

Decision D0132015 – Published in note form only

***Re Stuckey and City of Nedlands* [2015] WAICmr 13**

Date of Decision: 29 July 2015

Freedom of Information Act 1992: section 26

On 15 August 2014, Ms Bronwyn Stuckey (**the complainant**) applied to the City of Nedlands (**the agency**) under the *Freedom of Information Act 1992* (**the FOI Act**) for access to copies of documents relating to the requirement for development approval by the agency of expansions of telecommunications infrastructure. The documents sought included plans, drawings, proposals or submissions, made by the proponent or its subcontractors; decisions of the agency that planning approval was not required for the expansion; justification for such a decision; and representations made to the agency by members of the public.

By notice of decision dated 8 October 2014 the agency decided to give edited access to copies of 37 documents, refuse access to 24 documents on the grounds they are exempt under clause 7(1) of Schedule 1 to the FOI Act and refuse access to copies of all of the documents described as ‘... plans, drawings, proposals or submissions, made by the proponent or its contractors or subcontractors’ on the ground they are exempt under clause 4(2) of Schedule 1 to the FOI Act. The complainant applied for internal review of the agency’s decision on the grounds that further documents should exist and that the documents are not exempt under clause 4(2). On internal review the agency confirmed its decision.

The complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency’s decision. The Commissioner required the agency to conduct further searches for additional documents falling within the scope of the access application. As a result of these additional searches the agency identified additional documents, particularly in relation to the later expansion of the infrastructure, which were released to the complainant. The agency also withdrew its claims for exemption under clause 4(2) of Schedule 1 to the FOI Act and released these documents to the complainant.

The Commissioner required the agency to undertake further searches as a result of submissions made by the complainant, following her receipt of the additional documents. The agency subsequently advised that no additional documents had been identified and that it had provided copies of all documents it had previously identified to the complainant, other than those for which exemption under clause 7(1) had been claimed. The complainant remained dissatisfied and maintained her claim that additional documents should exist.

Section 26 of the FOI Act provides that an agency may refuse access to a document if it is satisfied that 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.

On 25 June 2015, after considering all of the information currently before him, the Commissioner wrote to the parties providing them with his preliminary view of the complaint. It was the Commissioner's preliminary 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 Commissioner 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 her complaint or to provide the Commissioner with further submissions relevant to the matter for the Commissioner's consideration.

The complainant did not accept the Commissioner's preliminary view and made further submissions. After considering the complainant's further submissions the Commissioner was not persuaded from his preliminary view. Accordingly, after considering all of the information before him, the 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.