

Decision D0132024 – Published in note form only

Re McLerie and City of Melville [2024] WAICmr 13

Date of Decision: 30 September 2024

Freedom of Information Act 1992 (WA): section 26

On 2 March 2022, 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 various documents relating to particular letters to him from the former Mayor.

By notice of decision dated 19 April 2022 (**initial decision**), the agency, in effect, refused the complainant access to the requested documents under section 26 of the FOI Act (**section 26**) on the ground they cannot be found or do not exist.

On 12 May 2022, the complainant applied for internal review of the initial decision.

By supplementary decision dated 16 May 2022, the agency gave the complainant access to edited copies of seven documents, claiming the deleted information was exempt under clause 3(1) of Schedule 1 to the FOI Act. However, as the agency did not give the complainant an internal review decision within the period prescribed in section 43(2) of the FOI Act, on 19 June 2022, the complainant applied to the Information Commissioner (**the Commissioner**) for external review, claiming that further documents existed within the scope of his access application.

Following receipt of the application for external review, the Commissioner obtained the agency's FOI file relating to the complainant's access application.

As the agency's FOI file provided limited evidence of the searches and inquiries it had conducted for the requested documents, one of the Commissioner's officers (**the officer**) obtained further information from the agency and required additional searches and inquiries to be made. Following those inquiries, further documents were located by the agency, which the agency subsequently provided to the complainant.

After considering the information before this office, on 17 July 2024, the officer provided the parties with their assessment of the matter. It was the officer's assessment that the Commissioner was likely to be of the view that the agency's decision to refuse the complainant access to further documents under section 26 was likely to be justified.

The complainant advised he did not accept the officer's assessment and made further submissions to the Commissioner.

The Acting Information Commissioner (**A/Commissioner**) reviewed all of the material before her, including the complainant's further submissions, and agreed with the officer's assessment.

Section 26 provides that an agency may refuse access to a document if the agency is satisfied that all reasonable steps have been taken to find 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 A/Commissioner acknowledged that when documents are located after further searches, it is understandable that an applicant may be skeptical about the adequacy of the agency's efforts to meet its obligations under the FOI Act in the first instance.

The A/Commissioner also observed that the terms in which an access application is framed set the parameters for an agency's response under Part 2 of the FOI Act and, in particular, set the direction of the agency's searches to locate all documents which may fall within the scope of the access application. To that end, section 12 of the FOI Act not only requires that an access application be in writing, but that it must also provide enough information to enable the requested documents to be identified: see *Re Guest and Main Roads Western Australia* [2009] WAICmr 24 at [20].

Having considered the terms of the complainant's access application, the searches and inquiries conducted by the agency, the documents located as a result of the agency's searches, the information provided by the agency and the complainant's further submissions, the A/Commissioner was not persuaded that there were reasonable grounds to believe that further documents exist or should exist within the scope of the access application.

The A/Commissioner noted that, even if she was persuaded that there were reasonable grounds to believe that further documents exist or should exist, she was satisfied, having regard to the terms of the access application and the searches and inquiries undertaken by the agency, that the agency has taken all reasonable steps in the circumstances to find documents within the scope of the access application and that further documents either cannot be found or do not exist.

Accordingly, the A/Commissioner confirmed the agency's decision to refuse access to documents under section 26 of the FOI Act.