

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: F2016327
Decision Ref: D0142017**

Participants:

Gavin Wells
Complainant

- and -

**Legal Profession Complaints
Committee**
Agency

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to an investigation of a complaint under the *Legal Profession Act 2008* – section 26 – documents that either cannot be found or do not exist.

Freedom of Information Act 1992 (WA): sections 4, 11, 26, 30, 40, 42, 76 and 102;

Freedom of Information Act 1982 (Cth): section 24A

State Records Act 2000 (WA): section 16

Chu v Telstra Corporation [2005] FCA 1730

Re Doohan and Police Force of Western Australia [1994] WAICmr 13

DECISION

The agency's decision is confirmed. I find that all reasonable steps have been taken by the agency to locate the requested documents and I am satisfied under section 26 of the FOI Act that further documents either cannot be found or do not exist. The agency's decision is justified.

Sven Bluemmel
INFORMATION COMMISSIONER

21 June 2017

REASONS FOR DECISION

1. This complaint arises from a decision made by the Legal Profession Complaints Committee (**the agency**) to refuse Mr Gavin Wells (**the complainant**) access to documents under the *Freedom of Information Act 1992* (WA) (**the FOI Act**).

BACKGROUND

2. On 12 September 2016 the complainant applied to the agency under the FOI Act for access to:

All documents in whatever format comprising, containing and/or noting:

- a) *Communication of my remarks directly or indirectly by the Committee to the Chief Justice;*
- b) *His direct or indirect initial response;*
- c) *All consequent direct and indirect communications between the Committee and the Chief Justice.*

3. For reasons that are unclear, the agency chose to paraphrase the scope of the complainant's access application and to deal with it in these terms:

Communications between the Honourable Wayne Martin AC, Chief Justice, Supreme Court of Western Australia and the Legal Profession Complaints Committee (LPCC) regarding your comments about the Chief Justice in your letter to the LPCC dated 29 December 2009 in the matter of Farrell (53/09 and S419/10).

4. There appears to have been no attempt by the agency to engage with the complainant, in order to clarify the scope of his access application, nor to discuss amending the scope, which it appears to have done unilaterally.
5. Section 4 of the FOI Act requires agencies to assist members of the public to obtain access to documents. Further, section 11(2) provides that, if the applicant's circumstances require it, an agency has to take reasonable steps to help a person to make an access application and subsection (3) states that the agency must take reasonable steps to help the applicant to change the application so that it complies with the requirements of section 12. It is sometimes the case that an applicant's scope may be too broad, or too imprecise, to enable the agency to deal with it. Such was not the case here. The original scope as provided by the complainant was clear, precise and to the point. In my view it was not necessary for the agency to change the scope without consulting the complainant, and by doing so, in my view the scope became less rather than more clear.
6. By notice of decision dated 5 October 2016, the agency decided to give the complainant access to two documents.
7. On 4 November 2016 the complainant applied for internal review of the agency's decision. By letter dated 22 November 2016 the agency confirmed its decision.

8. By letter dated 24 November 2016 the complainant applied to me for external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

9. Following my receipt of the complaint, the agency produced to me its FOI file maintained in respect of the complainant's access application.
10. My Principal Legal Officer (**PLO**) met with the agency's Law Complaints Officer on 23 February 2017 to discuss the agency's notices of decision, its record keeping plan and whether further documents within scope exist.
11. On 27 February 2017 my PLO wrote to the complainant to draw to his attention that the scope of his access application appeared to have been changed by the agency, to inquire whether this had been done following consultation with him or not, and to ask the complainant to confirm which of the two scope clauses was the correct one for the purpose of this external review.
12. The complainant responded by letter dated 28 February 2017 that the original scope as set out in his access application was the correct one. My consideration of this matter has proceeded on the basis that the original access application contains the correct scope clause, and it is with reference to that scope clause that I have determined the matter.
13. By letter dated 2 March 2017 my PLO asked the agency to conduct further searches based on the original scope, and to report back on progress by no later than 22 March 2017.
14. My PLO met with the complainant on 21 March 2017 to discuss the matter further, and to outline the external review process and the likely next steps in the process.
15. Under section 76(1)(b) of the FOI Act, I can decide any matter in relation to the access application that could, under this Act have been decided by the agency.
16. While the agency has not included in its decisions a reference to any sections of the FOI Act or its exemption clauses, I consider that this complaint is appropriately dealt with by considering the complainant's application as a complaint that other documents within the scope of his access application should exist.

SECTION 102 – ONUS OF PROOF

17. Under section 102(1) of the FOI Act, the onus is on the agency to establish that its decision is justified.

SECTION 30 – NOTICES OF DECISION

18. Neither the agency's initial decision nor its internal review decision complies with the requirements of sections 30 and 42 of the FOI Act.
19. Section 30 of the FOI Act sets out the details that must be included in an agency's notice of decision given to an access applicant. If an agency decides to refuse access to

a document, section 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 were based.
20. The obligation to provide applicants with notices of decision that contain all of the information prescribed by section 30 is intended to ensure that the true basis of a decision is clearly explained. In my view, an applicant who receives a decision that complies fully with section 30(f) of the FOI Act is less likely to seek external review of that decision.
21. In this case, neither the agency's initial decision nor its internal review decision complied with the requirements of section 30(f).
22. The initial notice of decision merely stated:
- Following consideration, a decision was made on the application in terms of section 13 of the [FOI] Act. The LPCC has decided that you should be given access to the following documents (two documents described).*
23. Under section 42 of the FOI Act, an internal review is to be dealt with as if it were an access application, that is, it must be crafted with the same level of care and attention to detail as an initial notice of decision, and constitute a genuine independent review of the access application. This does not appear to be the case here.
24. The internal review decision merely stated that the LPCC has considered the complainant's application under section 40 for internal review and a decision to confirm the original decision was made by the agency's Senior Legal Officer.
25. The decisions make no reference to any exemption clauses, searches conducted or decisions made with regard to any of the 15 exemption clauses in Schedule 1 to the FOI Act. They give no indication to the complainant that his access application was properly considered and appropriate searches carried out to find documents within scope.
26. In this case, therefore, it is not surprising that the complainant regarded the agency's response with some concern, if not suspicion.
27. If no particulars, reasoning or analysis are provided to a complainant, they are unlikely to understand why a particular decision has been made, or indeed to have sufficient information to determine whether to seek external review or not.

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

28. Section 26 (1) provides that:

- (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.*

29. 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 find those documents.
30. Provided I am satisfied that the requested documents exist, or should exist, I take the view that it is my responsibility to inquire into the adequacy of the searches conducted by an agency and to require further searches to be conducted if necessary. I do not consider that it is generally my function to physically search for requested documents on behalf of a complainant.
31. As stated above at [13], by letter dated 2 March 2017 my PLO asked the agency to conduct further searches of its records and to report back to her by no later than 22 March 2017 with the results of those further searches.

The complainant's submissions

32. The complainant's submissions are set out in his letter to me seeking external review dated 24 November 2016 and in his further letter dated 27 March 2017. In brief, the complainant submits as follows:
- He believes that documents relating to the three classes of documents identified in his access application are in the agency's records;
 - *All of the handful of documents released are just hard copy letters from the agency to the Chief Justice, the latest of which was sent over five years ago.*
 - 'No documents have ever been identified' comprising, containing and/or noting all consequent direct and indirect communications between the Committee and the Chief Justice, 'meaning all such communications ever since 10 November 2011'.
 - *The agency has never invoked section 26 ... all the agency had to do was to say, explicitly, that the documents existed but had been mislaid or that they don't exist. The agency has said nothing of the kind.*
 - *To spell out to the agency what should be obvious from its terms [the] access application ... sought from the agency access to documents that comprise, contain and/or note:*
 - i) *All consequential communications directly between the agency and the Chief Justice such as by letters, faxes, emails and texts, being communications at any time since 10 November 2011;*

- ii) *Notes and other records kept in any format of all phone conversations directly between the agency and the Chief Justice entailing such communications;*
- iii) *All consequential communications by the Chief Justice to a third party such as the Attorney General, the Solicitor-General and the legal Practice Board, by letters, faxes, emails and texts in which the agency was copied or which the agency received via the third party at any time since November 2011;*
- iv) *Notes and other records kept in any format of all phone conversations between the agency and any such third party regarding such third party communications.*

33. The complainant made further submissions by letter dated 16 June 2017. While they largely repeated submissions he made earlier to me, they are summarised below as follows:

- The additional files claimed to have been searched are five parts of a single file, which ceased to be active in August 2011. Any documents about the agency's further actions after that date would not be found on the files searched by Mr Merrick.
- It is not clear what the agency meant by searches of 'committee files'.
- A search by the then Deputy Chair of the Legal Practice Board would only disclose communications between the agency and the Chief Justice via the Legal Practice board and not communications directly between the agency and the Chief Justice.
- The sensitive nature of the documents means that other documents must be held in secure locations and 'are in all likelihood under lock and key in one or more dedicated files or sub-folders in Ms Roberts' office.'
- *Documents within access requests (b) and (c) that exist in electronic format, are in all likelihood on the hard drive of computer of key agency personnel such as Ms Roberts.*
- *Very likely she has a dedicated email address not accessible by other agency personnel. As office manager, Ms Roberts can undoubtedly inform you of the agency's information systems for recording, secure storage and accessing of its ultra-sensitive documents of that nature and their dedicated email addresses. The Chief Justice would have documents on point that correspond with those possessed by the agency.*
- If only two documents were located by the agency it was open to it to explain its searches and the outcome of those searches in its notice of decision.

- The agency has prevaricated and evaded responding in full to the access application.
- The three solicitors involved with the matter have disregarded sections 30 and 42 of the FOI Act.
- The agency should specifically have invoked section 26 at the outset. ‘The agency’s obligation to make a reasonable search within its records remains undischarged’.
- The Commissioner has coercive powers which he can use if, as and when he considers this necessary.

The agency’s submissions

34. The agency’s submissions are set out in its letters to me dated 22 March 2017 and 11 May 2017. In brief, the agency submits as follows:
- The agency’s records are stored in both hard copy and electronic format. In October 2010 an electronic document and records management system known as Objective was installed in the agency’s office.
 - Since October 2010 the agency’s processes have been changed to ensure that the hard copy and electronic records replicate each other. These changes were made over time. By September 2011 incoming hard copy mail was saved into Objective and by March 2013 attachments to covering letters were also saved into Objective. Incoming electronic mail has been saved into Objective since October 2010.
 - Since 29 December 2009 the agency’s system for retaining copies of outgoing letters has changed and it is now the practice to retain scanned signed and dated copies of original letters.
 - File notes of meetings and telephone conversations are retained in hard copy on the relevant file. Since October 2013 every attempt is made to ensure that a scanned copy of the file note is retained in Objective.
 - Each complaint to the agency now has both a hard copy and an electronic file.

Consideration

Is it reasonable to believe that the requested documents exist or should exist in the agency?

35. I have considered the submissions made by the complainant and in particular those submissions he made in response to my preliminary view.
36. Having examined the agency's FOI File maintained in respect of the complainant’s access application, I am satisfied that there are reasonable grounds to believe that documents of the type described in the access application should exist, and if so, it

would be reasonable to expect that documents of the types described are held by the agency.

37. This is because the documents already provided to the complainant relate to a complaint allegedly made about him by the Chief Justice of the Supreme Court of Western Australia to the agency. It is reasonable to assume that a disciplinary body would keep full records of a complaint and all relevant communications relating to a complaint, particularly in circumstances where such documents may be required as evidence in formal proceedings at the State Administrative Tribunal and/or the Supreme Court of Western Australia. Documents of the type described in the complainant's access application include direct and indirect communications between the agency and the Chief Justice relating to the complaint. I therefore consider it is reasonable to expect that documents of the kind set out in his access application would exist or should exist in the agency.

The searches conducted by the agency

38. I was unable to determine the extent of the initial searches and inquiries conducted by the agency in order to locate documents within scope from the agency's initial notice of decision or its internal review decision. Therefore, my PLO required the agency to undertake all necessary inquiries in an attempt to find documents described by the complainant, and to provide a more detailed explanation of the agency's efforts to identify the requested documents in the context of its normal operations and, more particularly, in the context of this case.
39. Following my PLO's request to the agency to conduct further searches, the agency responded as follows:

I have asked another of the Committee's FOI Officers, Mr Merrick, to conduct the searches he would undertake as an FOI officer who received Mr Wells' application in its original form and to provide a report documenting the steps he undertook and the results. I asked Mr Merrick not to refer to the Committee's FOI file on Mr Wells' application in undertaking this task. Mr Merrick has undertaken this task independently and without oversight by me.

40. As a result of the fresh searches undertaken by Mr Merrick, five further documents were located and released to the complainant in full. The complainant also received a copy of Mr Merrick's report detailing the files searched and the descriptions of the documents located.
41. On 13 April 2017 my PLO wrote to the agency again, seeking clarification of some of the further searches carried out. In particular, she asked the agency to confirm whether it had searched, by way of example, committee files, board minutes, incoming correspondence and briefing notes.
42. The agency responded by letter dated 11 May 2017 confirming that Mr Merrick had searched committee files which included documents of the type described above. Further, the agency had asked the then Deputy Chair of the Legal Practice Board to conduct a search of his records and no further documents within scope were found.

43. I have been advised that the agency's record keeping systems underwent significant change at around the relevant time, involving the implementation of a new electronic document management system called Objective. I understand that Objective is used by other state government agencies for their electronic document management requirements.
44. However, not all agency documents were or are currently stored in a unified system. The transition from hard copy to electronic document storage has taken some four years, and may well still be a work in progress.
45. Under section 16 of the *State Records Act 2000*, all government agencies are required to produce a record keeping plan and report to the State Records Commission periodically on its compliance with the plan.
46. My PLO requested and was provided with a copy of the agency's current record keeping plan. The Legal Practice Board's plan (**the plan**) is dated November 2015.
47. Relevantly, the plan discloses at section 2.1.1 - Records Management System:

[T]he system is electronic with the majority of records created and managed in electronic format, however our complaints division [the agency] manages the majority of its records in paper format for submitting documents in court cases.
48. I accept that, at the material time, the agency's record keeping was in a state of transition and this may have made the task of searching for relevant documents somewhat more difficult than it might otherwise have been.
49. *Chu v Telstra Corporation* [2005] FCA 1730 considered the interpretation of section 24A of the *Freedom of Information Act 1982* (Cth), which is almost identical to section 26 of the FOI Act. While the steps taken to search for documents do not need to be exhaustive, all reasonable steps are to be taken. At [35] Justice Finn said

A person requesting access to a document that has been in the agency's or Minister's possession should only be able to be denied on the s 24A ground when the agency (or the Minister) is properly satisfied that it has done all it could reasonably be required of it to find the document in question. Taking the steps necessary to do this in some circumstances may require the agency or Minister to confront and overcome inadequacies in its investigative processes. Section 24A is not meant to be a refuge for the disordered or disorganised.
50. It is therefore expected that agencies keep accurate and searchable records of all important documents in accordance with their approved Record Keeping Plans.
51. This would seem to be all the more important when the types of matters which the agency deals with include complaints against legal practitioners, the outcomes of which may lead to measures such as restrictions on practice, fines, suspensions and other proceedings in the State Administrative Tribunal and the Supreme Court of Western Australia. In such circumstances the public is entitled to expect that the agency would maintain accurate and detailed records of all relevant correspondence, file notes, memoranda and briefing notes.

52. In her decision in *Re Doohan and Police Force of Western Australia* [1994] WAICmr 13, the former Information Commissioner dealt with a decision to refuse access to documents under section 26 of the FOI Act. At paragraph 29 of her reasons for that decision, the former Information Commissioner said that, when an agency is unable to locate requested documents, an adequate statement of reasons may go some way towards reassuring a sceptical applicant and that, in her view, the minimum requirement was a brief explanation of the steps taken by the agency to satisfy the request. The former Information Commissioner observed that such an explanation should include the locations searched, why those locations were chosen and a description of how the searches were conducted. I agree with that view. Since the commencement of the FOI Act in 1993, people seeking access to government documents no longer have to rely on an agency's 'formal assurance' in response to a request. They are entitled to proper reasons for an agency's decision, the findings on material questions of fact underlying those reasons and information as to the material on which the findings are based.
53. The agency upon request undertook further searches for documents within scope, and provided a more detailed explanation to the complainant of the searches it had undertaken.
54. Accordingly, even though it first appeared to me that the agency may not have conducted sufficient searches to satisfy the requirements of section 26(1)(a) of the FOI Act, given the further searches that were undertaken by the agency, and the steps the agency took to ensure that an independent legal officer with no previous involvement in the matter undertook a review, the decision of the agency to refuse access to the requested documents pursuant to section 26 of the FOI Act, on the ground that the documents either do not exist or cannot be found, is justified.
55. Having further considered all of the information currently available to me, including the agency's latest advice, it now appears to me that the agency has taken all reasonable steps to identify all documents of the kind requested by the complainant. Therefore, I am satisfied that the agency has taken all reasonable steps to find documents within the scope of his access application and that further documents either cannot be found or do not exist.

DECISION

56. I find that all reasonable steps have been taken by the agency to locate documents and I am satisfied under section 26 of the FOI Act that further documents either cannot be found or do not exist. The agency's decision is justified.
