, the complainant carried out a search of the agency's minute books held at the State Library. The complainant advised that he had located six relevant documents contained within those minutes, which I have listed as follows ('Documents 1-6'):

    1. Rubbish Site Committee of 2 April 1973 – resolution adopted 9 April 1973.
    2. Health and Building Committee ('HBC') minutes of 7 May 1973.
    3. Works and Gardens Committee minutes of 26 June 1973.
    4. HBC minutes of 6 August 1973 – report of Senior Health Surveyor at page 36.
    5. Health Department – report of Chief Health Surveyor signed 8 August 1973, which refers to a letter dated 1 May 1973 sent from the agency to the City of Perth, and a subsequent letter (date unknown) sent from the City of Perth to the agency in response, regarding the management of the West Midland Tip.
    6. HBC minutes of 27 August 1973 – recommendation, which refers to a Chief Health Surveyor's report recommending that a contract be drawn up and signed by both the Perth City Council and the agency to define all conditions and responsibilities of both parties regarding the West Midland Refuse Site.

18. The complainant submitted that Documents 1-6 are a strong indication that, at least in relation to the agency's Council and committee minutes, the agency had not taken reasonable steps to find all relevant documents relating to his request. The complainant then listed the following nine categories of documents ('Categories 1-9') which he claims the agency had not located:

    1. *"*[C]*opies from the* [agency's] *Ordinary Council Meeting and Committee Minutes from 2 April, 1973, to 27 August, 1973;* [Documents 1-6]*; and from 27 August, 1973 and thereafter; copy of all sections of Minutes dealing with the* [agency's] *resolution to approve filling the rear portion of the owners' land abutting Ray Marshall Park."*

    2. *"Copy of the Engineer's Plan incorporating the Lot 33 and Lot 80 area (referred to in item 6, document 24 of 2 July, 1973)."*

    3. *"Copy of the officer's recommendation (referred to in item 6, document 24, 3 July, 1973)."*

    4. *"Copy of any and all correspondence between* [the agency] *and the HBC and Health Department regarding its instructions to contact owners; (Lot 33)... and (Lot 80)...*[owners] *and any and all correspondence between the HBC and these owners and any and all file notes of the HBC regarding the instructions received, or, conversations had by the Chief Health*

Surveyor... or, any other HBC officer to support the statement in the Health Department report of 8 August, 1973 (2) West Midland Tip [see Document 5] *in regards to* [the owners of Lots 33 and 80] *that:*

... Permission has been obtained from the owners of adjoining lots to fill the properties to a predetermined level."

5. *"Copy of any document evidencing an owner's admission, request, or, signed consent agreement between* [the agency] *and/or the HBC and the various owners of Lot 33 and 80 (see chart below), during the operation of the tip, regarding agreement to fill the rear portion of their Lots to a predetermined final level."* The complainant included a chart with the names of former owners of Lot 33 and Lot 80.

6. *"Copy of the* [agency's] *and Perth City Council contract (referred to in the HBC Minutes of 27 August, 1973, item 2 at page 15 regarding West Midland Tip Site* [see Document 6]*)."*

7. *"Copy of any additional, supporting documents (other than the HBC Chief Surveyor's Report of 8 August, 1973* [see Document 5]*) that verify the following statement made by the agency's CEO Mr* [name inserted]*, who was at the relevant time the Deputy Shire Engineer (referred to in item 12, 6 February, 1989):*

> *The council may have deposited refuse on the properties [i.e. Lot 34 20 Bayley Street] as part of the tipping carried out at the West Midland tip-site. At that time Council had the permission of the owners to undertake this work."*

8. *"Copy of any and all documents that support the following* [agency's] *statement in the Minutes of the Ordinary Meeting of Council 2.2 Former West Midland Tip-site – Outcomes of landfill investigations 21 May, 2008 (at page 4):*

> *Further it is known that fill material exists on the rear of numerous properties bordering the park along Harper/Bayley Streets. The material was brought onto the properties at either the owners request or consent."*

9. *"Copy of any document in support of the CEO's following public statement of 1 May, 2009: (ATTACHED)*

> *In addition, it is known that at least some properties in the past have brought fill material onto the rear of residential properties bordering the park, to assist in raising or levelling sites. Whilst this material should ordinarily be clean fill, there is always the risk that the material may contain some organic matter which can also generate localised gas emissions. Some properties are already known to have removed fill during construction of the properties, therefore this should not be an issue for these properties."*

19. By letter dated 30 November 2011, my Legal Officer wrote to the complainant requesting, among other things, clarification of the scope of his complaint on external review. On 2 December 2011, the complainant telephoned my Legal Officer confirming that the scope of his complaint related to the two items requested in his access application, that is, items 1 and 2 in paragraph 11, above. My Legal Officer confirmed this communication by letter to the complainant dated 5 December 2011.

20. Although the agency's notice of decision identified the specific hardcopy files in which it had located documents, it did not describe in any detail the searches undertaken to locate the requested documents nor were those searches set out in the agency's FOI file. Accordingly, on 5 December 2011, my Legal Officer obtained further details from the agency about the searches and inquiries made in dealing with the complainant's application.

21. On 12 December 2011, my Legal Officer made further inquiries with the agency and, on 19 December 2011, attended at its office to clarify the information provided. The agency provided additional information on 20 and 21 December 2011. The agency also conducted further searches suggested by my officer and confirmed, on 9 January 2012, that it had been unable to locate additional documents within the scope of the complainant's access application.

22. On 1 February 2012, after considering the material then before me, I informed the complainant and the agency in writing of my preliminary view of the complaint and my reasons. It was my preliminary view that Documents 1-6 and Categories 1-9 were outside the scope of the access application. It was also my preliminary view that the agency's decision to refuse access to the requested documents under s.26 of the FOI Act was justified and I did not require the agency to conduct any further searches at that time.

23. In light of my preliminary view, the complainant was invited to withdraw his complaint or provide me with further submissions relevant to the matter for my determination by 17 February 2012.

24. On 15 February 2012, the complainant sought, and was granted, an extension of time to 5 March 2012 in which to make submissions. On 2 March 2012, the complainant sought a further extension of time and subsequently, by letter dated 19 March 2012, the complainant provided me with further submissions in response to my preliminary view.

Form of notices of decision

25. Section 102(1) of the FOI Act provides that the onus is on the agency to establish that its decision is justified or that a decision adverse to another party should be made. In the present case, it was up to the agency to demonstrate that it had established the requirements of s.26 by showing that it had taken all reasonable steps to find the requested documents.

26. If an agency decides to refuse access to a document, s.30(f) of the FOI Act provides that the agency must include the following details in its notice of decision:

- the reasons for the refusal;
- the findings on any material questions of fact underlying those reasons; and
- reference or references to the material on which those findings are based.

27. Whilst the agency's notices of decision made some attempt to comply with s.30(f) of the FOI Act by providing reasons for the refusal and identifying the hardcopy files from which relevant documents were located, it did not contain the findings on the material questions of fact underlying the decision to refuse access. Neither notice refers to the material on which the agency's findings were based, as required by s.30(f). It is not sufficient compliance with s.30 solely to state, as here, that extensive searches were conducted, without detailed information as to the searches and inquiries made. Apart from specifying the files from which documents were located, the notices of decision did not identify the specific locations searched; the kind of searches or inquiries conducted (manual or electronic); or the keywords used to conduct electronic searches.

28. The obligation to provide applicants with notices of decision that contain all of the information prescribed by s.30 is intended to ensure that the true basis of a decision is clearly explained to the applicant. An applicant is entitled to reasons for the agency's decision. The agency's obligations are clearly set out in s.30(f).

THE REQUESTED DOCUMENTS

29. The requested documents are the documents sought in the complainant's access application dated 3 September 2010 ('the Application').

SCOPE OF THE APPLICATION

30. On 19 March 2012, in response to my preliminary view, the complainant submits, for the first time, that the scope of his Application was interpreted too narrowly by the agency. The complainant further submits that *"the Commissioner has, in part, erroneously, formed his finding from the misquoted item 1 Agency Statement that this incorrect premise formed the basis of his decision rather than upon the correct but broader statement in the Applicant's original application"*. In that regard, the complainant makes a number of submissions, which I have set out below.

The complainant's view of the scope of the Application

31. The complainant submits that the scope of the Application is much broader than interpreted by me and the agency and says that the original words of the Application are set out as follows:

> *"**Item 1***
>
> *The Applicant requests those documents referred to in* [the August Letter]. *(SEE ATTACHMENT "C" A COPY OF* [the August] *LETTER)*. ['Item 1 documents'].

Item 2

The Applicant further requests any correspondence in respect of Lot 80 between 1955 and 1973, and in respect of Lot 33 between 1961 and 1987, between the Shire of Swan (now the City of Swan) and any government body, or bodies and/or authorities in respect of:

(a) the depositing of landfill rubbish material (the "rubbish"); and

(b) rubbish adjoining the boundaries of Lot 80 and Lot 33 and Ray Marshall Park; and

(c) alterations to ground levels within Lot 80 and Lot 33 as a result of the depositing of this rubbish." [together, the 'Item 2 documents'].

32. The complainant contends that his request for Item 1 documents refers to the August Letter, which in turn refers to a letter dated 1 July 2010 ('the July Letter'). The August Letter is set out in paragraph 6 of this decision. I note, however, that the July Letter was not attached to the Application. The complainant says that the July Letter contained the following statement:

> *"**i. Contaminated Site Classifications***
>
> *Now that Classifications are to be issued to affected landowners, clarification is necessary as to who is legally responsible for the landfill contamination deposited by the City (then the Shire of Swan) within the Bayley Street and Harper Street residential Lots that back onto* [Ray Marshall Park]*."*

33. Therefore the complainant submits that the request for Item 1 documents in the Application is not limited only to 'letters of consent', but includes any *"connecting documents"* that show that the agency had the legal right to deposit infill refuse on Lots 33 and 80.

34. The complainant submits that having regard to both the August Letter and the July Letter, the plain meaning of the words used in the Application with regard to Item 1 are:

> *"all the words... used by the Applicant in its August and attached 1 July, 2010, letters to the City that refers to under (ii) CSA classification over lots 33 and 80 and the clarification as to who is responsible legally for the landfill contamination from landfill deposited by the City within the residential Bayley Street lots that back onto* [Ray Marshall Park]*."*

35. The complainant considers that the plain meaning of the words used in the request for Item 2 documents in the Application is:

> *"Item 2 - any correspondence involving the words:*
>
> *(a) 'depositing'*

(b) 'adjoining'
(c) 'alteration of land'

within Lots 33 and 80 contained within official Council records."

36. The complainant submits that the purpose of the Application, and what was required to be searched for, was made quite clear to the agency in the Application under the heading 'Reasons for Request' at points (i), (ii) and (iii). The complainant submits that those reasons make it clear that he was requesting access to any documents to establish who is legally responsible to remove the refuse. The 'Reasons for Request' are set out in full in paragraph 9 of this decision but, in fact, contain only points (i) and (ii).

37. The complainant further contends that his interpretation of Items 1 and 2 include anything to do with:

- *"inspection of site by Council officers*
- *discussions with landowners about power to access the property*
- *the then City's correspondence with the Swan Trust, Water Corporation, the parties responsible for the supervision and/or approving the fill within floodway/flood fringe and to approved levels*
- *type of fill that was acceptable*
- *correspondence relating to the purported agreement and any modifications thereafter*
- *revegetation of area following filling*
- *construction of joint boundary fence etc".*

38. The complainant submits that he is prevented from identifying documents regarding *"the right to deposit landfill refuse"* because he does not have access to all of the agency's Committee resolutions, minutes, recommendations and reports dealing with that subject matter.

39. The complainant requests that I reconsider my view and have the agency conduct further searches, based on his interpretation of the scope of the Application, for the following documents:

- The agency's Council and other committee minutes, particularly, from 1974-1984 relating to the subject matter of Items 1 and 2 of his Application. The complainant accepts that the State Records Office ('the SRO') holds the agency's Council and committee minutes dated prior to 1974 and therefore does not seek those minutes but submits that from 1974 onwards those minutes are held by the agency and are, thus, not publicly accessible.

- The agendas that would normally be attached to the agency's Council and other committee minutes from 1953-1984, as none of the agendas for that period are held by the SRO and are therefore not accessible to him.

- Documents 5 and 6 (as described in paragraph 17 of this decision), *"in particular the documents regarding:*

    - *the Chief Health Surveyor/Surveyor...of 8 August, 1973, specifically the contract containing the conditions and responsibilities of both the City of Perth and City of Swan (its predecessor) in the City of Swan/City of Perth Agreement regarding the control of the West Midland tip site.*

    - *The statement that all work on the tip site be carried out to the satisfaction of the Health Inspector Surveyor of the City of Swan."*

- With respect to the documents in Categories 1-9 (as described in paragraph 18 of this decision), the complainant only seeks those after 1973 that the SRO does not have but the agency does.

Consideration

40. In my view, the scope of the Application is set out in the complainant's access application in paragraph 8 above. As noted, the August Letter attached to the Application is set out in paragraph 6 but the July Letter was never attached to the Application.

41. I consider that it was reasonable for the agency to interpret the scope of this matter as it did, for the following reasons:

    - In the August Letter, the complainant specifically requests, at least three times, for *"a copy of the letter, or letters of consent."*

    - Nowhere else in the August Letter did the complainant request a copy of any other document(s) to be sent, collected or provided to him.

    - The statement which the complainant quoted from the July Letter did not specifically request any documents. I consider the reference to the July Letter in the first and second paragraphs of the August Letter was simply to provide context and background information. In my view, it is not reasonable to expect the agency to take into consideration the contents of a letter that was never provided to it as part of the Application.

    - I do not accept the complainant's submissions that the reasons in the Application clearly indicate the additional documents he now seeks. The 'Reasons for Request' made no request for documents other than the letters of consent from the previous owners of Lots 80 and 33.

    - At no stage did the complainant correct the agency's interpretation of the scope of the Application, despite the agency confirming its understanding of the request on 13 September 2010 and on 13 October 2010 and despite my Legal Officer confirming the scope again on 30 November 2011 and 5 December 2011. On none of those occasions did the complainant raise concerns about the interpretation of the scope of his Application.

- The request in Item 2 of the Application is prefaced with the words *"any correspondence"*. Accordingly, to fall within the scope of Item 2, the document must firstly be 'correspondence'. I do not consider that Item 2 includes anything other than correspondence. It is then followed by the words *"in respect of Lot 80 between 1955 and 1973, and in respect of Lot 33 between 1961 and 1987"* and *"between the Shire of Swan (now City of Swan) and any government body, or bodies and/or authorities"*. Therefore, on the plain words of the Application, the correspondence must also be between the agency and any government agency and also relate to Lot 33 (between the period of 1961 and 1987) or Lot 80 (between 1955 and 1973) in respect of (a), (b) and (c) as stated in the Application.

- I acknowledge the request in Item 2 of the Application uses the words 'any', 'depositing', 'adjoining' and 'alterations' of land. However, I do not accept the complainant's interpretation of Item 2, as noted above. I do not consider that there is any basis for the view that by isolating particular words or phrases the word 'correspondence' can be read to mean the more general term 'official Council records'.

42. In light of the above, I consider that it was reasonable for the agency to interpret the scope of Item 1 of the Application as limited to *"any letters of consent"* from any owners of the land within Lot 5 (formerly Lots 33 and Lots 80) that provided the agency with the right to deposit landfill refuse from its former tip-site. I do not consider that the scope can be extended to include any *"connecting documents"* that evidence the legality of the agency's right to deposit the refuse or any other document that are not letters of consent.

43. Nor do I consider that the scope of Item 2 was too narrowly interpreted; the agency simply dealt with what was requested in the Application. The wording of Item 2 in the Application is for any correspondence on (a), (b) and (c), between the agency and any government agency, concerning Lot 33 (between the period of 1961 and 1987) or Lot 80 (between 1955 and 1973). The request for the particular correspondence is very specific.

44. In my view, the Application does not include within its scope Council and committee minutes, agendas, Documents 1-6 or Categories 1-9 but is limited to the documents in Items 1 and 2. Documents 1-6 are either copies of a Committee resolution, minutes, recommendations, or report. They are neither 'letters of consent' (Item 1 documents) nor 'correspondence' (Item 2 documents). Categories 1-9 are either a variation of the complainant's requests for the Item 1 and Item 2 documents (rather than identifying additional documents that falls within the scope which the agency has not located), or are otherwise new requests for additional documents which are not within the scope of the Application.

45. I accept the complainant may have intended to include more than was requested. However, an agency in receipt of an access application is entitled to rely on the plain meaning of the words used in that application and it would not be feasible to administer the FOI Act based on what applicants intended to request but did

not request. An applicant cannot unilaterally extend the terms of an FOI access application at the stage of external review: see *Re Leighton and Shire of Kalamunda* [2008] WAICmr 52 at [27]. To do so would undermine the effective operation of the FOI Act.

46. Accordingly, from my review of all the material before me, I do not consider that the additional documents that the complainant seeks come within the scope of the Application and I have not dealt with that aspect of this complaint further.

SECTION 26 – DOCUMENTS THAT CANNOT BE FOUND OR DO NOT EXIST

47. The complainant claims that not all documents within the scope of the Application were identified and that additional documents should exist.

48. Section 26(1) of the FOI Act deals with an agency's obligations when it is unable to locate documents sought by an access applicant or when those documents do not exist. Section 26 provides:

> *"(1) The agency may advise the applicant, by written notice, that it is not possible to give access to a document if –*
>
> *(a) all reasonable steps have been taken to find the document; and*
>
> *(b) the agency is satisfied that the document –*
>
> *(i) is in the agency's possession but cannot be found; or*
>
> *(ii) does not exist.*
>
> *(2) For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a decision to refuse access to the document, and on a review or appeal under Part 4 the agency may be required to conduct further searches for the document."*

49. In its notice of decision dated 13 October 2010, the agency refused access to further documents under s.26(1)(b)(i) of the FOI Act on the ground that, having taken all reasonable steps to locate those documents, those documents could not be found. As I understand it, the agency is satisfied that the Item 1 documents are or were within the agency's possession but cannot be found. However, on the information before me, it is unclear whether the agency claims that the Item 2 documents are or were within the agency's possession but now cannot be found or whether some of those documents do not exist.

50. When dealing with an agency's decision to refuse access to documents pursuant to s.26, the questions to be asked are whether there are there 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 the documents.

51. The adequacy of an agency's efforts to locate documents are to be judged by having regard to what was reasonable in the circumstances: see *Re Anti-Fluoridation Association of Victoria and Secretary to Department of Health* (1985) 8 ALD 163 and also *Re Leighton* at [85].

52. I do not consider that it is generally my function or that of my staff to physically search for documents on behalf of a complainant. Provided I am satisfied that the requested documents exist or should exist, I consider that my responsibility is to inquire into whether the agency has taken all reasonable steps to find the documents and, if necessary, to require the agency to conduct further searches.

The complainant's submissions

53. The complainant's detailed submissions are set out in his application to me seeking external review dated 15 January 2011 and his further letters to me dated 3 February 2011 and 19 March 2012. I have not included submissions in relation to documents that, in my view, are outside the scope of the Application.

54. Notwithstanding that I consider that Council and committee minutes and agendas are outside the scope of the Application, the complainant submits that minutes and agendas should nevertheless be searched by the agency for any references to Item 1 or Item 2 documents. In brief, the complainant submits as follows:

- *"*[T]*he agency in this particular case cannot have an each way bet. It must.... continue to search until it categorically determines which of the two section 26 situations exist..."*. That is, it must determine whether the requested documents exist but cannot be found (which must be proven by related correspondence) or whether the requested documents do not exist.

- The agency made a statement in 2010 that *"consent was given by landowners to deposit rubbish on residential zoned land."* To date, the agency has been unable to find any signed agreement or documents to support that statement. The complainant's request is simply to give the agency the opportunity to provide evidence that this statement is *"truthful and demonstrate this by providing a copy of: the said agreement* [and] *relevant connecting correspondence"*.

- Given that the agency has stated in a letter to him that it *"has letters of consent"*, the complainant believes that documents could easily be identified and located by staff of the agency if it kept a proper, organised filing system that contained records of agreements (verbal or otherwise); letters written; and officers' file notes, supporting staff recommendations in respect of filling the rear portion of the Land.

- The fact that the agency admits that it is unable to produce Item 1 documents, yet states that it holds written agreements from the landowners of Lots 33 and 34 that provide the agency with the right to deposit landfill refuse, has resulted in an unjust outcome. This potentially places current and future owners of the Land in a severely disadvantaged redevelopment

and planning position in perpetuity. *"It is difficult to believe that the* [a]*gency, during the alleged comprehensive 200 volumes and electronic records search it claims to have undertaken... could submit it could not find one document that related to the agreement said by the* [agency] *to exist...".*

- Past actions of the agency have directly resulted in the recent registration of a memorial pursuant to the CSA, which places an encumbrance over the title of the Land creating severe financial implications for himself and any subsequent owners of the Land.

- The complainant submits that he located from the SRO and the State Library a wide range of documents referred to in the agency's minutes that related to the subject matter of the Application. The complainant submits that a *"discrepancy exists between the* [a]*gency's search methods that produced so little and the Applicant's methods that produced so much."*

- The agency should again search its Council and committee minutes, in particular those from 1974-1984 which are not publicly available at the SRO, because *"there is no conclusive evidence the City searched for and perused the contents of all the SRO records... nor the years for which the searches apply."* The complainant submits those minutes would contain *"debate in respect of agreement/s between resident/s and the* [agency]*... If discussions took place and if the said agreement was concluded as alleged, these concluded agreements should be recorded in the Council and other committee Minutes."*

- The agency should search – in respect of Lot 80 between 1955 and 1973, and in respect of Lot 33 between 1961 and 1987 – the *"voluminous Agenda material usually attached to the meetings called to ratify these Minutes where one would imagine ought still be retained within the* [agency's] *management system"*. It is relevant to search agendas because they *"contain copies of Minutes for correction and then ratification and also contain staff recommendation, reports and confidential items etc. that are not available to the public for inspection at the SRO, or, within the agency's records, only ratified Minutes. The agency made no assertions that Agendas together with attachments were searched, or, contain nothing."*

- There is no evidence that the agency searched any senior council staff members' names, which the complainant considers is the usual, critical source of document searching. The agency ought to conduct additional searches for *"the relevant periods under any of the names of any of the officers responsible at the time for the management of the Landfill site over the thirty years' of management (for example Health Inspector, engineer etc.)."* The complainant lists those names on page 45 of his submissions dated 19 March 2012.

- The complainant notes that the name "Woodbridge" did not apply to the locality until circa 2003. The tip site operated between circa 1967 and 1984 and was known during that time as "West Midland" (the relevant name). Therefore using the word "Woodbridge" to conduct searches would be unlikely to locate relevant documents. In conducting searches using the word "Woodbridge" rather than "West Midland", the agency may have missed relevant documents and that search *"ought not to be considered part of the 'reasonable steps taken'* [by the agency]*... as... they are superfluous to the request, taking time away from other, more relevant searches."*

- The complainant suggests that the search term "Sanitary Landfill Site" should have been used in conducting searches (as opposed to tip site, refuse site, sanitary site, landfill site) because the tip operation, at least in earlier years, was referred to in Committee records as "Sanitary Landfill Site", not the West Midland tip-site.

- The agency *"has adopted a "go through the motions, but give them nothing" approach"* to his request rather than a cooperative approach. It is more than likely that, based on what the complainant has discovered to date, the letters of consent or agreements from previous landowners which the complainant seeks, do not exist and the agency is required under ss.26 and 30 of the FOI Act to advise the him accordingly (and thereby confirm that the agency did not have any legal entitlement to dump refuse along the boundary to the Land).

Searches conducted by the agency

55. In correspondence to this office dated 5, 20 and 21 December 2011, 9 January 2012 and 4, 18 and 20 April 2012 the agency provided me with information about its record systems, details of the searches and inquiries made to locate the requested documents and the additional searches conducted during the course of this external review. I have summarised that information as follows:

    - The FOI Coordinator conducted manual (hard-copy) and electronic searches for the requested documents on the agency's two computer record-keeping systems. The older system is known as the 'legacy document system' ('the LDS'). The current system is known as ECM. The agency searched both systems.

    - The LDS holds a record of pre-2004 documents and their file location. Prior to 2004, documents were not scanned and saved electronically into a computer-system; accordingly, the LDS does not contain electronic copies of documents but keeps a record of where physical documents are located. The agency implemented the scanning of documents in stages during 2004. In order to locate the requested documents, the agency searched the LDS to identify the hard-copy files and their location. Those hard-copy files were retrieved from off-site storage and physically searched for any relevant pre-2004 documents. There are not too many ways of searching the LDS compared with ECM, the current system. The

easiest and most effective way is a keyword search over all fields and that was done in this case.

- Electronic searches were also conducted on ECM. ECM retains records from 2004 to the present. Current documents are scanned into that system. ECM also retains a record of the LDS which, as noted, is simply a list of pre-2004 documents and where they can be located. Documents are located on ECM by searching keywords in either the 'File Title' field or 'Document Description' field. A keyword search by 'File Title' will bring up files which contain those keywords in its title. A keyword search by 'Document Description' will bring up documents which contain those keywords in the document title used to save that document. There are many other ways of searching in ECM including by property, which also formed part of the search. However, the most effective means of locating documents for the 1950s-1980s is by a keyword search.

- The agency would not usually consider it worthwhile to conduct a search in the LDS or ECM by entering the names of previous owners of Lot 80 and Lot 33 as any correspondence or documents concerning those people and lots would be stored on the relevant property file. However, the agency did, in this case, enter all the names of those previous owners but identified no documents within the scope of the application, from those searches.

- The agency submits that searching by staff names is futile. Metadata from the LDS does not include officers' names and, therefore, it is not an available field for searching. Searching an officer's name in the description field would not return any results (except perhaps their personal Human Resources file). Since the requested documents were in relation to a reserve, park or property, it would have been inappropriate to create such a file under a staff member's name.

- For the relevant time period, there was no classification scheme (controlled language) to apply naming conventions to documents or files. Files were simply created according to the subject matter such as the name of the reserve or project. Since early 2000, the agency has used a list of controlled language for naming files as its classification scheme.

- There is a significant history with the relevant landfill site and the agency identified a number of files after entering keywords such as 'Midland Tip site' or 'Ray Marshall Park'. The following is a list of all the electronic searches of the complainant's property, adjoining properties, the landfill site and keyword searches that were conducted on the agency's electronic record-keeping systems and the physical files:

  001. Search term - 20 Bayley Street Woodbridge - hardcopy files and documents - relevant files searched A108510 / S109527 / DEV/2367 / DEV2368

002. Search term - Lot 5 Bayley Street Woodbridge - hardcopy files and documents - no relevant files due to date range of requested documents

003. Search term - Lot 80 Bayley Street Woodbridge - hardcopy files and documents - relevant files searched P108520 / S109527 / A108520

004. Search term - Lot 33 Bayley Street Woodbridge - hardcopy files and documents - relevant files searched A108510 / S109527

005-014. Search terms - [all the names of previous owners the complainant provided] - documents - no results

015. Search term - West Midland Tip - hardcopy files and documents - relevant files searched R108530 / R152210

016. Search term - West Midland Tip site - hardcopy files and documents - relevant file searched R152210

017. Search term - West Midland Refuse Site - hardcopy files and documents - relevant file searched CFF-2/4/5

018. Search term - West Midland Sanitary Site - hardcopy files and documents - no results

019. Search term - Sanitary Landfill Disposal Site - hardcopy files and documents - no results

020. Search term - Midland tip - hardcopy files and documents - relevant files searched R152210 / R108530

021. Search term - Ray Marshall Park - hardcopy files and documents - relevant files searched R108530 / R198527 / CFF-4/11/11 / SSP-24/1/22

022. Search term - Woodbridge Park - hardcopy files and documents - relevant files searched R108530 / R198527

023. Search term - Woodbridge Riverside Park - hardcopy files and documents - relevant files searched R198527 / R108530

024. Search term - West Midland Landfill - hardcopy files and documents - relevant files searched R108530

025. Search term - Midland Landfill - hardcopy files and documents - relevant files searched P108520 / R108530 / R152210

026. Search term - Landfill Site - hardcopy files and documents - relevant files searched R108530 / R152210 / R198257

027. Search term - Harper Park - hardcopy files and documents - relevant files searched R108530 / R198527

- Although many files were searched – including File A108510, which is the file for the complainant's property – only Files CFF-4/11/11, SSP-24/1/22 Volumes 1 & 2 and A108520 (which concern the complainant's property and the adjoining landfill site), as advised in the agency's notice of decision, contained the documents identified as falling within the scope of the Application:

    - File CFF-4/11/11 is entitled: Reserve - Ray Marshall Park West Midland. This property was a former landfill site and borders the complainant's property.

    - File SSP-24/1/22 Volumes 1 & 2 are entitled: Reserve - Marshall Park West Midland. This property was a former landfill site and borders the complainant's property.

    - File No A108520 is entitled: Lot 34 (22) Bayley St Midland (previously known as Lot 80 Bayley St Midland).

- The agency notes that the search terms it used: *"019. Search term – Sanitary Landfill Disposal Site"* and *"026. Search term – Landfill Site"* would cover the term 'Sanitary Landfill Site'. The agency advises that the field used to search electronic records is a substring search field. This means any files/documents with the words *"sanitary landfill site"* would be returned by searching the words *"sanitary landfill disposal site"* and would produce the same result. Similarly, searching using the term *"landfill site"* will return any records with those keywords, including records described as *"sanitary landfill site"*.

- With respect to the complainant's claim that its searches using the search term 'Woodbridge' and 'Woodbridge Riverside Park' were a waste of time, the agency submits that, even though the requested documents pre-date any renaming of the reserve, those terms were also searched in case files or documents relating to Ray Marshall Park (now Woodbridge Riverside Park) had been linked to those files.

- The agency disagrees with the complainant's submission that the agency may have missed relevant documents by conducting searches using the term 'Woodbridge' rather than 'West Midland' and says that it used the following search terms in conducting searches: *"015. Search term - West Midland Tip"*; *"016. Search term - West Midland Tip site"*; *"017. Search term - West Midland Refuse Site"*; *"018. Search term - West Midland Sanitary Site"*; *"020. Search term - Midland tip"*; *"024. Search term - West Midland Landfill"*; and *"025. Search term - Midland Landfill"*.

- The agency searched its Council minutes for 1955-1973 (for Lot 80) and 1961-1987 (for Lot 33) for any references to correspondence of the type requested in the Application, which equates to approximately 200 volumes which had to be physically searched. The committee minutes are included in the same minute books as the ordinary meetings of Council.

The agency also searched all committee meeting minutes for the relevant times, including the committees listed by the complainant. However, no further documents falling within the scope of the Application were found.

- The agency's minutes secretary advises that that there are no separate agendas for the periods requested by the complainant. At those times, the 'minutes' were basically a copy of the agenda with any Council resolutions and officers' reports included, which were all filed together. The agency's Council (and other local governments) only started maintaining separate agendas and minutes around 1990 at the direction of the Department for Local Government. Therefore, there are no separate agenda books held for the relevant dates.

- In order to assist the complainant, the agency gave him documents that it thought might be relevant even though they fell outside the scope of the Application. [I also note that, in connection with Document 5 (the Chief Health Surveyor's report of 8 August 1973), I asked the agency to conduct searches for two letters referred to in that document to check whether they were within scope. As a result, the agency's FOI Coordinator attended at the SRO in late December 2011 to try to locate the relevant file number for that report. He was able to locate the relevant minutes referring to the report but there was no reference to the file number, so unfortunately he was not able to follow this any further. The file reference of other minuted items relating to Ray Marshall Park from around the same time quoted File No 24/1/22 which relates to File No SSP-24/1/22. That file has previously been searched but no further documents were located.]

- The agency acknowledges that its records management from the 1950s to the 1980s – that is, the relevant time period for the documents sought in the complainant's Application – was not as reliable or stringent as its current system.

Consideration

56. The complainant submits that the agency *"cannot have an each way bet"* but is required to determine *"which of the two section 26 situations exist"*. That is, whether the requested documents exist but cannot be found or whether the requested documents do not exist.

57. In my opinion, section 26 requires an agency to be satisfied of the circumstances set out in s.26(1)(b)(i) or (ii). The use of the word 'or' in s.26(1)(b) is to be construed disjunctively: see s.17 of the *Interpretation Act 1984.* That is, that the requested documents are either in the agency's possession but cannot be found or do not exist. In cases where an agency is uncertain whether the situation is that it should hold but cannot find the document or the document does not exist, I consider that there is nothing to prevent it from citing both (i) or (ii) of s.26(1)(b) since the practical reality is that only one of those alternatives can apply.

58. As noted earlier, when dealing with an agency's decision to refuse access to documents pursuant to s.26, the questions to be asked are 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 the documents.

59. I have considered all of the information before me, including the information on the agency's FOI file; the agency's notices of decision; the documents that the agency previously released to the complainant; the information the agency provided to my office; the agency's searches and inquiries; and the complainant's detailed submissions.

60. On receipt of the complaint I considered that, on its face, it was reasonable to expect that the requested documents might exist and might be held by the agency, especially since the agency had referred to various consents. However, on the information now before me, there is no evidence that any additional documents that fall within the scope of Items 1 or 2 exist or, if they once existed, can now be found within the agency.

61. As outlined above, the agency has undertaken numerous and extensive searches in order to locate the requested documents. This included both electronic and manual searches of hard-copy files and physical searches of the agency's Council minutes, which I understand run into a large number of volumes. In the circumstances of this case, I consider it unreasonable to expect an agency to review all of its Council minutes for a thirty-year time period on the off-chance that they *may* contain some reference to documents which the complainant seeks. The purpose of the FOI Act is to assist the public to obtain access to documents; it does not require an agency to embark on an information-gathering exercise on behalf of a complainant.

62. In this case, the agency has acknowledged that its former record-keeping practices were not as stringent as its current practices. That situation would be similar for most agencies. Moreover, the FOI Act does not require agencies to guarantee that their record-keeping systems are infallible. In *Re Doohan and Western Australia Police Force* [1994] WAICmr 13 at [28], the former Commissioner recognised that documents may not be readily found for a number of reasons including misfiling; poor record keeping; ill-defined requests; proliferation of record systems; unclear policies or guidelines; inadequate training in record management; or simply that the documents do not exist. Nonetheless, the Federal Court in *Chu v Telstra Corporation Ltd* [2005] FCA 1730 has commented – in relation to the provision in the *Freedom of Information Act 1982 (Cth)* that corresponds to s.26 of the FOI Act – that the relevant provision is not meant *"to be a refuge for the disordered or disorganised."* However, I do not consider that to be an issue in this case.

63. Together with the lack of document classification conventions used for naming documents or files during that period, I accept that documents dating some thirty years ago cannot always be easily identified and located for the reasons the agency has explained.

64. In the present case, the 11 documents that were identified by the agency were located in its relevant property and reserve files. The agency gave the complainant access to those documents, including some that fell outside the scope of the Application. In my view, that does not support the complainant's submission that the agency adopted a "*go through the motions, but give them nothing*" approach rather than a cooperative approach. There is evidence the agency spent considerable time and effort in conducting its searches, including the additional inquiries made during this external review. In addition, although not required under the FOI Act to do so, the agency searched on a number of occasions for documents held by the SRO.

65. The extent to which an agency needs to look beyond the wording of an access application will depend on the particular circumstances. If, at any stage, it is apparent that other search terms would be relevant, it is incumbent upon agencies to use those terms for key word searches: see *Re MacTiernan and Minister for Regional Development* [2009] WAICmr 29 at [47]. In the present case, the agency's searches and inquiries did not indicate that other search terms might be relevant and I consider that the search terms it used were reasonable in the circumstances.

66. Other than the form of its notices of decision, there is nothing before me to suggest that the agency has acted other than in accordance with its obligations under the FOI Act in dealing with this matter.

67. Based on my review of all the material before me, I am satisfied that the agency has taken all reasonable steps to find the requested documents and that those documents either cannot be found or do not exist. I note that s.26 of the FOI Act requires an agency to take not 'all steps' but rather "*all reasonable steps*" to find documents: see *Re Boland and the City of Melville* [1996] WAICmr 53 at [27].

CONCLUSION

68. I find that the agency's decision to refuse access to the requested documents under s.26 of the FOI Act is justified.

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